ARTICLE

The right to family life: Why the genetic link requirement for surrogacy should be struck out

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Background. South African surrogacy law includes a provision, known as the genetic link requirement, that commissioning parents must use their own gametes for the conception of a surrogate child. As a result, infertile persons who cannot contribute gametes for the conception of a child are prohibited from accessing surrogacy as a way to establish families. The genetic link requirement was previously the subject of a constitutional challenge, but the challenge was rejected by a divided Constitutional Court bench with a seven-to-four majority. The genetic link requirement is again being challenged in a new lawsuit.
Objective. In light of the history of the issue, this article investigates the viability of relying on infertile persons' right to family life in the new lawsuit.
Method. The investigation takes the form of a human rights analysis.
Results. The right to family life was not considered in the previous case. As such, the right to family life constitutes a new legal issue that falls outside the scope of the precedent set by the Constitutional Court, and can therefore be relied upon. The genetic link requirement is a clear violation of infertile persons' right to family life, which includes the right to establish a family. Potential justifications for such violation are considered, but found wanting. Accordingly, the genetic link requirement is unconstitutional and should be struck out.
Conclusion. The outcome of the previous lawsuit was an injustice towards infertile persons. The new lawsuit presents an opportunity for this injustice to be rectified by vindicating infertile persons' right to family life.

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Infertility is a distressing and often devastating aspect of the lives of many people. However, over the last generation, great strides have been made in reproductive healthcare to assist people who cannot have children using 'natural' means. Surrogate motherhood in particular fulfils an important role as a reproductive healthcare service for infertile people. It entails that the pregnancy is not gestated by any of the intended legal parents, but by a third party – the surrogate mother.

Surrogate motherhood is governed by Chapter 19 of the Children's Act.[1] The salient characteristics of Chapter 19 are that (*i*) surrogate motherhood must be altruistic, (*ii*) surrogate motherhood agreements must be confirmed by the High Court before the surrogate pregnancy ensues, (*iii*) the High Court generally has a discretion as to whether to confirm a proposed surrogate motherhood agreement or not, and (*iv*) if confirmed, there is legal certainty for the parties involved (at least in the case of full surrogacy – when the child is not related to the surrogate mother), as the child will be deemed the child of the commissioning parents from the moment of birth.

The genetic link requirement for surrogacy

However, one aspect of Chapter 19 that has been controversial and which has invited litigation is section 294 – the so-called 'genetic link requirement'. This section reads as follows:

> **'Genetic origin of child**
> 294. No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.'

The first constitutional challenge: AB

The genetic link requirement was the subject of a constitutional challenge in *AB v Minister of Social Development* [2,3] – an application instituted in the Pretoria High Court in 2013. While the High Court held that section 294 was unconstitutional, a seven-to-four majority of the Constitutional Court (CC) rejected the constitutional challenge. The CC majority sided with the state in holding (at paragraph 287) that the genetic link requirement serves the purpose of 'creating a bond between the child and the commissioning parents or parent. The creation of a bond is designed to protect the best interests of the child-to-be-born so that the child has a genetic link with its parent(s)'. However, the psychological evidence before the CC was that children of parents who used both male and female donor gametes in in vitro fertilisation (IVF) to conceive such children enjoyed the same psychological well-being as children in the control group who had

been conceived through intercourse.[4] The CC majority simply paid no regard to the evidence properly before it.[5,6]

Later in its judgment (at paragraph 294), the CC majority elaborated on the purpose served by the genetic link requirement. It held that one should consider the 'substance below the surface', which is that 'clarity regarding the origin of a child is important to the self-identity and self-respect of the child'. In other words, the reason why a parent–child genetic link is required in section 294, is to ensure that children will know their genetic origins. The first applicant, AB, intended to use male and female anonymous gamete donors. Accordingly, had she been allowed to proceed with her intended surrogacy agreement, her surrogacy children would not know the identities of their gamete donors. This, according to the CC majority, would compromise such children's self-identity and self-respect, and hence their dignity, and therefore would not be in their best interests. Was there any psychological evidence to suggest that 'clarity regarding the origin of a child is important to the self-identity and self-respect of the child'? No, there was none. This was simply a personal value judgment by the justices that comprised the CC majority.[5,6] I analyse the purposes ascribed to the genetic link requirement by the CC majority in more detail below.

The CC minority, by contrast, held (in paragraph 193) that a High Court that hears a specific surrogacy agreement confirmation application is best placed to decide whether the use of (anonymous) gamete donors would in fact undermine a child's best interests.

