IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 40658/13

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: Yes.

(2) OF INTEREST TO OTHER JUDGES: Yes.

(3) REVISED.

DATE : 12 AUGUST 2015

In the matter between:

AB First Applicant

SURROGACY ADVISORY GROUP Second Applicant

and

MINISTER OF SOCIAL DEVELOPMENT Respondent

As *AMICUS CURIAE*:

CENTRE FOR CHILD LAW

JUDGMENT

AC BASSON, J

Surrogacy

[1] "Surrogacy" is regulated by chapter 19 of the Children's Act[1] ("the Act"). Although "surrogacy" is not defined by the Act, the Act does contain the following definition of a "surrogate motherhood agreement":

> "*'Surrogate motherhood agreement' means an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent;"*

[2] The principle purpose of the surrogate motherhood agreement is that the surrogate mother will carry a child (pregnancy) for the commission parents. Once the child is born, the child becomes - from the moment of the birth and for all purposes - the child of the commission parent or parents.[2] A surrogacy motherhood agreement will only be valid if a Court has confirmed the agreement.[3] No artificial fertilisation of the surrogate mother may take place before the agreement has been confirmed by the Court and after a lapse of 18 months from the date of the confirmation of the agreement by the Court.

---

[1] Act 38 of 2005.
[2] See section 297 of the Act in respect of the effects of a valid surrogate motherhood agreement.
[3] Section 295 of the Act sets out the requirements that must be met before a Court will confirm a surrogate motherhood agreement to be valid.

[3] An important requirement that must be met before a Court may confirm a surrogate motherhood agreement is contained in section 295(a) of the Act. For purposes of this judgment I will refer to this requirement as the "threshold requirement":

> *"295. Confirmation by court—A court may not confirm a surrogate motherhood agreement unless—*
>
> *(a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;"*

[4] In essence it is therefore required – as a threshold requirement – that surrogacy is available only to those parent(s) who are unable to procure implantation or carry a pregnancy to full term and in circumstances where this condition is permanent and irreversible. The threshold requirement is *not* the subject of constitutional challenge in these proceedings[4]. Those individuals who fulfil the "threshold requirement" and who intend to use surrogacy as a method to become parents will be referred to in this judgment as "the class". (I will revert to this concept herein below).

[5] In addition to the threshold requirement contained in section 295 of the Act, a further requirement for a valid surrogacy agreement is set out in section 294 of the Act. I will refer to this requirement as the so-called "*genetic link requirement*." In the context of surrogacy, this requirement requires a *genetic lineage* to the child

[4] This condition is referred to in this judgment as "*pregnancy-infertility*". See the discussion hereinbelow.

either from one or from both parents. Gametes[5] from either both parents or one of the two parents or in the case of a single parent from that parent, are therefore necessary in terms of section 295 of the Act to establish such a genetic lineage to the child.

[6] Compliance with this genetic link requirement is therefore fundamental to the validity of a surrogate motherhood agreement. Consequently, where no such genetic link exists, the surrogacy agreement will be invalid in terms of the Act as it currently stands. If the commissioning parents, or in the case of a single person, is therefore biologically or medically unable to use their own gametes, the surrogate motherhood agreement will be invalid and the commissioning parent(s) are legally prohibited from using surrogacy as an alternative of becoming a parent(s). This section reads as follows:

> *"294. Genetic origin of child.—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."*[6]

---

[5] The Act defines a gamete as follows: "*'gamete' means either of the two generative cells essential for human reproduction;*"

[6] Section 292 prescribes the formalities that must be complied with for a surrogate motherhood agreement must comply with. In terms of section 293 both husband and wife or partner must consent to confirm the surrogate motherhood agreement. Section 295 sets out the conditions that must be complied with before a Court may confirm a surrogate agreement. In terms of section 296 artificial insemination of the surrogate mother can only take place after the Court has confirmed the agreement. In terms of section 197(1) the child born to the surrogate mother becomes the child of the commissioning parents from the moment of the birth of the child. . The surrogate mother or her husband or partner has no rights of parenthood or care of the child. The child so born will also have no claim for maintenance or of succession against the surrogate mother, husband or partner subject to the provisions of section 292 and 293. An agreement that

[7] Commissioning parents or in the case of a single parent may therefore not elect to use male *and* female *donor gametes* (referred to in this judgment as *"double-donors*") in the context of a surrogacy motherhood agreement. However, outside of the surrogacy context, parents (or a single parent), have the choice to either use their own gametes or to use (both) male *and* female donor gametes (double donor) in the context of *In Vitro* Fertilisation (herein referred to as "IVF"). In the IVF context therefore, the parents or single parent have the right to make use of double donor gametes for any personal reason that they might consider convincing. The so called genetic link requirement can therefore be absent in the context of IVF. The only factual difference therefore between surrogacy and IVF is the fact that in the case of IVF a commissioning parent carries and gives birth to the child whereas in the case of surrogacy it is the surrogate mother who carries and gives birth to the child. In the case of IVF where the parent(s) decide to use double donors gametes, no genetic link will exists between the parent(s) and the child. In the context of IVF such fertilisation is not prohibited. In the context of surrogacy the agreement will be invalid.

Constitutional challenge

[8] The applicants in this matter are challenging the constitutional validity of the provisions of section 294 of the Act on the grounds that the genetic link requirement violates the first applicant's rights to equality, dignity, reproductive health care, autonomy and privacy. The applicants submit that, although it is

---

does not comply with the Act is invalid and the child born as a result of such an agreement is deemed to the child of the woman who gave birth to the child. Section 299 and 300 set out the grounds for terminating the surrogate motherhood agreement.

accepted that most people would prefer to use their own gametes in order to establish a genetic link with a child, there is no justification for the limitation of these rights on this basis and enforce such a preference on everyone in the context of surrogacy especially where such a limitation does not exists in the context of IVF. I will return to the submissions in this respect hereinbelow.

[9] In the factual matrix of this case the requirement of the genetic link effectively makes it impossible for the first applicant to conclude a surrogate motherhood agreement and consequently makes it impossible for her (except for adoption) to become a parent. Because of her specific medical condition, the first applicant is not only biologically unable to give birth to a child - which condition is permanent and irreversible - she is also unable to donate her own gametes (which is a requirement for surrogacy (the genetic link requirement). Furthermore because she is not involved in a sexual relationship with a person who is able to make such a contribution and therefore comply with the genetic link requirement, she is also unable to donate the gametes from another parent. The only avenue open to the first applicant (bar adoption – which will be indicated herein below is not a viable option) to become a parent is to resort to surrogacy using gametes from two donors (double donor gametes). Surrogacy as an option to become a parent is, however, in the first applicant's case prohibited in terms of the Act as a result of her inability to establish a genetic link with a child. This she says constitutes an infringement on her constitutional rights.

[10] Central to the applicants' case is the submission that members of the sub-class[7] are entitled to the same choice that those people who are using IVF outside of the surrogacy context may have. It is further submitted that the public at large has an interest in a legislative regime that regulates surrogate motherhood that is aligned with the values of the Constitution[8] and which is not arbitrary, discriminatory and destructive of the human dignity of especially members of the sub-class. The second applicant therefore brings this application on behalf of the class and the sub-class pursuant to section 38(c) of the Constitution and in the public interest pursuant to section 38(d) of the Constitution.

[11] The respondent submits that the requirement that a genetic link exist between the commissioning parent and the child is not unconstitutional and should therefore not be declared invalid. In the alternative, it is submitted that should this Court strike down the impugned provision, the invalidity should be suspended in order to allow Parliament to rectify same.

The Parties

[12] Consequent upon an anonymity order[9] the first applicant will not be identified in any way whatsoever in the papers or in the judgment. The first applicant is therefore merely identified as "AB".

[13] The second applicant, the Surrogacy Advisory Group, was granted leave to intervene and was joined as the second applicant on 8 November 2013.

[7] See herein below for a discussion of what constitutes "the class" and the "sub-class".
[8] Constitution of the Republic of South Africa Act 108 of 1996.
[9] Dated 28 June 2013.

Subsequent to the second applicant's joinder to this case, the second applicant is driving the case on behalf of both the applicants. The second applicant is a group of volunteers and represents the interest of the class of people who cannot bring a child into the world themselves and who intend to use surrogate motherhood to become parents. The second applicant assists in matching individuals who desire to become parent(s) with a suitable surrogate mother. The commissioning parents and the surrogate mother are also assisted during the process which includes medical assessments and psychological assessments. The second applicant also assists the commissioning parent(s) to approach the Court to confirm their surrogacy motherhood agreement. The deponent to the founding affidavit (on behalf of the second applicant) explains that since 1 July 2012 the second applicant had successfully matched 55 prospective commissioning parents (27 couples and one single person) with prospective surrogate mothers.[10]

[14] The respondent is the Minister of Social Development. She is cited in her capacity as the Minister responsible for the administration of the Children's Act.

[15] The Centre for Child Law ("CLL") was on application admitted as *amicus curiae*. The CLL was established in terms of the Constitution of the University of Pretoria and is also a registered law clinic with the Law Society of the Northern Provinces. The main objective of the CLL is to contribute within its means to establish and promote the best interest of children in South Africa and more particularly to use the law as an instrument to advance such interests.

