

## MEDICINE AND THE LAW

# Is open-identity gamete donation lawful in South Africa?

D Thaldar,<sup>1</sup> PhD ; B Shoji,<sup>1,2</sup> PhD<sup>1</sup> School of Law, University of KwaZulu-Natal, Durban, South Africa<sup>2</sup> Institute for Practical Ethics, University of California San Diego, USA**Corresponding author:** D Thaldar (thaldard@ukzn.ac.za)

South African (SA) gamete banks and gamete donation agencies do not offer open-identity donors, as it is generally believed that donor anonymity is a legal requirement in SA. However, analysis of SA statutory instruments and case law shows that this belief is mistaken, and that gamete donation in SA can be anywhere on the spectrum between anonymous and known. Accordingly, open-identity gamete donation would be lawful in SA and can be offered to the public by SA gamete banks and gamete donation agencies.

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If one visits the websites of international gamete banks and gamete donation agencies, one will observe that it has become increasingly common that many donors are 'identity-release' or 'open-identity' donors. This is quite conspicuous, as the photos of open-identity donors as adults are published on some of these websites. Being 'open identity' typically means that the donors have agreed to have their identities released on request by the donor-conceived child once the child reaches the age of majority. In contrast, gamete banks and gamete donation agencies in South Africa (SA) at most only share early childhood photos of their donors, and make it clear that all their donors are anonymous. The generally accepted belief in the SA fertility industry seems to be that gamete donation in SA must by law be anonymous and that it is unlawful to disclose the identity of a gamete donor. This belief is shared by the South African Law Reform Commission, a state agency that does legal research and makes proposals for legal reform to the legislature. It stated in a recent publication that 'The legal position in South Africa is that gamete donors ... must be anonymous and it is an offence to reveal the identity of a gamete donor ...'.<sup>[1]</sup>

In this article, we set out to critically interrogate this assertion about the lawfulness of open-identity donation. Whether open-identity donation is lawful in SA is relevant not only to South Africans using donor gametes, but to the many individuals around the world who deal with SA gamete banks and gamete donation agencies – all of whom may benefit from having the option of open-identity donation. It should be noted that papers by the South African Law Reform Commission carry no legal authority in SA law, but are purely to stimulate and inform public debate. And, as we show below, both the South African Law Reform Commission and the entire SA fertility industry may be misdirected about what the relevant sources of law say. We illustrate the common points of misconception by dissecting the statutory instruments that relate to the disclosure of the identities of gamete donors in SA, namely the Children's Act 38 of 2005,<sup>[2]</sup> the National Health Act 61 of 2003 (NHA),<sup>[3]</sup> two sets of regulations made in terms of the NHA,<sup>[4,5]</sup> and the Protection of Personal Information Act 4 of 2013 (POPIA).<sup>[6]</sup> We also consider the law of contract and case law.<sup>[7]</sup> We conclude that the legal position in SA is more nuanced than generally accepted, and highlight how open-identity gamete donations may be carried out lawfully in SA.

## Analysis

### The Children's Act

The Children's Act<sup>[2]</sup> is the primary SA statute on all matters relating to children, including certain aspects of assisted human reproduction using donor gametes. Section 41 of the Children's Act deals with children's rights to access information about genetic parents (i.e. the donor). It 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.

Succinctly stated, section 41(1) bestows a right on donor-conceived children (or their guardians) to access *medical* information about their gamete donors, which would be in possession of the gamete bank or gamete donation agency that the donor's gametes were acquired from, as well as in possession of the fertility clinic that effected the assisted reproduction. Once the donor-conceived children reach 18 years of age, this right extends to *any* information about their gamete donors from such entity. However, section 41(2) excludes a specific type of information – information that may reveal the gamete donor's *identity*. This may seem to outlaw open identity to donation, but it is important to interpret section 41(2) in the context of the scope of section 41.

Note that section 41(2) only relates to '[i]nformation disclosed in terms of subsection (1)'. As such, section 41(2) is limited to information that is requested by donor-conceived children (or their guardians) in terms of the right created in section 41(1). In other words, 41(2) applies only to information in the relevant gamete bank or gamete donation agency, and fertility clinic, and prohibits

this information from disclosing the identity of a donor. It does not apply to other sources of information, such as the donor. Ergo, section 41(2) does *not* prohibit gamete donors *themselves* from disclosing their identities – before gamete donation or at any later stage.