While the Pretoria High Court's decision to strike out the genetic link requirement was welcomed,[7] the CC majority decision to retain the genetic link requirement was widely criticised by leading scholars in reproductive law.[5,6,8-10] The case also attracted attention from a philosopher, Thaddeus Metz, who published on the genetic link requirement in this journal and concluded that it is 'unjust and should be revised'.[11]

Interpreting the genetic link requirement: *DW*

The untenability of the genetic link requirement was recently vividly illustrated in *Ex Parte DW*.[12] In this case, a single infertile man (who could not contribute his own sperm for IVF) intended to have children through surrogacy. He endeavoured to serve the purpose proposed by the state and accepted by the CC majority (that prospective surrogacy children must know their genetic origins) by arranging to import sperm from an 'identity release' sperm donor in the United States. This would ensure that the prospective surrogacy children would be able to know their genetic origins. However, The KwaZulu-Natal High Court dismissed the application as it did not conform with a plain reading of section 294, which speaks of 'the gamete of that person [the single commissioning parent]'. The Court remarked (at paragraph 16):

> 'I empathise with the applicant's desire to have a child, and would have helped him if I thought I could. Regrettably, I do not think I can.'

This illustrates the tragic and inhumane effect that the genetic link requirement continues to have in South Africa (SA).

The second constitutional challenge: *KB*

Recently, a new constitutional challenge to the genetic link requirement was launched in the Mpumalanga High Court: *KB v Minister of Social Development*.[13] KB and her husband could not conceive children through intercourse. They approached a fertility clinic to assist them. As neither KB nor her husband could contribute viable gametes for conception, gametes from anonymous male and female donors were used to create a batch of in vitro embryos. One of these embryos was transferred to KB's womb, and she fell pregnant. Nine months later, she gave birth to a boy. However, there were complications with the birth, and KB had to undergo a hysterectomy. KB and her husband intend to have more children using the remaining three in vitro embryos and a surrogate mother. The main factual difference between the cases of *AB* and *KB* is that KB already has a child – gestated by herself prior to a hysterectomy – conceived by the very same donor gametes that she now intends to use to further build her family through surrogacy. KB is basing her challenge to the genetic link requirement on the best interests of her existing child to have a genetically related sibling.

Although the decision in *AB* constitutes binding law, the system of precedent is subject to the Constitution. Given that *KB* presents new facts and legal argument that were not considered in *AB*, the Mpumalanga High Court is not bound by *AB*.[14,15]

While the best interests of an existing child is certainly a valid argument, it is restricted to exceptional scenarios such as the one of *KB*. By contrast, in this article I present and analyse a human rights argument against the genetic link requirement that is not only applicable to the *KB* factual matrix, but is generally applicable to all surrogacy agreements. Moreover, this argument is new, in the sense that it has not been raised in *AB*, and therefore is not subject to the *AB* precedent. It is an argument based on the right to family life.

The right to family life

The right to family life is protected under the auspices of the right to privacy[16] and the right to dignity.[17] Importantly, families do not just arise out of nothing – they are established through the will and action of intended parents. Accordingly, for the right to family life to have any meaning, it must include the right to *establish* a family.

This interpretation of the right to family life is supported by the International Covenant on Economic, Social and Cultural Rights, which SA signed and ratified. Article 10(1) of the Covenant provides as follows:

> 'The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society, *particularly for its establishment* and while it is responsible for the care and education of dependant children.' (emphasis added)

Because of the advent of artificial reproductive technologies, such as IVF using donor gametes, combined with surrogacy, it is possible for infertile persons to establish families. Moreover, infertile persons – like everyone else – have the right to family life, and therefore the right to *establish* a family using the means at their disposal, namely donor gamete IVF and surrogacy. On the part of the state, this implies at the very least a negative constitutional duty not to interfere with this right. However, by requiring infertile persons to contribute their own gametes for conception – which they cannot do! – the genetic link requirement effectively prohibits infertile persons from accessing surrogacy, and therefore infringes on infertile persons' right to family life.

In the following paragraphs, I consider three possible counterarguments to the position that the genetic link requirement

infringes on infertile persons' right to family life. The first two are borrowed from the reasoning by the CC majority in *AB*, while the third one can be traced back to the report[18] by the parliamentary ad hoc committee that looked into surrogacy before the enactment of Chapter 19 of the Children's Act. By considering these possible counterarguments, the position that the genetic link requirement infringes on infertile persons' right to family life is not only tested from various angles, but in the process also clarified and strengthened.

Counterargument 1: Do not blame the law – blame your own infertility

The first possible counterargument is that infertile persons' own infertility disqualifies them from accessing surrogacy, not the genetic link requirement. In other words, the fact that they are not legally allowed to build their families using surrogacy is to be blamed on their own infertility. This counterargument is based on the reasoning by the CC majority in *AB* in the context of the equality challenge in that case. The CC majority held as follows (paragraph 299 of the majority judgment):

> 'It needs to be stressed that section 294 [the genetic link requirement] merely regulates the conclusion of a valid surrogate motherhood agreement. What disqualifies AB, and others similarly placed, is nothing but the biological, medical or other reasons as contemplated in section 294.'