[10] 87% were married couples; 11% were unmarried couples and 2% (one person) was single. 76% are heterosexual and 24% are gay. 80% are white and 20% are black.

Factual matrix

[16] The first applicant, who (as already indicated) will remain anonymous, is an infertile mother who intends to use a surrogate mother to have a child. She explains in her affidavit that as a result of the quality of her eggs and after two *in vitro* fertilisation ("IVF") procedures using both her own eggs and her husband's sperm, she was unable to harvest her eggs for continued IVF purposes and was advised by her gynaecologist that continued harvesting of her own eggs was not feasible. After careful selection from a local egg donor database, she started using anonymous eggs for IVF.

[17] After her relationship with her husband ended in divorce she started, similar to the donor ova, carefully selecting the sperm donor from a local sperm donor database. The first applicant in total underwent eighteen IVF cycles in an attempt to achieve pregnancy. Fourteen IVF cycles used *both* male and female *anonymous donor gametes*. In other words, in the context of IVF the first applicant made use of "double donors" in an attempt to become a parent.

[18] As a result of the fact that none of the IVF cycles resulted in a pregnancy, she was advised by her gynaecologist that, in his expert opinion, further IVF attempts would have an incredibly small change of success and that she should rather consider surrogacy as a means to have a child. I do not for purposes of this judgment intend to refer in detail to the medical opinion of the applicant's doctor. Suffice to point out that it was not disputed by the respondent that the first applicant is medically unable to carry a pregnancy to term and that this condition

is permanent and irreversible. Also evident from her gynaecologist's affidavit is that, in his expert opinion, the first applicant cannot contribute her own gametes for conception nor is she medically able to carry a child.

[19] The first applicant thereafter investigated the option of using surrogacy as a means of having a child. With the assistance of an organisation called *Baby2Mom* the first applicant was placed into contact with a potential surrogate mother who agreed in principle to act as a surrogate mother for the applicant.

[20] The first applicant explains that she received legal advice that, as far as the law on surrogacy currently stands, a single person who is infertile (in the sense that they cannot contribute their own gametes for conception) is legally forbidden to use surrogacy as a means to become a parent.

[21] The first applicant refers to the fact that whereas the law allows for a person to use the gametes of two donors ("double donor gametes") in the context of an IVF procedure (where the parent to be (mother) carries her child to birth), the law forbids the same mother to be from using surrogacy as a means to have a child using the same double donor gametes.

[22] The first applicant explains in her affidavit that she received the legal advice with a mixture of shock, sadness and bafflement especially since she has after all been using double donor gametes (in other words, gametes both male and female) for several years in her attempts to achieve pregnancy herself through IVF. This, she explains, simply does not make sense to her. She further explains that her only

option now is to launch a constitutional challenge to have the genetic link requirement removed from the Act as she is of the view that the current law is clearly unfair and discriminatory.

Class v subclass

[23] In order to analyse the autonomy of commissioning parent(s) in the context of surrogacy to make use of “donor gametes”, it is useful to draw the following distinction between the different members of the "class" that presupposes that they are permanently and irreversibly unable to give birth to a child themselves.

[24] The “class” as a whole comprises of parents who are reliant on a surrogate mother to carry their prospective child on their behalf. The class presupposes that the parent is pregnancy infertile in the sense that such parent is medically and biologically unable to carry a child. The class further comprises of a person or persons who are able to contribute their own gametes towards conception. Typically members of the class are “*conception-infertile*” parent(s) (within the context of section 295(a) of the Act) but parent(s) who are still able to contribute at least one gamete towards conception. In the case of a single parent, that parent, although conception-infertile, is able to contribute her own gametes towards conception. Because the commissioning parents or (single) parent is able to contribute and in fact does contribute his or her own gametes towards conception, the genetic link requirement as set out in section 294 is therefore complied with.

[26] Within the context of members of “the class” there are also individuals who, for whatever reason, may elect not to use their own gametes(although they are able to do so) and intend to use both male and female donor gametes. Typically these individuals may not wish their prospective child to inherit a disease or disability of which members of the class are likely genetic carriers. These individuals are likewise prohibited from using double donors since they are unable to establish a genetic link with the prospective child.

[27] Within this “class” a further class – referred to herein as the “subclass” may be identified. The members of the “sub-class” are distinguished from the aforementioned “class” by virtue of the fact that they are biologically *unable* to contribute their own gametes to conception or are not involved in a sexual relationship with a person who is able to make such contribution. Members of the sub-class are therefore unable to use surrogacy as a method to become a parent because they are unable to establish a genetic link with the child that is carried by the surrogate mother until birth. The first applicant in this matter forms part of the “sub-class”.

[28] Within the context of the members of the class, it is therefore important to distinguish between two types of infertility: The first type of infertility is referred to “*pregnancy-infertility*” which refers to the inability of a woman to procure implantation or to carry a pregnancy to full term. *Pregnancy-infertility* constitutes the basis for qualifying for surrogacy in terms of the Act. I have already pointed out that this requirement – which is the basis for qualifying for surrogacy - is not contentious in this application. However, in the context of surrogacy, the second

type of infertility namely "*conception-infertility*" is contentious as it may constitute a *disqualifying* factor for pregnancy in that the inability to contribute one's own gametes (or to contribute the gametes of your partner) towards conception effectively *disqualifies* the commissioning parent or parents from concluding a valid surrogate motherhood agreement.[11] "*Conception-infertility*" in this context therefore means the biological inability of a person (man or woman) to contribute to conception. Because a parent is prohibited from using double donors, surrogacy is prohibited. As a result of the absence of a genetic link with the prospective child, the commissioning parent(s) are therefore prohibited from turning to surrogacy as a means to become a parent.

[29] As already pointed out, the first applicant in this matter is not only *pregnancy-infertile*; she is also *conception-infertile*. As a result the first applicant - whilst she qualifies on the basis of being *pregnancy-infertile* - she is effectively disqualified from using surrogacy because she is also *conception-infertile* and therefore unable to establish a genetic link with a prospective child as is required by section 294 of the Act. Her desire to use surrogacy to have a baby therefore prompted her to bring this constitutional challenge to strike down the genetic link requirement as constituting an infringement on several of her human rights.

[30] The first applicant further submits in her affidavit that it is her desire to be granted the same choice that persons outside the surrogacy-context (in the IVF context) already have and to end the exclusion of conception-infertile prospective commission parents from using surrogacy.

[11] I have already referred to the fact that there may be a class of parent(s) who may not want to donate a gamete for other reasons such as where they are carriers of a genetic disease which they do not wish to carry over.

Divergent views regarding surrogacy

[31] Whilst the parties in this matter are *ad idem* that surrogate motherhood fulfils an important function as a viable avenue to parenthood, they however, differ as to what is meant by the concept of "*surrogacy*" and it is this difference in opinion in respect of what this concept means which lies at the heart of this dispute: The applicants regard the concept of "*surrogacy*" to mean the provision of an opportunity to persons who cannot give birth themselves to become parents *irrespective* of whether the child will be genetically related to the parents or not. The respondent, on the other hand, regards the concept of "*surrogacy*" to mean an opportunity to persons who cannot give birth themselves to have a *genetically related* child. The respondent's interpretation of the concept "surrogacy" is therefore in line with the legislature's view of surrogacy as encapsulated in chapter 19 of the Act which emphasises the requirement of a genetic lineage.

[32] As will be pointed out herein below, the parties have divergent views regarding the constitutionality of the challenged provision that requires such a genetic lineage: The applicants are of the view that the genetic link requirement violates several constitutional rights of the class and the subclass. The respondent, on the other hand, denies that the impugned provision infringes on any human rights.[12] On a more elevated level, the applicants specifically take issue with the special *value*

[12] Sue A Meinke – Surrogate Motherhood : ethical and Legal Issues describes the concept of surrogacy and the concerns as follows: " *Among the many applications of the new reproductive technologies (including artificial insemination by donor – AID, In Vitro fertilization- IVF, embryo transfer and embryo freezing) surrogate motherhood has far-reaching consequences that it raises a multitude of ethical and legal questions…What distinguishes surrogacy from other reproductive technologies is not the technology itself but the circumstances of its application… an arrangement whereby one woman bears a child for another with the intention of relinquishing the infant at birth."*

that the legislature has assigned to genetic lineage and submitted that the legal concept of a “family” cannot be assigned special value to genetic lineage as families without a parent-child genetic link are as valuable as families with such a genetic lineage.[13]

[33] The dispute before the Court not only raises difficult legal and ethical questions; it also raises complex emotional issues that have a fundamental effect on many of those individuals who struggle with the devastating effects of infertility.

History of surrogacy

[34] It is not necessary for purposes of this judgment to give a detailed exposition of the history preceding the enactment of Chapter 19 of the Act. Suffice to note that the South African Law Commission ("SALC") investigated surrogate motherhood in the South African context. Representatives of various religious groups either opposed surrogacy in any form whatsoever or proposed that it be restricted to the use of the commissioning parents’ gametes. Representatives of the government of the time did not however object to a child being born to a couple where the gametes of neither spouses were used.

[35] The SALC issued a report in 1992 recommending that surrogate motherhood agreements should be permissible “*only if the gametes of at least one of the commission parents are used so that the child is related to at least one of the commissioning parents*”. The following appears to be the rationale for this decision:

[13] See *Du Toit and Another v Minister of Welfare and Population Development and Others* 2003 (2) SA 198 (CC) at par [19].

