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**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

Case No. **032161 / 2024**

(1) REPORTABLE: YES/NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO

(3) REVISED: YES

DATE 14/4/2025

SIGNATURE:

In the matter between:

NM

APPLICANT

and

MINISTER OF HEALTH

FIRST RESPONDENT

MINISTER OF SOCIAL DEVELOPMENT

SECOND RESPONDENT

CENTRE FOR CHILD LAW

AMICUS CURIAE

JUDGMENT

NEUKIRCHER J

[1] This court was convened at the direction of the Judge President in order to consider whether any order contrary to the provisions of Regulation 18 of the National Health Act 61 of 2003 (NHA) can be granted and, if so, on what terms.

[2] The background to this direction is the following:

- a) at the time the full court was convened, two applications served before it:
 - (i) the first was the matter this judgment seeks to address;
 - (ii) the second was a surrogacy application¹ in which the commissioning parents sought relief that they are the owners of any zygote(s) or embryo(s) created in terms of the written Surrogate Motherhood Agreement.

[3] The surrogacy application was withdrawn at the hearing and therefore the relief is moot, and it is unnecessary for this Court to consider it. However, the other application was argued, and it is to this that we direct our attention.

[4] The relief sought in this application was framed in the alternative: the main prayer was for a declaratory order that ownership in reproductive material is capable of being transferred; in the alternative, the applicant seeks an order that the ownership in certain sperm straws vest in her. In truth, this application turns on whether or not the applicant (NM) should be granted permission to use her late husband's (the deceased) stored gametes to extend their family and to give their existing child a sibling.

¹ *Ex parte* CJ and Others, Case Number 046454/2024.

[5] Whilst this sounds simple enough, there are two important considerations that give pause for thought: the first is that the provisions of the National Health Act 61 of 2003 (NHA) and its Regulations (in particular Regulation 18) are silent on the issue of posthumous use of gametes; the second lies in the manner in which the relief sought in the Notice of Motion was couched.

[6] The Minister of Health chose to file an explanatory affidavit and made submissions to this court. The Minister of Social Development simply filed a Notice to Abide. The Centre for Child Law was appointed by the court as *amicus curiae*. We are indebted to them for their helpful and insightful submissions. Neither of the Ministers oppose the relief sought. The *amicus* supports the applicant's request to use the frozen blastocysts and frozen sperm of the deceased to conceive a child through artificial fertilisation, but the *amicus* does not support a finding that classifies reproductive material as property. I will deal with this issue in due course.

[7] At the hearing, the applicant did not persist with the main prayer. She simply asked for the declarator that the ownership of the sperm straws vests in her.

Background

[8] The applicant is an (almost) 40-year-old woman who was married to the deceased in 2015. The deceased was diagnosed with Hodgkin's Lymphoma and before he underwent chemotherapy treatment he was advised to freeze his sperm for use should he want children later. Subsequent to doing that, the deceased received a bone marrow transplant during approximately February 2015.

[9] The applicant and the deceased consulted Dr Gobetz² at Vitalab Fertility on 28 December 2015. At this stage, the deceased was in complete remission. Because they were unable to conceive naturally, the applicant underwent fertility treatment the result of which was that on 8 February 2016 a total of sixteen eggs were retrieved from her by Dr Gobetz under conscious sedation by transvaginal ultrasound guidance. Only nine of the eggs were mature and the others had to be discarded as

² A fertility gynecologist / reproduction medicine specialist working at Vitalab. He has practiced as a sub-specialist in reproductive medicine for 34 years.

they were not suitable for the Intracytoplasmic Sperm Injection³. Two sperm straws were used for the latter procedure.

[10] Eleven straws remained cryopreserved, and six embryos were also cryopreserved as blastocysts.⁴

[11] According to Dr Gobetz, the first double embryo transfer was performed in March 2016 but without success. The second transfer was performed in May 2016 which resulted in the live birth of the applicant and the deceased's daughter (GGM) on 2 February 2017.

[12] Of the original six blastocysts, two remain. Eleven sperm straws remain cryopreserved.

[13] The deceased passed away on 10 August 2017⁵ without stipulating in writing what should happen with the remaining eleven sperm straws. Dr Gobetz states that Vitalab did not enter into an agreement with the applicant as to what would happen with the gametes and embryos in the event of the death of either the applicant or the deceased.

[14] There is also no Ownership Disposition Agreement that applicant and the deceased signed that can provide guidance on what should happen with the eleven sperm straws upon the death of the deceased. The only written instruction⁶ is to be found in paragraph 5 of the deceased's Last Will and Testament which provides:

"5. Should my wife survive me:

5.1 I leave my estate to my wife N...M..."

[15] According to Dr Gobetz, the applicant's situation is not unique – Vitalab has other clients in a similar position. He states that:

³ This is a microscopic procedure where one sperm is inserted in an egg with a glass needle which is fourteen times thinner than a human hair.