This reasoning by the CC majority is tantamount to reasoning that:

- (Before racial equality:) The legal requirement that a person must be white to vote in a national election does not disqualify black persons; what disqualifies black persons from voting is their own blackness; or
- (Before marriage equality:) The common law rule that marriage is between a man and a woman does not disqualify same-sex couples from marriage; what disqualifies same-sex couples from marriage is their own sexual orientation.

Accordingly, this reasoning by the CC majority is clearly wrong, and should not be followed. Importantly, if a judgment is clearly wrong, the doctrine of precedent stipulates that a court may depart from its previous decision.[19]

Consider the following example: If one is in a motor-car accident and loses the use of one's legs, one does not lose the right to freedom of movement guaranteed by section 21 of the Constitution.[20] There are technological solutions, such as wheelchairs and modified motor cars, that can help one exercise the right to freedom of movement.

Similarly, if one is infertile, one does not lose one's right to establish a family. There is a technological solution, namely donor gamete IVF and surrogacy, that can help one exercise the right to establish a family. However, by requiring that one must use one's own gametes, the *genetic link requirement* prohibits infertile persons from accessing this technological solution for their infertility, and therefore violates their right to family life.

Counterargument 2: Negating autonomy

The second counterargument is that because an infertile person can comply with the genetic link requirement by entering into a relationship with a person who is fertile, who can then contribute his or her gametes, the genetic link requirement does not infringe on infertile persons' right to family life. As with the first counterargument, this counterargument is also based on some of the reasoning of the CC majority in *AB*. The CC majority held (at paragraph 288 of the majority judgment) that AB had an existing legal pathway to access surrogacy: she could in theory find a (fertile) partner who can contribute his or her own gametes. This is one of the most deeply concerning parts of the majority judgment. To put it bluntly: It is patronising and extraordinarily insulting to tell an adult person who stands before the court to vindicate her constitutional rights to rather just find a person with useful sperm or eggs. In addition, how will this kind of patronising response operate in the context of *KB*? Should KB divorce her husband and start a relationship with a new (fertile) person for procreative purposes? The CC majority's suggestion that AB should find a (fertile) partner suggests disdain for family life. It also suggests disdain for adults' moral autonomy to decide to be single parents by choice and, more broadly, for adults' moral autonomy to form personal intimate relationships with other adults for their own personal reasons, and not because someone in a position of power tells them to.

Consider the following example: Would it be constitutionally tenable if parliament passed a law that requires that only jurists who are devout Christians can serve as justices of the CC? Following the CC majority's logic, such a new law would be perfectly constitutional because non-Christian jurists would have a clear pathway to qualifying – they just have to convert to Christianity. Why would such a requirement be unconstitutional? Because, as O'Regan J held in *NM v Smith* (at paragraph 145):[21,22]

> 'Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them.'

Counterargument 3: Adoption as alternative

The third counterargument relates to a question that is often raised when access to medically assisted reproduction and surrogacy is discussed: Why not rather adopt a child? This question becomes more pronounced in the context of medically assisted reproduction and surrogacy that purely make use of donor gametes – in other words, where the intended parents will not have a genetic link with the prospective child. This was indeed the justification for the genetic link requirement proffered by the parliamentary ad hoc committee on surrogacy in its 1999 report.[18] The ad hoc committee stated its view as follows (at paragraph E1(2)(e)):

In instances where both the male and the female gametes used in the creation of the embryo are donor gametes, it would result in a situation similar to adoption, as the child or children would not be genetically linked to the commissioning parent or parents. This would obviate the need for surrogacy as the couple could adopt a child.

However, there are various problems with this argument. First, the adoption-as-alternative argument shows indifference to persons' autonomy. As a society, we generally allow people to build their families in the way that they prefer for their own reasons. Remember that fertile people can also adopt children. Why treat infertile people differently? We do not prevent fertile people from making children through sexual intercourse because they have an alternative, namely, to adopt a child.

Second, there are good reasons why infertile people may prefer surrogacy above adoption. Psychological studies show that couples

who make use of donor gametes typically spend significant time in selecting donors, and endeavour to find a donor who closely matches the traits of the intended parent who cannot contribute his or her own genetic material.[23,24] This can be perceived as the infertile parent's constructive contribution to the prospective child, and establishes a positive psychological link between intended parent and child.[25] No such opportunity exists in the case of adoption.