"The Commission remains convinced that in order to promote the bond between the child and the commissioning parents it is desirable, in the best interest of such a child, that the gametes of at least one of the commissioning parents should be used. This would also restrict undesirable practices such as shopping around with a view to creating children with particular characteristics."

[36] A parliamentary *ad hoc* Committee followed in 1994. Their deliberations culminated in a further Report "The Ad Hoc Committee Report" in 1999. One of the far reaching additions to the SALC Report was the inclusion of unmarried couples (irrespective of their sexual orientation) and single persons. In the case of a single person, it was recommended that such parent must still contribute its own gametes:

"*Unmarried persons who are involved in homosexual relationships should also qualify as commission parents. A refusal to allow persons involved in such relationships to become commission parents should be based only on established evidence that such persons are less capable parents, and that it will, therefore, not be in the best interest of the child. It will not be possible to argue that the sexual orientation of a person should per se disqualify him or her from becoming a parent. Disqualification may further be seen as an impairment or limitation of the rights of certain persons to*

make decisions concerning reproduction and a violation of their rights to dignity and privacy."[14]

[37] The Ad Hoc Committee Report therefore recommended the retention of the requirement that the gametes of at least one of the commission parents be used towards conception or in the case of a single person, the gametes of that single parent. The rationale for this recommendation was as follows:

> "*In the instance where both the male and the female gametes used in the creation of the embryo are donor gametes, it would result in a similar situation 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. This type of surrogacy was not preferred by most commentators. It was felt that in both partial and full surrogacy it should be a pre-condition that the child or children should always be genetically linked to the commissioning parent or parents."*[15]

[38] Two observations can be made: Firstly, the inclusion of homosexual parents and a single parent in the context of surrogacy demonstrates an acceptance that social practices and norms constantly change and evolve and that the legislature must take cognisance of these changes. Secondly, the SALC specifically recognised in the context of homosexual relationships that individuals have the right to make certain decisions concerning reproduction and that a limitation of this right constitutes a

[14] Paragraph E2(2)(d)(ii) of the Report.
[15] Ad Hoc Committee Report ad paragraph E1(2)(e).

violation of their rights to dignity and privacy.

[39] The genetic link requirement was subsequently enacted into law as section 294 of the Act.

The legislative intent of Chapter 19 of the Children's Act

[40] Before I turn to a comparative study of surrogacy, it is necessary to briefly make a few remarks regarding the legislative intent of Chapter 19 of the Act. In this regard the Court in *Ex Parte MS and Others*,[16] held that, should the surrogacy agreement at issue in that case not be confirmed it will be invalid and the consequence would be that the child, once born, would be the child of the surrogate mother and not the commissioning parents. This Court held would be contrary to the broad objectives of the Children's Act, and would impinge on the rights of the commissioning parents, the surrogate mother, and the child:

> *"[50] .. The broad objective of the regulatory scheme established under ch 19 of the Act is to ensure sufficient protection for the rights and interests of all parties involved in surrogacy arrangements. . . .*
>
> *[51] … It [the consequences of not confirming the surrogacy agreement] would impinge also on their [the commissioning parents'] right to make reproductive choices, as the commissioning parents' only recourse would be to seek to adopt the child born to the surrogate mother. This is precisely the problem that the Act sought to overcome in making it possible for*

---

[16] 2014 (3) SA 415 (GNP).

commissioning parents under surrogacy agreements to acquire parental rights without the necessity of following an adoption process."[17]

[41] The Court in *Ex Parte MS* therefore confirmed that the overriding legislative purpose of Chapter 19 of the Children's Act is to regulate surrogacy (in contrast with leaving it unregulated or outlawing it) and to ensure the sufficient protection of the rights and interests of all parties involved in surrogacy arrangements, which is to make it possible for commissioning parents under surrogacy agreements to acquire parental rights without the necessity of following an adoption process.

[42] The inclusion of the generic link requirement as a distinct requirement included in the Act must be seen against the overriding legislative purpose of the Act which is to make it possible for commissioning parents to become parents and acquire parental rights without having to go through an adoption process. If this is then accepted to be the overriding legislative purpose, the question arises whether the generic link requirement infringes upon an individual's right to become a parent in circumstances where a prospective parent(s) is unable to contribute gametes towards conception and therefore unable to establish the legislative requirement of a genetic link.

The constitutional concept of the family

[17] *Ibid*, par [49] and [51] footnotes omitted.

[43] I have already referred to the fact that the applicants and the respondent have different views regarding what should be understood to define a family. It is in my view therefore necessary to make a few remarks in this regard: The question that pertinently arises is whether genetic lineage (which constitutes a critical component currently in terms of the Act) should be relevant in defining the concept of a family. The applicants contend that no special value can be allocated to genetic lineage in the legal concept of the family.

[44] The Constitutional Court has on occasion been willing to question the traditional view of what constitutes a family in the context of two lesbian parents. In *J v DG, Department of Home Affairs and Others,*[18] a woman gave birth to twin babies as a result of artificial insemination with an anonymous donor sperm. She and her lesbian partner wished to be recognised as the legal parents of the twins on the twins' birth certificates. However, based on the relevant legislation at the time, the Department of Home Affairs refused, stating that "the two ladies cannot be regarded as father and mother or parent of the children since there is no legal marriage and none of them can claim fatherhood of them".[19] With reference to the impugned provision, the Court *held that:*[20]

> *"[23]… Plainly the Legislature sought thereby to deal with advances in fertility and reproductive technology but it seems to have confined itself to the traditional view of the family.*"

[18] *J and Another v Director General, Department of Home Affairs and Others* 2003 (5) SA 621 (CC).
[19] *Ibid at par [2].*
[20] *Ibid.*

[45] In *Satchwell v President of the Republic of South Africa and Another*[21] the Constitutional Court likewise questioned the traditional view of a family and held as follows:

> *"Family means different things to different people, and the failure to adopt the traditional form of marriage may stem from a multiplicity of reasons – all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under law."*

[46] It is thus argued on behalf of the applicants that the genetic link requirement allocates special value to genetic lineage in the context of establishing a family through surrogacy. This, so it was submitted, should be found to be in conflict with the legal concept of the family in our constitutional dispensation. As was pointed out by the Constitutional Court in *Satchwell* - although family can mean "*different things to different people*"- all of them are equally valid. I am in agreement with the sentiments expressed by the Constitutional Court: A family cannot be defined with reference to the question whether a genetic link between the parent and the child exists. More importantly, our society does not regard a family consisting of an adopted child or adopted children as less valuable or less equal than a family where children are the natural or genetically linked children of the parents. A family can therefore not be defined by genetic lineage. The legislature should therefore, in my view, take due cognisance of the advances made in fertility and reproductive technology and with that comes the obligation to redefine the traditional view of the family.

---

[21] 2002 (6) SA 1 (CC) at par [11].

Comparative study on surrogacy

[47] The Court was referred to extensive literature regarding the statutory or regulatory framework in numerous foreign legal dispensations. I will refer only briefly to the legal position in some of the countries referred to. The *amicus curiae* (the Centre for Child Law) also filed extensive submissions in respect of the comparative position on surrogacy. Before turning to a brief reference to some of the jurisdictions, it appears from the survey that: (i) Surrogacy motherhood agreements are widely accepted in many countries. (ii) All countries (including South Africa) appear to strictly regulate surrogacy in some form or another. On this point I must make it clear that this Court does not, nor did any of the parties, take issue with the fact that surrogacy motherhood agreements are (and in fact should be) tightly regulated by the legislature. Sound reasons for doing so exist and I will refer to some of these considerations herein below. What is at issue in this matter is therefore not the principle that surrogate motherhood agreements should be strictly regulated, what is at issue in the application is the contention that the genetic link requirement contained in section 294 of the Act infringes upon several human rights of certain commissioning parents. (iii) The survey further shows that there are a number of countries that likewise require a genetic link between the commissioning parents and the child and that there are countries where this genetic link is not required. It does however, appear from the literature that there are examples of more recent legislative trends to move away from the genetic link requirement.

[48] The respondent relied on the regulatory framework in England in support of its argument that section 295 should be retained. The Surrogate Arrangement Act[22] read with the Human Fertilisation and Embryology Act[23] regulate surrogacy in the United Kingdom and require a genetic link between the commissioning parents and the child. The respondent referred to *Carnelly and Soni – Ex-Parte WH*[24] where the following explanation for the genetic link requirement is proffered:

> *"The aim of the legislation and regulation is to make it possible for commissioning couple to have a child genetically linked to either or both of them. Such surrogacy arrangements are legalised as a last option for infertile couples or same sex persons to conceive a child genetically linked to either of them (Herring family Law (2004) 344). If there is no genetic connection, there is no need for surrogacy as adoption could be viable alternative. It has been argued that commercial surrogacy arrangements should be avoided for ethical reasons as it "commodities" children and treats them as possessions that can be bought and sold (Herring 343). Moreover, commercialisation could lead to poorer women being exploited and forced into surrogacy arrangements for monetary purposes (Herring 343) whatever the rationale, in the principles have been firmly established in the legislation of both jurisdictions."*

[49] In respect of the genetic link requirement the aforementioned position is the same as in South Africa. There are, however, fundamental differences between the position in South Africa and the United Kingdom. In the United Kingdom surrogacy

---

[22] Of 1985.
[23] Of 2008.
[24] Carnelly & Soni 2012 De Jure pages 179-188.

is restricted to couples therefore excluding single persons from using surrogacy.[25] In contrast single persons in South Africa are allowed to make use of surrogates. Accordingly, the United Kingdom's legal position on surrogacy is antithetical to our South African constitutional values therefore rendering the comparative value of United Kingdom surrogacy law limited. Also, South Africa is a constitutional democracy. The United Kingdom, on the other hand, is not a constitutional democracy.