### The National Health Act

The NHA<sup>[3]</sup> provides in section 14 that all information concerning a ‘user’ is confidential, and that no person may disclose such information unless: (i) the ‘user’ consents to that disclosure in writing; (ii) a court order or any law requires that disclosure; or (iii) non-disclosure of the information represents a serious threat to public health. A ‘user’ is defined in section 1 as a ‘person receiving treatment in a health establishment, including receiving blood or blood products, or using a health service’. Are gamete donors ‘receiving treatment’ or ‘using a health service’, or are they instead contributing towards somebody else’s treatment? Considering the context of the definition, as well as usage of the word ‘user’ in the NHA as a whole, it can be argued that the purpose of the term ‘user’ is to include persons who are undergoing medical procedures or receiving healthcare services for their own care or treatment, which would exclude gamete donors. On the other hand, it can be argued that egg retrieval – and even producing sperm for purposes of medically assisted reproduction – constitute ‘using a health service’ broadly construed. If this latter interpretation is adopted, it means that donors’ identities may be disclosed if they consent to disclosure in writing. Accordingly, regardless of which one of these interpretations of the scope of ‘user’ is correct, the position remains that the law does *not* prohibit gamete donors *themselves* from disclosing their identities – before gamete donation or at any later stage.

Given these varying possible interpretations of ‘user’ in the NHA, we suggest that gamete banks and gamete donation agencies should err on the side of caution and ensure that consent to be an open-identity gamete donor is obtained *in writing*, as required by section 14.

### The Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes

The most explicit answer to the question of whether open-identity gamete donation is legal in SA is found in the Regulations Regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes.<sup>[4]</sup> Regulation 24(1)(c) provides for the disclosure of a gamete donor’s identity – subject only to consent by the gamete donor. This is a clear rebuke of the general belief that gamete donation in SA must always be anonymous.

### The Regulations Relating to the Artificial Fertilisation of Persons

The Regulations Relating to the Artificial Fertilisation of Persons<sup>[5]</sup> were promulgated in terms of the NHA with the aim of specifically governing assisted human reproduction. The Regulations refer to the concept of a known gamete donor in two separate provisions. The first provision, in regulation 7(c), relates to the maximum number of children that may be conceived from a known donor’s gametes; the second provision, found in regulation 7(j), refers to a situation where ‘the donor and recipient are known to each other’, and requires the competent person to, *inter alia*, ensure that both parties undergo psychological evaluation prior to gamete donation. It is clear from these provisions that the lawgiver has foreseen gamete donation by persons who are known to recipients, and decided not to ban it but rather to regulate aspects of it.

However, there is another provision in the Regulations that can be used to argue that the identity of gamete donors may not be revealed *ex post facto*, namely regulation 19,<sup>[5]</sup> which reads as follows:

#### Prohibition of Disclosure of certain facts

19. No person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders.

If literally interpreted, this provision implies a blanket ban on any communication by any person, including gamete donors *themselves*, about the fact that they donated gametes (note the past tense). Prospective gamete donors who intend to donate their gametes therefore remain free to openly share their identities and their intention to donate as broadly as they wish. Only after the donors have donated does it apparently become *verboten* to disclose their identities. This pre-post dichotomy is both impractical and arbitrary. In our digital age, it is difficult – if not impossible – to delete information from the public sphere once it has become public. Furthermore, there is no conceivable rationale for allowing intended gamete donors to openly share their intention to donate their gametes (and share their identities) with the whole world, but the moment they have donated, outlawing disclosure of the exact same facts.

In our view, one would be wrong to favour a literal interpretation of regulation 19. This interpretation would lead to a number of problematic outcomes, not least being how it would render a whole range of innocuous acts unlawful, leading to absurd results. For example, infertile parents who use a gamete donor to have children would be regarded as breaking the law if they ever disclosed to the children that they were donor conceived. (‘*No person shall disclose ... any matter related to the ... reproduction resulting from such artificial fertilisation [using donor gametes] [our italics].*’) Such an interpretation would completely conflict with the right of donor-conceived children (as per section 41 of the Children’s Act<sup>[2]</sup>) to access information about their gamete donors, as it would be unlawful to ever tell such children that they were donor conceived.