Apart from the genetics of the prospective child, in the case of surrogacy, the commissioning parents can also ensure that the environment in which the fetus will be growing is healthy. They choose their surrogate mother, and surrogate motherhood agreements typically provide that the surrogate mother may not smoke or drink alcohol or use any other substances that may cause harm to the fetus. Surrogate mothers are also evaluated by psychologists, and must be deemed suitable by the court. By contrast, adoptive parents have no such control over the environment in which the adoptive child was as a fetus. Worse, they would typically not even know the biological mother.

Moreover, surrogacy offers legal certainty for all parties involved before the process of embryo transfer to the surrogate mother begins.[26] By contrast, in the case of adoption, there is uncertainty about when (and if) an adoption order will be granted, and about how long the new-born baby will have to remain in interim care before being handed to the adoptive parents when (and if) an adoption order is granted.

There is a further reason why infertile people may prefer surrogacy above adoption. Like the applicants in *KB*, intended parents may, for a variety of reasons, already have existing embryos created for them using donor gametes.[27] These existing embryos represent not only a financial investment, but also a significant emotional investment for the intended parents. The only way for such intended parents to have children using their existing embryos is through surrogacy.

However, in contemporary SA, the Achilles' heel of the argument that adoption offers an alternative is practical in nature: It is simply unrealistic for many infertile persons to adopt a child. Intended parents who do not conform to traditional hetero-normative values, such as gay couples, face prejudice in SA's adoption system.[28] To make matters worse, there are very few white and Indian babies available for adoption.[29,30]

Accordingly, the argument that adoption offers an alternative should not only be rejected based on the principled ground of autonomy, but also because it is utopian and not reality-based.

The counterarguments can be rejected with confidence

I have considered three counterarguments to my proposition that the genetic link requirement infringes on infertile persons' right to family life. I contend that all three of these counterarguments can be rejected with confidence. The genetic link requirement indeed infringes on infertile persons' right to family life; but, is it not possible to justify such an infringement?

Justification analysis

The first step in a justification analysis is to enquire: what is the purpose served by the impugned provision? As observed by Meyerson, the most likely purpose of the genetic link requirement is to promote a bio-normative conception of the family, i.e. a family that comprises one or more parents and one or more genetically related children.[9] This is evidently not a legitimate government purpose, and hence constitutes sufficient reason to declare the genetic link requirement unconstitutional based on the rule of law, as guaranteed in section 1(c) of the Constitution. By contrast, the CC majority in *AB* did not recognise promoting a bio-normative conception of the family as the purpose of the genetic link requirement, and ascribed two other seemingly more palatable purposes to it: (*i*) creating a parent–child bond, which in turn serves the best interests of the prospective child; and (*ii*) ensuring that the surrogate child will know his or her genetic origin, which in turn serves the best interests of the prospective child. In the following paragraphs, I show that these two purposes have no basis in fact or in logic and, going forward, cannot stand.

The parent-child bond

The genetic link requirement obviously ensures a parent–child *genetic* bond. Having such a genetic bond with one's children is clearly important for most people. However, the question is whether the absence of a genetic bond is likely to negatively affect the child. When evaluating the evidence, it is important to clearly differentiate between the different kinds of family contexts that are characterised by the absence of a parent-child genetic bond, as observations in one kind of family context are not necessarily applicable to another kind. In particular, a clear distinction should be made between (*i*) families formed through assisted reproduction on the one hand, and (*ii*) adoptive families and stepfamilies on the other hand. As observed by Golombok:[31]

> 'The idea that third-party assisted reproduction adversely affects parenting and children's adjustment comes, in part, from research showing an increased likelihood of childhood psychological problems in adoptive families … and stepfamilies … in which children similarly lack a biological link to one or both parents. However, the problems experienced by adopted children and stepchildren often arise from difficult family situations before being adopted, or before or after moving into a stepfamily. Adopted children often have suffered maltreatment before being placed with their adoptive parents, sometimes for years, and many have been moved from one foster family to another before being adopted … Children in stepfamilies often have been separated from a parent to whom they were attached and are required to form relationships with new family members. Moreover, stepparents generally do not see stepchildren as their own children … In contrast, children born through assisted reproduction are raised *from birth by parents who wanted to have them and who consider them to be their own children*.' (emphasis added)

Accordingly, the appropriate question to ask is whether the absence of a parent-child genetic bond *in the context of assisted reproduction* translates into any decreased well-being in a child. The answer to this question is a clear 'no'. Golombok concludes in this regard:

> 'The assisted reproduction families generally showed high levels of family functioning and children's adjustment from early childhood through to adolescence, suggesting that biological relatedness is less important than positive parent-child relationships for the well-being of children conceived by third-party assisted reproduction.'