[50] The legal position in Australia is regulated on state level. Two of Australia's states requires a parent-child link whereas five of Australia's states do not require a parent-link requirement in any form.[26]

[51] Dutch legislation requires a parent–child genetic link for surrogacy. Surrogacy is, however, limited to heterosexual couples.[27] The fact that the Netherlands effectively limits access to surrogacy to heterosexual couples the Dutch position is misaligned with the South Africa's human rights dispensation and therefore of limited comparative value.[28] Since 2002 (in respect of donations made after 1 June 2004) the donation of gametes is no longer anonymous. When the child reaches the age of 16 a child conceived through medically assisted reproduction

---

[25] See section 54(2) of the Human Fertilisation and Embryology Act of 2008.

[26] In fact in Tasmania (in terms of the Tasmania Surrogacy Act of 2012) it is specifically legislated that: "(2) Subject to subsection (1), this Act is to be administered according to the following principles: …..

(b) the same status, protection and support should be available to a child born as a result of a surrogacy arrangement regardless of

(i) how the child was conceived under the arrangement; or

(ii) whether there is a genetic relationship between the child and any of the parties to the arrangement or; …"

[27] A Comparative Study on the Regime of Surrogacy in EU Member States (Brussels: European Parliament's Committee on Legal Affairs) at 303.

[28] See *Du Toit and Another v Minister of Welfare and Population Development and Others* (Lesbian and Gay equality Project as *Amicus curiae* 2003 (2) SA 198 (CC) where permanent same sex lie partners have been granted the right to jointly adopt children.

with a sperm donor, has the possibility of obtaining the identity of the third-party donor, with the consent of the latter.[29]

[52] The *amicus curiae* also referred the Court to the position in Greece where it is not required that there be a parent–child genetic link for surrogacy. Brunet *et al* comments as follows:

> *"The state sought to empower the respect for the individual's desire to achieve self-fulfilment through parenthood, even in its modern form of "social parenting", where the parent-child relationship is based on emotions of love instead of biological ties, and embraced a regulatory approach to the issues of the assisted reproduction. The law recognizes the case of full "social parenthood", where the child has no genetic relationship with his/her parents, and where the family relationships are based merely on intent."* [30]

[53] In respect of the position in the United States of America the Court was referred to the fact that the position regarding the genetic link requirement seems to be diverse: [31] Several states have enacted legislation that deals with surrogacy without including a parent–child genetic link requirement such as *inter alia*, Alabama, Louisiana, and Texas. In California, for example, no explicit legislation exists that deals explicitly with surrogacy or with the genetic link requirement, yet

---

[29] *Ibid* at 307.
[30] Brinet, Laurence et al., A Comparative Study on Regime of Surrogacy in EU Member States (Brussels: European Parliament's Committee on Legal Affairs), p201 http://www.europa.es/RegDatn/etudes/join/2013/474403/ipolJURI_ET%282813%29474403_EN.pdf.
[31] 'State-by-State Surrogacy Summary' (The Center for Bioethics and Culture, 2012) (http://www.cbc network.org)

the California Court of Appeal held that the commissioning parents are the legal parents of the child even though neither of the commissioning parents had any genetic link with the child.[32] Lastly, the National Conference of Commissioners on Uniform State Laws in the USA has enacted a Uniform Parentage Act as a model law for the fifty states and Washington DC. It is noteworthy to point out that while a previous version of the Uniform Parentage Act included an equivalent of the genetic link requirement, such requirement was specifically deleted from the current version.[33]

[54] The position in Canada is regulated by the Assisted Human Reproduction Act of 2004. Legislation allows for altruistic surrogacy and does not contain any provision that is similar to the genetic link requirement. Commissioning parents in Canada are therefore free to use male and female donor ("double-donor gametes").

[55] In Tasmania the Tasmania's Surrogacy Act of 2012 explicitly states that a parent-child genetic link is legally irrelevant.

[56] I will now turn to a brief discussion of surrogacy in terms of our Constitutional framework.

Constitutional framework

[32] See for example *Buzzanca v Buzzanca* 72 Cal Rptr 2d 280 (Cal Ct App 1998).
[33] Uniform Parentage Act (United States of America). Revised in 2000 and amended in 2002. AAG, comment p 69: *"[T]he restriction..that at least one of the intended parents would be genetically related to the child born of the gestational agreement*."

[57] Section 1(c) of the Constitution of the Republic of South Africa[34] reads as follows:

> *"The Republic of South Africa is one, sovereign, democratic state founded on the following values:*
>
> *…*
>
> *(c) Supremacy of the constitution and the rule of law."*

[58] The interpretation clause of the Bill of Rights provides that the Court *must* promote the values that underlie an open and democratic society. See in this regard *Investigating Directorate Serious Economic Offence and Others v Hyundai Motor Distribution (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and others v Smit NO and others*[35] where the Constitutional Court confirmed that judicial officers should read legislation as far as possible in ways which give effect to its fundamental values.

> *"[21] Section 39(2) of the Constitution provides a guide to statutory interpretation under this constitutional order. It states:*
>
> > *'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'*
>
> *This means that all statutes must be interpreted through the prism of the Bill of Rights. All law-making authority must be exercised in accordance*

[34] Act 108 of 1996.
[35] 2001 (1) SA 545 (CC).

with the Constitution. The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens, and includes all in the process of governance. As such, the process of interpreting the Constitution must recognise the context in which we find ourselves and the Constitution's goal of a society based on democratic values, social justice and fundamental human rights. This spirit of transition and transformation characterises the constitutional enterprise as a whole.

[22] The purport and objects of the Constitution find expression in s 1, which lays out the fundamental values which the Constitution is designed to achieve. The Constitution requires that judicial officers read legislation, where possible, in ways which give effect to its fundamental values. Consistently with this, when the constitutionality of legislation is in issue, they are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation so far as is possible, in conformity with the Constitution."

[59] The Court in *Zondi v MEC for Traditional and Local Government Affairs and Others* [36] however, cautioned a Court considering a constitutional challenge to a statutory provision not only to keep in mind the purpose and effect of a statute but also to keep in mind the principle of a separation of powers.

[36] 2005 (3) SA 589 (CC) at par [90] –[91].

[60] The Rule of Law requires that legislation must have a rational nexus with a legitimate governmental purpose: *New National Party v Government of the Republic of South Africa and Others:* [37]

> *"[19] … The first of the constitutional constraints placed upon Parliament is that there must be a rational relationship between the scheme which it adopts and the achievement of a legitimate governmental purpose. Parliament cannot act capriciously or arbitrarily. The absence of such a rational connection will result in the measure being unconstitutional."*

[61] Against this background it falls to be considered whether the genetic link requirement for the validity of a surrogacy motherhood agreement has a rational connection between the scheme it adopts and the achievement of a legitimate governmental purpose. In the absence of such a rational connection, the challenged provision should be declared unconstitutional.

[62] The respondent has identified nine purported purposes of the genetic link requirement in support of its view that there if a rational nexus between the purpose and the genetic link requirement. They are the following:

(i) The best interests of the child;

(ii) Prevention of the commodification and trafficking of children;

(iii) Promotion of the child's rights to know its genetic origin and to information about the processes involved in his or her conception;

---

[37] 1999 (3) SA 191 (CC).

(iv) Prevention of the creation of designer children and of shopping around for gametes with the intention of creating children with particular characteristics;

(v) Prevention of commercial surrogacy;

(vi) Prevention of the potential exploitation of surrogate mothers;

(vii) Prevention of circumvention of adoption law;

(viii) Promotion of adoption; and

(ix) Prevention of a negative impact on the adoption process.

[63] It is trite that the respondent has the burden of justifying the infringement of the various constitutional rights by the imposition of the genetic link requirement. See in this regard: *Moise v Greater Germiston Transitional Local Council*:[38]

> *"[19] … . If the government wishes to defend the particular enactment, it then has the opportunity - indeed an obligation - to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment. Indeed, this is such a case."*

[64] It is the case for the applicants that there is no rational nexus between the purpose of the legislation which is to provide for a legislative framework within

[38] 2001 (4) SA 491 (CC).

which individuals are able to become parents in circumstances where they would otherwise not have been able to become parents and the genetic link requirement. The Act further regulates surrogacy precisely to allow commissioning parents to acquire parental rights without the necessity to follow an adoption process.[39]

Autonomy

[65] Having regard to the fundamental values underlying our democratic society, it was submitted on behalf the applicant that an underlying constitutional value that is of particular relevance to the present case is *autonomy*. Before I turn to the content of this value, it needs to be pointed out that autonomy is recognised as a underlying constitutional value in our law. Autonomy as a constitutional *value* (albeit in this case in the context of the law of contract) was recognised in the following terms by Ngcobo J *in Barkhuizen v Napier*:[40]

> *"[57] The first question involves the weighing-up of two considerations. On the one hand public policy, as informed by the Constitution, requires in general that parties should comply with contractual obligations that have been freely and voluntarily undertaken. This consideration is expressed in the maxim pacta sunt servanda, which, as the Supreme Court of Appeal has repeatedly noted, gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own*

[39] Ex-parte MS and others supra at par [49] and [51].
[40] 2007 (5) SA 323 (CC).

affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress. These considerations express the constitutional values that must now inform all laws, including the common-law principles of contract."