But it goes even further. A literal interpretation of regulation 19 can compromise people’s health and even be life-threatening. Consider an egg donor who experiences a complication, such as excessive bleeding and pain in the abdomen, a few days after the egg donation procedure. As she lives far away from the fertility clinic where the egg donation procedure was performed, she consults a local gynaecologist for urgent, potentially life-saving medical treatment. However, the egg donor will break the law (and risk 10 years’ imprisonment in terms of regulation 21!) if she discloses to the local gynaecologist the highly relevant medical fact that she donated eggs. (‘*No person shall disclose the identity of any person who donated a gamete ... [our italics].*’) A literal interpretation of regulation 19 as entailing a blanket ban on any communication by any person, including gamete donors themselves, is clearly untenable.

However, SA law adheres to a purposive rather than a literal interpretation of statutes.<sup>[8,9]</sup> The apparent purpose of regulation 19 is to protect the privacy of persons who are involved in medically assisted reproduction. This is a legitimate government purpose aligned with the values of the Constitution<sup>[10]</sup> – the right to privacy protects its holders from breaches of their private spaces by other persons. What the right to privacy does *not* do, is take away its holders’ freedom to open their private spaces to specific individuals of their choosing, or to society at large. Ergo, giving a purposive interpretation of regulation 19, persons who are involved in medically

assisted reproduction themselves are free to disclose their own involvement in medically assisted reproduction to whomever they wish, as this regulation only prohibits other persons from disclosing such information without their consent.

From the foregoing, there can be little doubt that a literal interpretation of regulation 19 is untenable, while a purposive interpretation is aligned with the prescripts of the law and sensible. It follows from this purposive interpretation of regulation 19 that gamete donation can be anywhere on the range from anonymous to complete openness to the entire public – depending on the election of the individual gamete donor. Within this spectrum there is space for the typical ‘open-identity’ model, which entails that the donor’s identity can be disclosed to the donor-conceived child upon request when the child reaches the age of majority, or other models such as the donor meeting (and hence being known to) the intended recipient before the donation transaction is finalised.

### The Protection of Personal Information Act

The last statute that we consider is POPIA.<sup>[6]</sup> Generally speaking, POPIA applies to the processing of *personal information*. Personal information includes a person’s name, other identifying information, and the fact that a person is a gamete donor. Accordingly, where a gamete bank, gamete donation agency or fertility clinic is in possession of a donor’s personal information, POPIA would as a general rule apply. However, as long as the donor consents (in terms of section 11), nothing in POPIA prohibits the disclosure of the donor’s identity. Note that such consent in the context of POPIA is ‘any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.’ In other words, consent in the context of POPIA is very similar to ‘informed consent’ that healthcare practitioners are familiar with, with the added requirement of specificity. Therefore, consent by gamete donors to process their information *in any way* deemed fit by a sperm bank would lack specificity and be invalid for purposes of POPIA. Gamete donors would need to consent to a specific expression of will, such as *the disclosure of their identities* to potential recipients who register on the sperm bank’s website.

There are two relevant exceptions to the general rule discussed above. Note that POPIA (section 6) provides that the processing of personal information in the course of a *purely personal* or household activity is excluded from the scope of POPIA. As such, in cases where the donor is known to the intended parents through personal contacts and without an external intermediary that provides services to the public at large, POPIA does not apply. For example, when the donor is the intended mother’s sister, there is no need for the sister to provide specific consent in terms of POPIA to disclose her identity to intended mother – this would be nonsensical. In contrast, where a fertility clinic, egg donation agency or sperm bank is involved in process of introducing the parties, POPIA will apply.

The second exception to the general rule is where persons deliberately make their own personal information public. This would be the case if, for example, a young man states on his public social media profiles that he is willing to donate sperm, and that intended parents are welcome to contact him. This is perfectly legal, as nothing in POPIA prohibits persons themselves from sharing their own personal information with whomever they want – even with the whole world! Where persons deliberately make their own personal information public, it also has the consequence of relaxing various of POPIA’s provisions applicable to how other persons may process such publicly available personal information.

Accordingly, while POPIA puts in place legal measures to protect personal information, it is flexible and also provides various avenues to share personal information. Donor consent would probably be the standard avenue, and aligns with the consent requirements of the other statutory instruments discussed above. What is important, however, is to ensure that consent in terms of POPIA is *specific*, as discussed above. Therefore, in principle, POPIA allows for open-identity gamete donation.