Reflecting on 40 years of empirical research conducted worldwide on donor-conceived and surrogacy children, Golombok remarks as follows:[32]

> 'The findings show that … families created by donor conception and surrogacy, are just as likely to flourish as traditional families, *and sometimes more so*, although the children from these families will sometimes face prejudiced attitudes from others.' (emphasis added)

I pause here briefly. Should it concern the court that the children from donor conception and surrogacy families sometimes face prejudiced attitudes from others? Yes, I suggest it should. The court should actively fight bio-normative prejudice by making a clear pronouncement that donor conception and surrogacy families are as equally worthy of concern and respect as traditional families are.

Should societal prejudice, however, influence the court's consideration of the best interests of the child? This question is of course broader than just donor conception and surrogacy. Say, for instance, a black couple move to a small town where anti-black racism is prevalent. If they have a child, the child will probably suffer prejudice at school and in the community. Should the law – based on the best interests of the child – prohibit the couple from having this child? The answer is clearly 'no'. If the court allows itself to be prescribed to by societal prejudice, the law will give effect to prejudice. The Constitution demands the exact opposite, namely that the law should be rational and a bulwark against prejudice.[33]

To summarise, then: children born in the context of assisted reproduction may not have a genetic link with their parents, but these children are raised from birth by parents who wanted to have them and who consider them to be their own children. As such, despite the absence of genetic bonds, psychological studies have consistently shown that there are positive emotional bonds between these children and their parents. When compared with traditional families, families created by donor conception and surrogacy are just as likely to flourish – and sometimes even more so. Accordingly, the notion that the genetic link requirement serves the best interests of the prospective child by creating a bond between the child and the parents is counter-factual and should be rejected.

The 'right' to know one's genetic origins

By holding (at paragraph 294) that 'clarity regarding the origin of a child is important to the self-identity and self-respect of the child', the CC majority in *AB* effectively invented a new 'right' of children to know their genetic origins. However, the CC majority's substantiation is paper thin – one sentence! – and they failed to consider the ramifications of creating this new 'right'. If these ramifications are considered, it becomes clear that such a new 'right' is not tenable in our law and should be rejected.

Proponents of a 'right' of children to know their genetic origins, such as the *amicus curiae* in *AB*, often refer to sections 247 and 248 of the Children's Act that give a right to adopted children, once they reach the age of majority, to access adoption records to, inter alia, establish the identity of their biological parents. However, it is important to note that there is no guarantee that the adoption records will contain any information on biological parents. This is not only because many adopted children were abandoned by their biological parents, but also because biological parents who work with social workers to give their child up for adoption may in practice refuse to provide their names or any identifying information.[34] Accordingly, the right of adopted children, once they reach the age of majority, to access adoption records is only that and no more – a right to access information that is on record, and not a right to know one's genetic origins.

A seemingly more promising rationale for recognising a 'right' of children to know their genetic origins would be to argue, as the CC majority did in *AB*, that knowing one's genetic origins is important for children to develop healthy self-identities. Especially during their teenage years, children may struggle with forming their own identities. Furthermore, if children live in communities that place considerable value on knowing one's genetic origins, not knowing one's genetic origins may complicate this coming-of-age process of self-identity formation. However, will this complication cause an inability on the part of the child to form a healthy self-identity and self-respect? The answer suggested by science is 'no'. Large-scale psychological studies on donor-conceived children, as reported by Gartrell and Bos[35] and Van Gelderen et al.[36] have found the following:

- At 16 to 18 years of age, donor-conceived children show healthy psychological adjustment – in fact the same psychological well-being as a matched group of non-donor-conceived adolescents.
- Furthermore, at 16 to 18 years of age, there is no difference in terms of the donor-conceived adolescents' psychological well-being related to whether their donors are known to them or unknown (anonymous).

Accordingly, clarity about the origin of a child is, as a general statistical rule, not important for the self-identity and self-respect of the child. The statement by the CC majority in *AB* that 'clarity regarding the origin of a child is important to the self-identity and self-respect of the child' is clearly contradicted by these results. However, it can be argued that these results are statistical averages and that there may always be exceptions or different individual contexts. These objections are true, but they miss the point. The point is that the rationale by the CC majority in *AB* cannot hold. At most, it can be stated that clarity about the origin of a child *may* be important to the self-identity and self-respect of the child in *some* cases. And such a qualified – and more accurate – statement does not justify the limitation of intended parents' rights across the board.

Moreover, there is a question of legal policy: Is children's identity formation something that the law should concern itself with? More specifically, should knowing one's genetic origins be given legal force to limit intended parents' right to establish families? I suggest not.

There may be multiple factors in children's environments that affect the process of self-identity formation. For example, being the only Jewish child in a small-town Christian community, or being the child of an inter-racial marriage in a community where all the other children are either white or black, will probably complicate the child's self-identity formation and make the process more challenging. However, the law allows these situations, and does not put in place hurdles that hinder these parents from establishing their families. There is no reason to treat intended parents in a surrogacy context differently.