O'Regan J in *NM v Smith*[41] offered the following in respect of the subject of autonomy:

"[145] … Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. 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. As Scanlon described in his seminal essay on freedom of expression, an autonomous person:

'. . . cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment

[41] 2007 (5) SA 250 (CC).

likely to be correct, and to weigh the essential value of their opinion against contrary evidence.'"

[66] In light of the quoted decisions herein above it appears firstly that autonomy is an underlying value of the Constitution; and secondly, what is meant by the value is the ability to independently form opinions and act on them.

[67] The respondent does not dispute that autonomy is a constitutional value that underlies an open and democratic society based on human dignity, equality and freedom. The respondent, however, disputes the attempts by the second applicant to elevate a value to a *right:* See also *State v Jordan and others (Sex worker Education and Advocacy Task Group and others as Amicus Curiae)*:[42]

"[52] There was considerable overlap in the challenges. Thus, counsel for the appellants argued that the structure of the Constitution makes it necessary to cluster the rights to dignity, privacy, and freedom of the person under the global concept of autonomy. In the first place, he argued, it is a matter of extreme significance for all persons to be able to determine how to live their lives. It is the experience of autonomy that matters, the right to make decisions rather than the content of these decisions. Secondly, the State should not be empowered to make judgments concerning the good or bad life, provided that the conduct in question does not harm others. Such conduct might be unworthy or risky, but if it is not harmful to others then the State cannot interfere.

[42] 2002 (6) SA 642 (CC).

[53] While we accept that there is manifest overlap between the rights to dignity, freedom and privacy, and each reinforces the other, we do not believe that it is useful for the purposes of constitutional analysis to posit an independent right to autonomy. There can be no doubt that the ambit of each of the protected rights is to be determined in part by the underlying purport and values of the Bill of Rights as a whole and that the rights intersect and overlap one another. It does not follow from this however that it is appropriate to base our constitutional analysis on a right not expressly included within the Constitution."

[68] I do not read the applicants' papers to suggest that the value of autonomy should be elevated to a right under the Constitution. I read the submission to mean no more than that autonomy is a constitutional value that should be considered in deciding the question before this Court.

[69] I will now turn to a brief discussion of the reasons advanced by the applicants as to why they are of the view that the genetic link requirement in the context of surrogacy are infringing upon members of the class.

Right to equality

[70] Central to the applicants' constitutional challenge is the contention that the genetic link requirement causes a certain category of persons namely specifically members of sub-class to be treated differently and not to enjoy equal protection and benefit of

the law. To this end, it was submitted that there is no rationality for such differentiation and accordingly the provisions of section 9(1) of the Constitution are violated.

[71] Section 9(1) of the Constitution reads as follows:

> *"Everyone is equal before the law and has the right to equal protection and benefit of the law."*

[72] I am in agreement that the right to equality is undoubtedly of considerable importance in deciding this matter. The right to equality is recognised as being "*deeply foundational*" to the creation of our democracy and has been recognised as such in *S v Makwanyane* and Another:[43] *See also: Minister of Home Affairs and Another v Fourie and Another*.[44]

---

[43] 1995 (3) SA 391 (CC): *"[156] In reaction to our past, the concept and values of the constitutional State, of the 'regstaat', and the constitutional right to equality before the law are deeply foundational to the creation of the 'new order' referred to in the preamble. The detailed enumeration and description in s 33(1) of the criteria which must be met before the Legislature can limit a right entrenched in chap 3 of the Constitution emphasise the importance, in our new constitutional State, of reason and justification when rights are sought to be curtailed. We have moved from a past characterised by much which was arbitrary and unequal in the operation of the law to a present and a future in a constitutional State where State action must be such that it is capable of being analysed and justified rationally. The idea of the constitutional State presupposes a system whose operation can be rationally tested against or in terms of the law. Arbitrariness, by its very nature, is dissonant with these core concepts of our new constitutional order. Neither arbitrary action nor laws or rules which are inherently arbitrary or must lead to arbitrary application can, in any real sense, be tested against the precepts or principles of the Constitution. Arbitrariness must also inevitably, by its very nature, lead to the unequal treatment of persons. Arbitrary action or decision-making is incapable of providing a rational explanation as to why similarly placed persons are treated in a substantially different way. Without such a rational justifying mechanism, unequal treatment must follow."*

[44] 2006 (1) SA 524 (CC):*"[60] A democratic, universalistic, caring and inspirationally egalitarian society embraces everyone and accepts people for who they are. To penalise people for being who and what they are is profoundly disrespectful of the human personality and violatory of equality. Equality means equal concern and respect across difference. It does not presuppose the elimination or suppression of difference. Respect for human rights requires the affirmation of self, not the denial of self. Equality therefore does not imply a levelling or homogenisation of behaviour or extolling one form as supreme, and another as inferior, but an acknowledgment and acceptance of difference. At the very least, it affirms that difference should not be the basis for exclusion, marginalisation and stigma. At best, it celebrates the*

[73] It was submitted on behalf of the applicants that because the genetic link requirement completely excludes the sub-class from using surrogacy as a means to become a parent(s) (conception-infertility), the genetic link requirement effectively constitutes discrimination on the basis of infertility. "*Infertility*" is, however, not listed as one of the grounds constituting discrimination in section 9(3) of the Constitution. Although it is accepted that a mere "*differentiation*" does not necessarily constitute an impermissible and unconstitutional violation of equality, a differentiation may constitute discrimination if it is based on a ground that is analogous to the grounds listed in section 9(3) of the Constitution.[45] In *Harksen v Lane*[46] it was held that discrimination will manifest, if the ground is "*based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparably serious manner*."[47] In deciding the question whether a differentiation constitutes discrimination, factors such as patterns of discrimination in society; the

---

vitality that difference brings to any society. The issue goes well beyond assumptions of heterosexual exclusivity, a source of contention in the present case. The acknowledgment and acceptance of difference is particularly important in our country where for centuries group membership based on supposed biological characteristics such as skin colour has been the express basis of advantage and disadvantage. South Africans come in all shapes and sizes. The development of an active rather than a purely formal sense of enjoying a common citizenship depends on recognising and accepting people with all their differences, as they are. The Constitution thus acknowledges the variability of human beings (genetic and socio-cultural), affirms the right to be different, and celebrates the diversity of the nation. Accordingly, what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect. The test of tolerance is not how one finds space for people with whom, and practices with which, one feels comfortable, but how one accommodates the expression of what is discomfiting."

[45] *Prinsloo v Van der Linde 1*997(3) SA 1012 (CC): "[25] "*It is convenient, for descriptive purposes, to refer to the differentiation presently under discussion as "mere differentiation". In regard to mere differentiation the constitutional state is expected to act in a rational manner. It should not regulate in an arbitrary manner or manifest "naked preferences" that serve no legitimate governmental purpose, for that would be inconsistent with the rule of law and the fundamental premises of the constitutional state. The purpose of this aspect of equality is, therefore, to ensure that the state is bound to function in a rational manner."*

[46] *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC).

nature and purpose of the discriminatory law; and the impact of the discrimination on fundamental dignity must be considered.

[74] I accept the view that infertility objectively has the potential to impair human dignity. Ms Rodrigues states as follows in her expert opinion:[48]

> *"Infertility is often a painful and complicated emotional experience for both sexes and across cultures; it has a profoundly negative effect on some of the core elements of a person's being, such as self-worth, sense of identity and autonomy. While societal marginalisation of infertile people in South Africa is a sad fact in many cases, there are also positive signs of acceptance and support."*

[75] In addition she points out that that infertile people are often subjected to marginalisation in our society:[49]

> "*Infertile persons often feel socially isolated and marginalised, as they often experience their family and friends as – although well-intentioned – lacking in understanding of the full reality and impact of infertility.*"

[76] I am in agreement with the submission that the genetic link requirement (in the context of surrogate-gestation) clearly constitutes discrimination if regard is had particularly to the impact this requirement has on the sub-class. The genetic link requirement has the effect of completely excluding members of the sub-class from

---

[47] I*bid* at par [46].
[48] Rodrigues Expert Opinion, par 32.1.
[49] *Ibid* par 10–11.

accessing surrogate motherhood as a reproductive avenue. Furthermore, excluding members of the sub-class from accessing surrogate motherhood undoubtedly encroaches upon their human dignity not only in that it prohibits a member of the sub-class from exercising his or her right to autonomy but also in light of the fact that the exclusion reinforces the profound negative psychological effects that infertility often has on a person. Excluding the members from the subclass on the basis of the genetic link requirements therefore constitutes in my view discrimination as contemplated by section 9 of the Constitution.