⁴ A pre-implantation embryo consisting of an outer layer, which forms the placenta and a 30 to 200-cell inner cell mass that develops into the fetus.

⁵ i.e., 6 months after GGM's birth.

⁶ On applicant's version.

“[it] is a policy at Vitalab that we do not proceed with any IVF procedure pertaining to the human reproductive material i.e. sperm, gametes because of the uncertainty surrounding the transferability of ownership of the sperm, gametes, etc.”

[16] He lastly states that he supports the present application as *“it will bring clarity not only to the applicant but also to Vitalab and other people in similar circumstances.”*

[17] As stated, the Minister of Health filed an Explanatory Affidavit setting out the framework of the current application. Unfortunately, the affidavit is of little assistance – other than superficially setting out the provisions of Regulation 18 of the NHA, the Minister of Health offered no insight, no legal analysis and no discussion of whether the relief sought is tenable given the provisions of Regulation 18 or the remainder of the legislative framework that informs the use/ownership/transfer of gametes posthumously in South Africa.

[18] At the outset, it needs to be said that the Court has great difficulty with the concept of “ownership” as it relates to reproductive material. The word “ownership” is introduced in Regulation 18, which I will discuss later in this judgment. Suffice it to say at this introductory stage, that a different concept is required to describe the relationship between the reproductive material and the person/institution that has the right to dispose of the material. I align myself with the sentiments of Robbie Robinson in the article “The Legal Nature of the Embryo, Legal Subject or Legal Object”, which, although specifically aimed at the legal standing of embryos, is to my mind also applicable to other reproductive material. Nonetheless, the legislative scheme that is currently applicable is based on the concept of “ownership”. – whether that is true ownership in terms of the common law concept of ownership, or something lesser, is not defined at all in the Act (as discussed below).

[19] One aspect of this case that deserves comment is that the applicant does not require this court to confirm her ownership of the two remaining blastocysts. The reason for this is that they contain her gametes over which she retains

ownership/possession even though they contain the deceased's genetic material as well.⁷

[20] To explain:

- a) the NHA defines a “gamete” as “either of the two generative cells essential for human reproduction.”;
- b) these “generative cells” are the egg (oocyte) and the sperm (spermatozoa);
- c) a “zygote” is defined by the NHA as “the product of union of a male and a female gamete” which is produced when the gametes are fertilised in vitro – the fertilised gametes are known as a zygote⁸.

[21] The fetus develops in various stages:

- a) day zero in the embryology laboratory is the day after the gametes have been placed together in the lab;
- b) on days two and three of a fertilised oocyte, the embryos are cellular structures: on day two it is usually a four-cell structure and on day three it is usually an eight cell structure;
- c) on day four, the fertilised oocytes look like Mulberries;
- d) by day five or six of the process, the zygote is known as a blastocyst and it is at this stage that it is either frozen or implanted;
- e) approximately fourteen days after fertilisation, the blastocysts become an embryo and for the next six weeks the embryonic cells continue to develop until they form a fetus.

⁷ Because of the provisions of Regulation 18(2) of the NHA – see par 31 below.

⁸ The zygote is the fertilised organism from the moment of fertilisation until 4 days thereafter.

[22] Thus it appears that the fertilised oocyte at the heart of this matter is not an embryo, but rather a blastocyst – an important developmental distinction.

[23] As stated, it is because that blastocyst contains applicant's gamete that she retains "ownership"⁹ and these can be implanted without permission of this court. It needs to be said however, that where implantation of the blastocyst is to occur via a surrogate mother and not in the applicant herself, the provisions of Chapter 19 of the Children's Act 38 of 2005 must be applied.

[24] However, if implantation of these blastocysts is unsuccessful and the blastocysts do not develop into embryos, there will be only two avenues available to applicant to provide a genetic sibling to GGM:

- a) she will either have to have her oocytes harvested again and use the deceased's cryopreserved sperm straws to fertilize them; or
- b) she will have to use a surrogate and the deceased's sperm – this may have its own legal challenges, but as this is not an issue before us, I make no finding or further comment on this.

[25] What is before us stems from the scenario sketched in paragraph 16 supra. Dr Gobetz requires an order from this court in order to use the deceased's cryopreserved sperm to create the embryo.

The legislative framework

[26] Government Gazette No R.180, published on 2 March 2012, provides for the general control of human bodies, tissue, blood, blood products and gametes. According to these requirements:

⁹ The word used in Regulation 18.