A powerful reason why knowing one's genetic origins should not be given legal force to limit parents' rights can be illustrated with the following hypothetical example: A single woman has intercourse with a man and falls pregnant. She decides to raise the child on her own. She also decides, for reasons of her own, never to tell her child the identity of the child's father. What would a 'right' of children to know their genetic origins entail in these circumstances? Would the child be able to get an interdict against his or her mother to disclose the name of the father? And, if so, what would happen if the mother still refuses to do so – will she be thrown into jail for contempt of court until she discloses the name of the child's father to the child? Clearly, if knowing one's genetic origins is given the legal force to limit parents' rights – and is applied consistently to all children – it will have profoundly disruptive and absurd consequences.

For all of the reasons discussed above, knowing one's genetic origins should *not* be given the legal force to limit persons' constitutional rights, such as intended parents' right to establish a family. As a general principle in our law, parents are trusted to make their own reproductive decisions that they themselves deem suitable in their own cultural and social contexts – and to guide their children in navigating the cultural and social oceans, even through stormy waters. The same should apply in the surrogacy context.

Excursus: Less restrictive means

In this excursus, I analyse a scenario where the court finds – contrary to science and common sense – that the 'right' of children to know their genetic origins should indeed be recognised. I show that even in such a scenario, the 'right' of children to know their genetic origins would not justify the genetic link requirement in its current (absolute) form.

One of the many shortcomings of the CC majority judgment in *AB* is that it failed to consider whether there were less restrictive means to accomplish the purpose of children knowing their genetic origins. This is despite the fact that it is a constitutional imperative to consider less restrictive means (section 36(e) of the Constitution). This omission in the CC majority's judgment in *AB* may be due to the particular factual circumstances of AB, the first applicant in *AB*, which provided the factual matrix for that case. AB intended to use her existing embryos which were all created from anonymous donor gametes. Also, the CC majority referred to section 41 of the Children's Act, which reads as follows:

> **'Access to biographical and medical information concerning genetic parents**
>
> 41. (1) A child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to—
>
> (a) any medical information concerning that child's genetic parents; and
>
> (b) any other information concerning that child's genetic parents but not before the child reaches the age of 18 years.
>
> (2) Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation or the identity of the surrogate mother.'

While this section may superficially be interpreted as always mandating anonymous gamete donation, such an interpretation would be erroneous. This section provides that a child does not have the right to know the identity of the gamete donor(s) However, nothing in this section prohibits the donor from *electing* to disclose his or her identity to the parents or to the child.[37] This would typically be the case when the intended parents use a close friend or family member to be their donor – a 'known' donor. When the intended parents enter into a written agreement with their known donor, this is referred to as a 'known donor agreement'. An example of a reported case that involved reliance on a known donor agreement is *QG v CS*.[38]

As observed in *Ex Parte DW* (at paragraph 3), sperm banks in SA currently all practise anonymous donation.[12] However, intended parents can import sperm from foreign sperm banks that offer the option to have an 'identity release' donor. This entails that the sperm bank contractually agrees with the intended parents that the prospective child will, once he or she reaches a certain age, have the right to obtain the name and most recent contact details of the sperm donor from the sperm bank. This is indeed what the applicant in *Ex Parte DW* intended to do.

Evidently, the rationale of ensuring that children will know their genetic origins can also be served by allowing donor gametes to be used, but with the proviso that at least one of the gamete donors must be a known donor or an identity release donor. This less restrictive means can be attained through reading in the parts in italics:

> **'Genetic origin of child**
>
> 294. No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, *(a)* if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, *(b)* where the commissioning parent is a single person, the gamete of that person, *or (c) in the case of either (a) or (b), the gamete of at least one gamete donor who is known to the commissioning parent(s), or who has contractually agreed that his or her identity can be released to the child upon the child's request once the child reaches a certain age*.'

In this way, infertile persons (who cannot use their own gametes) would be able to build their families using surrogacy – on the proviso that at least one of the gamete donors is a known donor or an identity release donor. This ensures that their surrogacy children will be able to know their genetic origins. This solution is clearly a less restrictive means to accomplish the purpose of ensuring that children will know their genetic origins – if the court finds sufficient merit in the purpose to limit intended parents' right to establish families.

It should be noted that none of these facts about known donors or identity release donors was before the court in *AB*, as that case centred on the factual circumstances of AB, the first applicant. By considering a more complete factual and legal picture, a less restrictive means to accomplish the purpose presents itself. Importantly, if the court in *KB* accepts that the purpose of the genetic link requirement is to ensure that children know their genetic origins, then it is incumbent on the court to consider this less restrictive means to accomplish the purpose. While it would offer a solution to a situation like the one in *Ex Parte DW*, it will not necessarily offer a solution to KB and her husband. However,

research has shown that over half of egg donors in SA would be willing to disclose their identities.[39] Accordingly, should KB and her husband approach their egg donor (via their fertility clinic), the chances are that their egg donor would be willing to disclose her identity to them.