[77] I should point out that although the respondent accepts that the genetic link requirement causes differentiation, it submitted that the differentiation is rational. More in particular the respondent emphasises the factual difference between "*self -gestation*" and "*surrogate-gestation*". Although it is accepted that *factually* such a differentiation exists, it is not accepted that this factual differentiation justifies a legal differentiation. If regard is had to the IVF regime where parents are free to use double-donor gametes, the proposition that the factual differentiation justifies a legal differentiation becomes difficult to accept.

[78] See in this regard the "Regulations Relating to Artificial Fertilisation of Persons" ("the Regulations"). The Regulations form an integral part of the surrogacy regulatory scheme and constitute an important source of the legal rights in the context of artificial fertilisation:[50]

[50] Dated March 2012.

"1 In these Regulations any word or expression to which a meaning has been assigned in the Act shall have such meaning and, unless the context otherwise indicates –

"gamete donor" means a living person from whose body a gamete or gametes are removed or withdrawn, for the purpose of artificial fertilisation;

"recipient" means a female person in whose reproductive organs a male gamete or gametes are to be introduced by other than natural means; or in whose uterus/womb or fallopian tubes a zygote or embryo is to be placed for the purpose of human reproduction;"

10(2)(a) A competent person shall not effect in vitro fertilisation except for [the purpose of] embryo transfer, to a specific recipient and then only by the union of gametes removed or withdrawn from the bodies of –

(i) such recipient and an individual male gamete donor; or

(ii) ***an individual male and an individual female gamete donor;***[51]

[51] My emphasis.

11 A competent person intending to effect the artificial fertilisation or embryo transfer to a recipient shall, before effecting the artificial fertilisation or embryo transfer –

(a) ensure that if a recipient file has not previously been opened in respect of that recipient, open such a recipient file, to which a unique identification number shall be allocated in respect of the recipient;

(b) …

(c) ensure that –

(i) …

(ii) the recipient's particulars and wishes referred to in regulation 13(1)(a)(i) to (iii) are conformed with;

14(1) A competent person who effects the artificial fertilisation of or embryo transfer to a recipient shall immediately record or file the following particulars and documents in a recipient file referred to in regulation 11(a):

(a) the recipient's –

(i) full name, surname, date of birth and identity number;

(ii) family history, especially with regard to possible carrier status for genetic and or mental disorders;

(iii) ***wishes in respect of the population group of which the gamete donor, whose gametes are to be used***

for the artificial fertilisation, should be a member and the religion, which the gamete donor should profess, as well as any other wish of the recipient concerning the gamete donor;"[52]

[79] If the Regulations are perused it is clear that in the context of IVF a recipient who decides to use donor gametes is entitled to state her wishes in respect of the gamete donor. In fact, if the Regulations are carefully analysed it appears firstly that the recipient specifically has the right (but not limited) to choose gametes from a person who is from a particular population group or from a particular religion. Furthermore the Regulations specifically allow the recipient to use gametes from *both* an individual male *and* an individual female donor. It therefore appears that, at least as far as *in vitro* fertilisation is concerned, the recipient has the right to use and select *both* male and female donor gametes purely based on personal choice. This stands in stark contrast with the genetic link requirement in terms of which members of the class to which the first applicant belong may not choose to use and select both male and female donor gametes purely based on personal choice.

[80] I have already referred to the fact that the respondent draws a difference between self-gestation (in the context of IVF) and surrogate-gestation to justify the genetic link requirement. I have already referred to the fact that in the context of the Regulations it is the recipient herself who takes the decision to receive a

---

[52] *Ibid.*

gamete(s) into her reproductive organ.[53] In the context of surrogacy it is a third party namely a surrogate mother who (in consequence of a surrogate motherhood agreement) consents to receive both male and female gametes. This she can only do consequent upon an agreement that has been confirmed by the court in terms of section 296 of the Children's Act which sets as a requirement that a genetic link to the commissioning parent(s) exists.

[81] On the basis of this distinction it was submitted on behalf of the respondent that the procedures are different and therefore not comparable. If was further submitted that in the event of double donor gametes the "*surrogate mother merely provides her womb for hire* "and that to allow the commissioning of a child with no genetic link to the commissioning parent is tantamount to the creation of a new form of adoption. In other words, a child would be created for "adoption" by the commissioning parent. Lastly it was submitted that such a process will circumvent the existing laws of adoption.

[82] I have several difficulties with this submission: Firstly, the submission that the "womb is for hire" is fundamentally wrong. Section 295(c)(iv) of the Act specifically outlaws using surrogacy as a source of income. The mere fact that double donors are used does not alter this principle. Secondly, the fact that the two procedures are fundamentally different is factually correct but does not, in my view, offer a justification for the fact that in law a differentiation is drawn between IVF procedures and surrogacy especially in light of the fact that both procedures have

[53] The term "*recipient*" is defined in Regulation 1 as: "*A female person in whose reproductive organs a male gamete or gametes are to be introduced by other than natural means, or in whose uterus/womb or fallopian tubes a zygote or embryo is to be placed for the purpose of human reproductio*n."

at its primary aim allowing infertile people to become parents. Thirdly, the submission that surrogacy (double donor) will circumvent the existing laws for adoption is groundless. This submission is particularly without merit in light of the fact that it was, conceded by the respondent during argument, that adoption is not a viable option. I am particularly not in agreement with the submission that to allow the commissioning of a child with no genetic link to the commissioning parent is tantamount to the creation of a new form of adoption. This argument has no merit at all: Firstly, the Act provides for the consequences of a surrogacy agreement on the status of the child. Once the child is born he/she becomes the lawful child of the commissioning parent(s). The child is therefore not adopted. Whether one donor gamete or two donor gametes are used will in my view make no difference to the consequence of such an agreement. Furthermore, this argument completely loses sight of the complex procedures that accompanies adoption in general which renders the process often inaccessible to prospective parents.

[83] More fundamental is the submission on behalf of the respondent that the constitutional rights of a child guaranteed in section 28(2) will be compromised if the genetic link requirement is removed in that: Firstly, the information relating to the child's genetic origins and conception are withheld. (ii) Secondly, the child's right to dignity are compromised in that the child is the subject of a contractual transaction which is created for the specific requirement of the commissioning parent and which can be bought and sold to the highest bidder; and (iii) Thirdly, in that absence of a genetic link, a child born with a disability may become an abandoned object as it is easy for the commissioning parent to walk away.

[84] Again I have several difficulties with these submissions: Firstly, there is no persuasive evidence before the Court that information relating to the child's genetic origin is necessarily in the best interest of the child. This proposition further begs the following question: how is the child's alleged interest in knowing its genetic origin promoted by targeting only surrogacy commissioning parents who elect to use double-donor gametes but not prospective parents who use IVF and elect to use double-donor gamete? There is in my view simply no rationality in such a differentiation. Secondly, the submission that the child is subject to a contractual transaction where double donors are used in surrogacy context is misplaced. Surrogacy motherhood agreements are specifically recognised in our law and also in various other legal systems. The mere fact that double donors (and not only a single donor) are used should not in law make a difference. Such contracts are and should be, carefully scrutinized by the Courts before such a contract will be valid. The mere fact that double donor gametes are used will merely be a factor that the Courts will take into account together with all other relevant factors. Thirdly, submitting that the child can be bought and sold to the highest bidder is inappropriate and devoid of any substance. Lastly, it was submitted, relying on Professor Van Bogaert's opinion that it will not be in the best interests of the child to strike down the genetic link requirement. There is no substance in this submission. In fact I am of the view that this constitutes an insult to all those families that do not have a parent-child genetic link. Surely it can never be argued in the context of adoption that the absence of a parent-child genetic link is not in the best interests of the child.

[85] The respondent relied on the opinion of Professor Van Bogaert[54] where she says that – "*clarity of origin is critical for a child as it is inexorably bound to self-identity and self-respect*." While it is accepted by the applicants that clarity of origin may be important to the self- identity and self-respect of the child, this argument ignores the fact that this argument is equally valid in cases where the commission parent uses the gametes of a donor or in the case of IVF where the parent(s) often use the gametes of *two* donors. This opinion also ignores the fact that there are no persuasive arguments before this Court to indicate that the child who does not know his genetic origin is necessarily negatively affected thereby. Furthermore, this argument completely loses sight of the fact that even in circumstances where a single gamete is used towards conception - which is legal in terms of the Act because a genetic link will be established - the child will also not necessarily know the identity of the donor. This factual element does not, therefore in my view, constitute a legitimate government purpose as it fails, in my view, to justify such government purpose.

[86] I am particularly not persuaded that the respondent has placed any persuasive and credible data before this Court to show that the presence or absence of a genetic link between a parent and child in the context of surrogacy appears to have an adverse effect on the child's psychological well-being. In this regard the Court was referred to the well-researched report presented by Professor Golombok (who is an expert in the specialised field of psychology or in psychology in general) that no such evidence exists. Moreover, Professor

[54] Extensive submissions were made in respect of whether this Court should or could rely on the expert opinion of Professor Van Bogaert. I do not intend to repeat those submissions. Suffice to state that the criticisms levelled against Professor Van Bogaert are well founded. I have thus concluded that little if not no reliance could be placed on her opinion.