### Excursus: The interaction between contract law and statute law

Based on our findings above, it is clear that statute law does not require donor anonymity. Does this then mean the current regime of donor anonymity is not aligned with the law, and the identity of donors may freely be revealed? Not so. It is important to note that the fact that anonymity is not required by statute, does not mean that anonymity is not provided for elsewhere in the law. In this case, donor anonymity may be protected by the principles of the law of contract.

It is important to note that the fact that anonymity is not required by statute, does not mean that anonymity cannot still be attained through another avenue. Generally, in SA law, a person who makes a donation (of any kind, for example a sum of money) to an unspecified person or persons can use a third person to act as intermediary and enter into an agreement with the intermediary to keep the donor’s identity confidential. Alternatively, the donor can agree with the intermediary to disclose the donor’s identity only under certain specified conditions. The same with gamete donation. In other words, gamete donor anonymity can be freely arranged through contract. As analysed above, such a contractual arrangement automatically receives statutory protection from being pierced by donor-conceived children’s general right to access information about their gamete donors (by section 41 of the Children’s Act<sup>[2]</sup>). And should a gamete bank or donation agency breach the confidentially provision of its agreement with the donor, the donor will have civil remedies against such a gamete bank or donation agency.

### Case law

That open-identity gamete donation is legal in SA is further supported by case law. This may be observed in the first reported case in SA to consider non-autologous gamete donation: *QG v CS*.<sup>[7]</sup> The facts of the case are as follows. A lesbian couple advertised on social media for a sperm donor. A gay man, QG, responded to the advertisement and met with the couple. They agreed on the terms of the donation in writing, namely that QG would not have any parental rights and responsibilities but could have contact with the child at the discretion of the couple, who would be the child’s legal parents. QG and the couple visited a fertility clinic; he provided his sperm and one of the women was inseminated. A baby boy, L, was born 9 months later. QG had occasional contact with L. When L was still a toddler, QG invited the couple to rent a cottage on his property at a discounted price, and they accepted. QG’s mother lived in the main house on the same property as the cottage, and QG himself lived in the adjacent property. Consequently, QG and his mother now had more regular contact with L. The arrangement lasted less than a year, as there were disputes about the way in which the couple was raising L. After moving out of QG’s cottage, the couple stopped all contact between QG and L. Consequently, QG and his mother sued the couple for parental rights and responsibilities in respect of L. Although the Pretoria High Court held that the terms of the sperm donor agreement are not binding on the court in matters pertaining to children, the court found on the facts that the applicants failed to

establish that the bond they developed with L was of a sufficiently significant nature to justify judicial intervention to maintain such a bond. As such, the court dismissed the application. (Note that the case is reported using acronyms because in SA, whenever children are involved in cases, the identities of the parties – and the children – are not made public.)

Importantly, *QG v CS* clearly dealt with gamete donation by a *known* donor. When QG responded to the couple's social media advertisement, he revealed his identity to them. This was not an accidental disclosure – all the parties involved intended to know each other's identities. Moreover, the intended recipient and the intended donor met in person and subsequently entered into an agreement. If known gamete donation was unlawful, it would be reasonable to expect that the court would point out such unlawfulness. After all, the known nature of the gamete donation is the *conditio sine qua non* of the entire sad course of events in this case. However, the judgment is silent on this issue. While it is reasonable to expect the court to point out when a consequential event in the factual matrix before it is *unlawful*, it is not reasonable to expect the court to remark on the *lawfulness* of every aspect of such a factual matrix. In civil matters, lawful conduct by the parties is the general norm; only an exception to such a norm would call for attention. Accordingly, the judgment can be interpreted as implicitly confirming that known gamete donation is lawful.

## Conclusion

We began this article by observing that SA gamete banks and gamete donation agencies at most only publish the early childhood photos of their donors, and do not offer open-identity donors. We suggest that this is an unnecessary and self-imposed limitation based on a misconception about the law, as revealed by a proper analysis of the relevant sources of law. The position in SA law is that gamete

donation can be anonymous, completely open to the public, or anywhere in between – depending on the election of the individual gamete donor. Accordingly, it would be lawful for SA gamete banks and donation agencies to follow the international trend and offer open-identity donors with adult photos. The legal requirement is *specific consent* by the donors, and to err on the side of caution such consent must be in *writing*.

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