This excursus on less restrictive means assumes that the court finds merit in the notion that children should know their genetic origins – and that the law should enforce this in a way that limits the intended parents' right to establish families. However, I must reiterate my conclusion above that this notion is devoid of merit, as its rationale is contradicted by scientific findings, and it constitutes a radical departure from the way in which our law trusts parents to make reproductive decisions and manage their families' lives. Moreover, I have illustrated that if the notion that children should know their genetic origins is legally enforced in a consistent way to family contexts beyond surrogacy, the absurd consequences become apparent. Accordingly, knowing one's genetic origins should not be allocated the kind of legal significance that would allow it to limit persons' constitutional rights.

Appropriate remedy

The genetic link requirement violates infertile persons' right to family life; on the other side of the scales of justice, the purposes that the genetic link requirement are supposed to serve are nothing more than fanciful expressions of bio-normative prejudice. Clearly, the CC minority in *AB* was correct: the genetic link requirement cannot survive constitutional scrutiny. Importantly, the genetic link requirement is entirely severable from the rest of Chapter 19 of the Children's Act; the remainder of Chapter 19 – with its comprehensive and robust legal checks and protections on surrogacy – will remain in effect.

The court has a constitutional duty (imposed by section 172(1) of the Constitution) to vindicate persons' rights and to declare any legislation that violates such rights invalid. Based on the principles laid down by the CC in *Van Der Merwe v Road Accident Fund* (at paragraphs 70 to 71),[40] the applicants in *KB* (i.e. KB and her husband) are entitled to:

- proper vindication of their right to family life that is violated by the genetic link requirement; and
- immediate and effective relief that eliminates the source of the constitutional complaint in a way that provides a meaningful remedy.

And KB and her husband are not alone. The genetic link requirement affects all infertile persons in SA at a very personal and intimate level. All of these persons – who are often socially marginalised[41] – are entitled to have their right to family life vindicated. The appropriate remedy is to strike out the genetic link requirement with immediate effect.

Conclusion

Infertility, whether resulting from natural causes or accidents, causes much heartache to women and men in SA. Many women first try to fall pregnant themselves using donor gametes, but ultimately are unsuccessful. Infertile persons often focus their last hope on surrogacy to establish their families, only to have their hope obstructed by the law – the genetic link requirement. Is destroying the dreams of building a family the proper purpose of the law? The answer ought to be a resounding 'no'.

The case of *KB* offers an opportunity for this injustice to be rectified and for infertile persons' right to family life to be vindicated.