Golombok's opinions are shared by the expert opinion of Dr Vasanti Jadva a colleague of Prof Golombok at the Centre for Family Research at Cambridge University who is also an expert in the same specialised field as Professor Golombok.[55] Dr Jadva states that the results of the empirical research conducted by the Centre for Family Research at Cambridge University add to the "growing body of research that shows that biological relatedness between parents and children – whether genetic or gestational – is not essential for positive child adjustment." [56] In support of the statement, she presents peer-reviewed research results of other researchers in this field who are not related to Cambridge University.[57]

[87] I am therefore not persuaded that there is a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to achieve. The purpose of regulating surrogacy into legislation was to allow commissioning parents including a single parent to have a child. This is also the purpose of the legislation in the IVF context. Requiring that a genetic link should exist between the parent(s) and the child in the context of surrogacy whereas such a requirement is not set in the context of IVF defeats the purpose and in the absence of a legitimate governmental purpose should be struck down.[58]

---

[55] Jadva Expert Opinion, par [4] and [5.2].
[56] *Ibid*, par [68].
[57] *Ibid*, par [69]–[72].
[58] *Poverty Alleviation Network and Others v President of the Republic of South Africa and Others* 2010 JDR 0111 (CC) the Court held as follows:"[65] The principle that every law and every exercise of public power should not be arbitrary but rational has been developed by this Court in a series of judgments. This principle sets rationality as a necessary condition for legal validity that every law or act of organs of state should fulfil.
[66] In *Merafong,* the Court, per Van der Westhuizen J, stated the following: ""What is required, insofar as rationality may be relevant here, is a link between the means adopted by the legislature and the legitimate governmental end sought to be achieved. It is common cause that doing away with cross-boundary municipalities is desirable for improved service delivery and governance. This is the purpose of the Twelfth Amendment. More ways than one of achieving the objective are, however, available, namely to locate

Human Dignity

[88] Section 10 of the Constitution provides as follows:

> "*Everyone has inherent dignity and the right to have the dignity respected and protected."*

[89] I am in agreement with this submission that given the fact that a genetic link requirement infringes on autonomy - which is a vital part of human dignity - this requirement infringes on human dignity.[59] I have already pointed out that commissioning parent(s) who make the decision to use donor gametes towards the conception of the prospective child for whatever personal reasons, are exercising their autonomy.

Reproductive autonomy

[90] The Court was also referred to section 12(2)(a) of the Constitution which reads as follows:

Merafong either wholly in Gauteng or wholly in North West. From economic, geographical and other perspectives the choice can be debated, but it is one for the legislature to make. *It is not for this court to decide in which province people must live or to second-guess the option chosen by the Gauteng Provincial Legislature to achieve its policy goals and thus to make a finding on how socially, economically or politically meritorious the Twelfth Amendment is.*" (Emphasis added.)"

[59] *Teddy Bear Clinic for Abused Children RAPCAN and Minister of Justice and Constitutional Development Other* 2014 (2) SA 168 (CC): "*[52]… While dignity is a cornerstone of our constitution, it is not easily defined, at least in legal terms. Suffice it to say that dignity recognises the inherent worth of all individuals (including children) as members of our society, as well as the value of the choices that they make. It comprises the deeply personal understanding we have of ourselves, our worth as individuals in our material and social context."*

"12(2) Everyone has the right to bodily and psychological integrity, which includes the right

a. to make decisions concerning reproduction;"

[91] In light of the above it was submitted that the decision to use donor gametes for the conception of one's child-to-be and acting on such decision falls squarely within the ambit of this constitutional right.

[92] I am in agreement with this submission particularly if regard is had to the fact that in the context of IVF gamete donor selection has already become accepted practice in our country. In fact, gamete donor selection and in fact double donor selection is recognised as a legal right in the context of IVF. The fact that IVF and gamete selection are now regarded as an accepted practice available to parents who are unable to conceive children in the traditional way (through sexual intercourse) has also invariably resulted in broadening the ambit of the decisions that an individual may make regarding his or her reproduction.

[93] In light of the above I am of the view that the genetic requirement in the context of surrogacy infringes on the constitutional right to make decisions concerning reproduction and consequently also constitute a violation of the human dignity of members of a class.

Privacy

[94] In two Constitutional Court decisions, *Bernstein v Bester NO and Others*,[60] and *NM v Smith*, the Constitutional Court acknowledged the right to privacy and the fact that the right to privacy encompasses the right of a person to live his or her life as he or she pleases, and not to be interfered with.[61]

[95] I am in agreement with the submission that the commissioning parent(s) decision to use donor gametes for the conception of their prospective children and acting on such decision falls within the realm of privacy and accordingly within the ambit of protection of the constitutional right to privacy. Commissioning parents (in the surrogacy context) therefore have a constitutional right not to be interfered with in making decisions to use donor gametes for the conception of their prospective children especially in light of the fact that parents already have such a right in the context of IVF. Limiting the right to circumstances where a single donor is used constitutes, in my view a drastic interference by the State of the right to privacy.

[96] Accordingly, the genetic link requirement infringes on the constitutional right to privacy.

Access to healthcare

[60] 1996 (2) SA 751 (CC) at par [67].
[61] NM and Others v Smith and Others 2007 (5) SA 250 (CC).

[97] The applicant also submitted that the genetic link requirement constitutes an infringement of the subclass' right to access to health care. Section 27 of the Constitution reads as follows:

> "(1) Everyone has the right to have access to –
>
> (1) health care services, including reproductive health care;
>
> …
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[98] I do not intend analysing the content of this right in detail for purposes of this judgment suffice to point out that surrogacy is a form of reproductive health care, as has been recognised by the *Ad Hoc* Committee, albeit in the context of the financial cost of surrogacy:[62]

> *"Furthermore, the cost factor in South Africa regarding surrogacy should be seen in the light of the Constitution, which provides that everyone has a right to have access to health care services, including reproductive health care."*

[99] The interest of persons who are members of the subclass to access surrogacy is accordingly protected within the ambit of the constitutional right to access to health care services. Consequently, the right to access to health care services

---

62 *Ad Hoc* Committee Report, E9(9)(d) (pp352–353).

consequent to the genetic link requirement excludes persons who are members of the subclass from accessing surrogacy. Accordingly, the genetic link requirement infringes on the constitutional right to access to health care services.

Remedy

[100] I am in agreement with the submission that the only remedy that will afford appropriate relief to the class (and per definition the sub-class) is the striking down of the genetic link requirement. The striking down of the genetic link requirement is the only way in which to ensure the consistency of Chapter 19 of the Act with the Constitution and its underlying values. In this way, members of the class (persons who cannot themselves give birth to a child) would be able to decide for themselves – as autonomous moral agents – whether to use their own gametes or donor gametes.

[101] I am not persuaded that the remainder of Chapter 19 of the Act, with its comprehensive and robust legal checks and protections will be adversely affected by the striking down of the genetic link requirement. Accordingly, whether a member of the class decides to use their own gametes or donor gametes, the surrogacy agreement and its legal consequences would be regulated in the same way by Chapter 19 of the Act. Furthermore should a member of the class decide to use donor gametes, the Regulations in terms of the National Health Act that already regulate gamete donor selection, already provide for a legal framework within which gamete donor selection will take place.

[102] The genetic link requirement violates persons' human rights on a very personal and intimate level. In the case of the sub-class, it completely prohibits them from accessing surrogacy. It effectively puts persons' personal lives and family-building plans on hold. This situation begs immediate relief.

[103] Section 172 of the Constitution obliges ("must") this Court to declare that any law (or conduct) that is inconsistent with the Constitution is invalid. The Court "may" however also make an order suspending the declaration of invalidity for a period on (*inter alia)* the condition that a competent authority corrects the defect.[63] On behalf of the respondent it was submitted that that an immediate striking-down of section would cause disorder or dislocation. More in particular, it was submitted that section 295 of the Act is not severable from the remainder of the sections contained in Chapter 19 of the Act and that an immediate striking down of the section would be prejudicial to good governance. It was also submitted that declaring section 294 of the Act unconstitutional immediately would create a

---

[63] *"172. Powers of courts in constitutional matters.—(1) When deciding a constitutional matter within its power, a court—*
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable, including—
(i) an order limiting the retrospective effect of the declaration of invalidity; and
(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect.
(2) (a) The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court.
(b) A court which makes an order of constitutional invalidity may grant a temporary interdict or other temporary relief to a party, or may adjourn the proceedings, pending a decision of the Constitutional Court on the validity of that Act or conduct.
(c) National legislation must provide for the referral of an order of constitutional invalidity to the Constitutional Court.
(d) Any person or organ of state with a sufficient interest may appeal, or apply, directly to the Constitutional Court to confirm or vary an order of constitutional invalidity by a court in terms of this subsection.

vacuum during which there would be no regulation of surrogacy. (See *S v Jordaan.*[64])

[104] I do not agree. I have carefully scrutinized section 294 in the context of Chapter 19 of the Act. This section is entirely severable: the remainder of the provisions in Chapter 19 is not affected nor is the overriding purpose of regulating surrogacy agreements impinged upon: A surrogate motherhood agreement must be confirmed by a Court. The fact that a double donor gametes and not only one donor gamete is to be used makes no difference. The checks and balances provided by section 295 and conferred upon a Court will remain unaffected. I have already stated hereinabove that the important supervisory role of the Courts in the context of surrogacy was acknowledged by all parties. It is also instructive to emphasise that in terms of section 296 of the Act, no artificial fertilisation of the surrogate mother may take place before the surrogate motherhood agreement is confirmed by the Court. Apart from this section which contains a crucial regulatory instruction in respect of surrogacy motherhood agreements, I am of the view that the remainder of the sections contained in Chapter 19 will remain unaffected in the event of the removal of section 294 of the Act on the basis that it is unconstitutional: The requirement that the agreement be in writing (section 292 of the Act the consent of husband, partner of wife (section 293 of the Act); the provisions regulating the artificial fertilisation of the surrogate mother (section 296 of the Act); the effects if the surrogate motherhood agreement on the status of the child (section 297 of the Act); the termination of the surrogate motherhood agreement (section 298 of the Act); the effect of the termination of surrogate

[64] 2002 (6) SA 642 (CC) at par [126].

motherhood agreement (section 299 of the Act); the termination of pregnancy (section 300 of the Act); the regulation of payments in respect of surrogacy (section 301 of the Act); the identity of the parties to court proceedings (section 302).