Declaration. The author served as legal counsel in *AB* and in *Ex Parte KAF*, and as *amicus curiae* in *QG v CS* and in *KB* (High Court phase).
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1. South Africa. Children's Act No. 38 of 2005. https://www.gov.za/documents/childrens-act
2. AB v Minister of Social Development 2016 (2) SA 27 (GP).
3. AB v Minister of Social Development 2017 (3) SA 570 (CC).
4. Golombok S. Expert opinion filed in AB v Minister of Social Development 2016 (2) SA 27 (GP) and AB v Minister of Social Development 2017 (3) SA 570 (CC).
5. Thaldar DW. Post-truth jurisprudence: The case of AB v Minister of Social Development. S Afr J Hum Rights 2018;34(2):231-253. https://doi.org/10.1080/02587203.2018.1497124
6. Thaldar D. The Constitution as an instrument of prejudice: A critique of AB v Minister of Social Development. Const Court Rev 2019;9(1):343-361. https://doi.org/10.2989/ccr.2019.0013
7. Boniface AE. The genetic link requirement for surrogacy: A family cannot be defined by genetic lineage. Tydskrif Suid-Afr Reg 2017;1:190-206. https://hdl.handle.net/10520/EJC-659204745
8. Van Niekerk C. Assisted reproductive technologies and the right to reproduce under South African law. PER/PELJ 2017;20(1):1-31. https://doi.org/10.17159/1727-3781/2017/v20i0a1305
9. Meyerson D. Surrogacy, geneticism and equality: The case of AB v Minister of Social Development. Const Court Rev 2019;9(1):317-341. https://doi.org/10.2989/ccr.2019.0012
10. Shozi B. Something old, something new: Applying reproductive rights to new reproductive technologies in South Africa. S Afr J Hum Rights 2020;36(1):1-24. https://doi.org/10.1080/02587203.2020.1776632
11. Metz T. Questioning South Africa's 'genetic link' requirement for surrogacy. S Afr J Bioeth Law 2014;7(1):34-39. https://doi.org/10.7196/sajbl.314
12. Ex Parte DW [2022] ZAKZPHC 11.
13. KB v Minister of Social Development (966/2022 ZAMPMBHC, pleadings stage).
14. Prince v Minister of Justice and Constitutional Development 2017 (4) SA 299 (WCC).
15. Canada (Attorney General) v Bedford 2018 SCC 72. https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do
16. Bernstein v Bester 1996 (2) SA 751 (CC).
17. Nandutu v Minister of Home Affairs 2019 (5) SA 325 (CC).
18. Parliamentary Ad Hoc Committee on Surrogate Motherhood. Report. 11 February 1999. Cape Town: Parliament;1999.
19. Camps Bay Ratepayers' and Residents' Association v Harrison 2011 (4) SA 42 (CC).
20. Constitution of the Republic of South Africa, 1996. https://www.gov.za/documents/constitution-republic-south-africa-1996
21. NM v Smith 2007 (5) SA 250 (CC).
22. Quoted and relied upon in: British American Tobacco South Africa (Pty) Ltd v Minister of Health [2012] ZASCA 107.
23. Frith L, Sawyer N, Kramer W. Forming a family with sperm donation: A survey of 244 non-biological parents. Reproductive BioMedicine Online 2012;24:709-718. https://doi.org/10.1016/j.rbmo.2012.01.013
24. Drewes CT. Anonymous sperm donor preferences of non-genetic mothers [master's dissertation]. Northampton, Massachusetts: Smith College; 2009. https://scholarworks.smith.edu/theses/1191/
25. Rodrigues M. Expert opinion 1, filed in AB v Minister of Social Development 2016 (2) SA 27 (GP) and AB v Minister of Social Development 2017 (3) SA 570 (CC). Case index pp 852-867.
26. Ex Parte MS [2014] ZAGPPHC 457.
27. See, for example, Ex Parte KAF 2019 (2) SA 510 (GJ).
28. Mokomane Z, Tamsen JR, The Directorate: Adoptions and International Social Services, National Department of Social Development. Adoption in South Africa: Trends and patterns in social work practice. Child Fam Soc Work 2012;17(3):347-358. https://doi.org/10.1111/j.1365-2206.2011.00789.x

29. De Caires M. Expert opinion, filed in AB v Minister of Social Development 2016 (2) SA 27 (GP) and AB v Minister of Social Development 2017 (3) SA 570 (CC). Case index pp 1289-1297.
30. Bloem M. Expert opinion, filed in AB v Minister of Social Development 2016 (2) SA 27 (GP) and AB v Minister of Social Development 2017 (3) SA 570 (CC). Case index pp 1298-1302.
31. Golombok S. Love and truth: What really matters for children born through third-party assisted reproduction. Child Dev Perspect 2021;15(2):103-109. https://doi.org/10.1111/cdep.12406
32. Golombok S. The psychological wellbeing of ART children: What have we learned from 40 years of research? Reprod Biomed Online 2020;41(4):743-746. https://doi.org/10.1016/j.rbmo.2020.08.012
33. Hoffmann v South African Airways 2001 (1) SA 1 (CC).
34. Rosenberg W. The mother's right to privacy in infant abandonment cases. Tydskrif Suid-Afr Reg 2022;1:92-105. https://doi.org/10.47348/tsar/2022/i1a5
35. Gartrell N, Bos H. US National Longitudinal Lesbian Family Study: Psychological adjustment of 17-year-old adolescents. Pediatrics 2010;126(1):28-36 https://doi.org/10.1542/peds.2009-3153
36. Van Gelderen L, Bos HMW, Gartrell N, Hermanns J, Perrin EC. Quality of life of adolescents raised from birth by lesbian mothers: The US National Longitudinal Lesbian Family Study. J Dev Behav Pediatr (2012);33(1):1-7. https://doi.org/10.1097/dbp.0b013e31823b62af
37. Thaldar D, Shozi B. Is open-identity gamete donation lawful in South Africa? S Afr Med J 2022;112(6):409-412. https://doi.org/10.7196/samj.2022.v112i6.16368
38. QG v CS [2021] ZAGPPHC 366.
39. Thaldar D. Egg donors' motivations, experiences, and opinions: A survey of egg donors in South Africa. PLoS One 2020;15(1):1-13. https://doi.org/10.1371/journal.pone.0226603
40. Van Der Merwe v Road Accident Fund 2006 (4) SA 230 (CC).
41. Mabasa LF. The psychological impact of infertility on African women and their families [doctoral thesis]. Pretoria: University of South Africa; 2002. http://hdl.handle.net/10500/974

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