[105] I am consequently in agreement with the submission on behalf of the applicants that the genetic link requirement is entirely severable from the rest of Chapter 19. More importantly, as already pointed out, I am of the view that the remainder of Chapter 19, with its comprehensive legal checks and protections, would remain unaffected.

[106] I am therefore of the view that this Court should declare section 294 of the Act to be inconsistent with the Constitution and therefore invalid to the extent of its inconsistency. More in particular, I am of the view that there is no reason why the declaration of invalidity of the genetic link requirement should be suspended to provide the legislature time to investigate the matter and attempt to obtain public opinion: Section 294 is unconstitutional for the reasons set out hereinabove and suspending the invalidity declaration in order to obtain public opinion is, in my view a futile exercise. In this regard I am in full agreement with what the Constitutional Court held in *Van der Merwe v RAF*[65] namely that constitutional validity of a law stems from the Constitution itself and that a law inconsistent with it is invalid:

[65] 2006 (2) SA 230 (CC).

"[61] This line of reasoning falters on two grounds. First, the constitutional validity or otherwise of legislation does not derive from the personal choice, preference, subjective consideration or other conduct of the person affected by the law. The objective validity of a law stems from the Constitution itself, which in s 2, proclaims that the Constitution is the supreme law and that law inconsistent with it is invalid.[66] *Several other provisions of the Constitution buttress this foundational injunction in a democratic constitutional State. A few should suffice. Section 8(1) affirms that the Bill of Rights applies to all law and binds all organs of State including the Judiciary. Section 39(2) obliges courts to interpret legislation in a manner that promotes the spirit, purport and objects of the Bill of Rights. And importantly, s 172(1) makes plain that, when deciding a constitutional matter within its power, a court must declare that any law that is inconsistent with the Constitution is invalid to the extent of its inconsistency. Thus the constitutional obligation of a competent court to test the objective consistency or otherwise of a law against the Constitution does not depend on and cannot be frustrated by the conduct of litigants or holders of the rights in issue. Consequently, the submission that a waiver would, in the context of this case, confer validity on a law that otherwise lacks a legitimate purpose has no merit."*

Costs

[66] My emphasis.

[107] The applicants strongly submitted that a special costs order namely costs on an attorney clients scale is warranted in this matter both in respect of the main application and the interlocutory application.

[108] In considering the issue of costs it is imperative to have regard to the fact that this is a constitutional challenge against the validity of a provision of an Act. The party against whom this application is brought is the State (more specifically the Minister of Social Development) who is the custodian of the Act.

[109] The applicants submitted that they are entitled to a special costs order. (I will for purposes of costs distinguish between the costs pertaining to the main application and costs pertaining to the interlocutory applications). The applicants submitted that, in respect of the main application the respondent was at all times aware of the urgency of the matter and was specifically alerted to the fact that the matter required the urgent attention of the respondent. Save for the respondent's Notice to Defend, every single other document were filed late. In stark contrast is the fact that the applicants were not late in filing their documents. It is common cause that the respondent has filed its answering affidavit 5 months' late. In argument, the blame for the delays was placed on Professor Van Bogaert. Apart from the fact that this was raised for the first time from the bar, there is nothing before this Court to substantiate this allegation. Moreover, if regard is had to the correspondence that formed part of the record it is clear that the respondent was urged by the applicant to file its answering affidavit. Finally on 1 November 2013, the respondent filed its answering affidavit. When the answering affidavit was filed, it was incomplete. The answering affidavit was filed without attaching a

single one of the documents referred to by the respondent's expert. This necessitated the applicant to serve a Rule 35(12)[67] Notice on the respondent. What makes matters worse is the fact that about a month after the answering affidavit was filed; the respondent served the second part of the expert's opinion. Similarly to the first part, the second part of its expert's opinion refers to various documents without attaching any. The respondent was again forced to serve a new Rule 35(12) applicant on the respondent relating to the belated supplementary expert opinion.[68]

[110] The applicants also referred to the fact that the respondent was in particularly obstructive in refusing to furnish the applicants with a copy of the s-called "Adoption Report" ("*The Perceptions, Understanding and Beliefs of People towards Adoption and Blockages which prevent Communities from Adopting Children in South Africa"*)[69]. The respondent submitted that since it did not rely on the Adoption Report it was therefore not incumbent upon them to make the report available. The respondent also insisted that the Report was in the public domain. In respect of the latter, it was denied by the applicants that the Adoption Report was in the public domain. This necessitated the applicants to approach the Court for an appropriate order. On 6 March 2014, the Deputy President of this Division granted an order ordering the respondent to make available the Adoption Report and to make available copies of various articles and chapters in books referred to

[67] The first Rule 35(12) application is dated 20 December 2013. In this application the respondent was requested to produce various articles referred to by the respondent's expert in her opinion.
[68] In terms of the second Rule 35(12) application dated 17 January 2014, the respondent was requested to furnish copies of various additional articles and chapters in books referred to by the respondent's expert in her opinion. A third Rule 35(12) applicant is dated 28 January 2014.
[69] Prepared by the Human Sciences Research Council for the Directorate of Adoptions and International Social Services, National Department of Social Development.

by Professor Van Bogaert in her expert opinion. It is common cause that despite this order, the respondent still has not made available six articles.

[111] The respondent conceded in argument that the applicants should be entitled to the costs in respect of the interlocutory application. However, in an attempt to explain the respondent's blatant refusal to furnish the Adoption Report, the argument was advanced from bar that the respondent relied on section 248 of the Act in refusing to disclose. It was, however, conceded that this view was misconceived and that the applicants are entitled to their costs.

[112] I have decided that the applicants are entitled to a special costs order. Firstly, if regard is had to the correspondence, the respondent was blatantly obstructive in its refusal to furnish the Adoption Report. The applicants on the other hand, attempted to avoid approaching this Court by writing numerous letters urging the respondent to furnish the information. Secondly, the Adoption Report was in the possession of the respondent. After all, the respondent instructed the HRSC to compile the Report. Thirdly, the respondent explicitly stated that she would only provide the applicants with the Adoption Report if forced to do so by an order of court. Fourthly, if the contents of the Adoption Report is, viewed in the context of this matter and, viewed against the submission advanced on behalf of the respondent that adoption is a viable option to the first applicant, it is clear that the Adoption Report is of considerable importance to the applicants and that the Adoption Report contains information that is highly relevant to salient aspects of this constitutional challenge. What is of concern to the Court is the fact that in her answering affidavits the respondent made several bare denials to statements by

the applicants regarding adoption. On behalf of the applicants it was submitted that these bare denials by the respondent are directly contradicted not only by the Adoption Report but also by the respondent's department co-authored article on Adoption.

[113] I am in agreement with the applicants that the respondent has flagrantly disregarded her constitutional duty in respect of ensuring that all relevant evidence was timeously is placed before the Court.

[114] Accordingly, although I am mindful that this matter concerns constitutional litigation and that a Court should be hesitant to make an adverse cost order in these types of matters, I am nonetheless of the view that the respondent's conduct warrants a special costs not only in respect of the main application but also in respect of the interlocutory application.

Order

[115] In the event the following order is made:

1. Section 294 of the Children's Act, Act 38 of 2005, is inconsistent with the Constitution of the Republic of South Africa and invalid;

2. The respondent is directed to pay the cost of the application, including the costs incumbent upon the employment of two counsel, and including the

qualified costs of all the experts who provided their expert opinions on affidavit for the second applicant, on a scale as between attorney and client;

3. The respondent is directed to pay the costs of the interlocutory application that was filed on 25 February 2014, including the costs incumbent upon the employment of two counsels, on a scale as between attorney and client.

_____

AC BASSON, J
JUDGE OF THE HIGH COURT OF
SOUTH AFRICA, PRETORIA

Appearances:

For the Applicant:		Advocate Donrich Jordaan
		with Advocate Christopher Woodrow
Instructed by	:	
For the Respondents	:	Advocate Nelly Cassim SC
		with Advocate Happy Mpshe
Instructed by	:	The State Attorney