- a) “artificial fertilisation” means the introduction by other than natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purpose of human reproduction and includes
- b) “artificial insemination” which means “in vitro fertilisation, gamete intrafallopian tube transfer, embryo intrafallopian transfer or intracytoplasmic sperm injection.”

[27] The legislative framework that governs the transfer of “ownership” of reproductive material in South Africa is informed by several provisions of the NHA and its Regulations. Section 56(1) of the NHA allows for the use of gametes withdrawn from a living person with the written consent of the person¹⁰ only for such medical purposes as may be prescribed. The current matter does not offend section 56, as the deceased was still alive when the gametes were withdrawn.

[28] Whilst all this is well and good in respect of a living donor, the issue at hand is what to do if the donor passes away before the gamete is used for fertilisation?

[29] Section 62 of the NHA makes provision for the donation of a person’s body “or any specified tissue¹¹ thereof” to be used after their death where:

“(1)(a) A person who is competent to make a will may –

- (i) in the will;
- (ii) in a document signed by him or her and at least two competent witnesses; or
- (iii) in an oral statement made in the presence of at least two competent witnesses,

donate his or her body or any specified tissue thereof to be used after his or her death ... for any purpose provided for in this Act.”

¹⁰ Per s55 of the NHA.

¹¹ “Tissue” is defined by the NHA as “human tissue, and includes flesh, bone, a gland, an organ, skin, bone marrow or body fluid, but excludes blood or a gamete.” (my emphasis).

[30] Section 62 is not applicable to this case. The definition of “tissue” in the NHA specifically excludes gametes. There is thus no legislative provision that deals with the donation of reproductive material or with its disposal post-mortem.

[31] It is then towards Regulation 18¹² that one must look. Unfortunately, this is not a model of clarity either.¹³ Regulation 18 provides for the “ownership” of gametes, zygotes and embryos. It states:

- “18(1) Before artificial fertilisation, the ownership of a gamete donated for the purpose of artificial fertilisation is vested -
- (a) in the case of a male gamete donor but –
 - (i) before receipt of such gamete by the authorised institution to effect artificial fertilisation by the authorised institution which removed or withdrew the gamete; and
 - (ii) after receipt of such gamete by the authorised institution that intends to effect artificial fertilisation, in that institution;
 - (b) in the case of a male donor for the artificial fertilisation of his spouse, in that male gamete donor; and
 - (c) in the case of a female gamete donor, for the artificial fertilisation of a recipient in that female gamete donor.
- (2) After artificial fertilisation, the ownership of a zygote or embryo effected by donation of a male and female gametes is vested -
- (a) in the case of a male gamete donor, in the recipient; and
 - (b) in the case of a female donor, in the recipient.”

[32] The legislative framework can therefore be summarized as follows:

- a) gametes may not be removed from living persons without their written consent. In this instance, the deceased’s consent was obtained when he was still alive;

¹² GN R175 in GG 35099 of 2 March 2012.

¹³ As was conceded by the Minister of Health during argument.

- b) those gametes may only be used for the artificial fertilisation of another person;
- c) the ownership of the male gamete:
 - (i) prior to artificial fertilisation “of his spouse” vests in the male donor; and
 - (ii) after artificial fertilisation, in the recipient.

[33] The Director General: National Department of Health (the DG) states in his explanatory affidavit that:

- a) the NHA is not explicit on whether human reproductive material can be transferred or not;
- b) that although the Regulations do not provide for the transfer of gametes but only for ownership, the Regulations do not prohibit the transfer of gametes;
- c) that had it been the intention of the Regulations to prohibit the transfer, Regulation 19 would have expressly provided for this;
- d) that s68(1)(p)¹⁴ of the NHA envisages a situation where there may be a need to acquire gametes as it empowers the Minister to make regulations in relation to the acquisition of gametes for any purposes.

[34] The DG then states:

“Acquisition may be another way of establishing ownership of something (gametes in the current case). Furthermore, acquisition may also entail the

¹⁴ “S68(1) The Minister may make regulations regarding-
(p) the acquisition, storage, harvesting, utilisation or manipulation of tissue, blood, blood products, organs, gametes, oocytes or human stem cells for any purpose...” (my emphasis).

transfer of what has been acquired (gametes). Although Regulation 18 does not expressly provide for the transfer of the gametes, it does not prohibit such transfer. The Act also acknowledge[s] the need of acquisition which will ordinarily also include the transfer of what has been acquired.”

[35] Although not expressly stated, it is clear from the facts that the requirements set out in paragraphs 32(a) and 32(b) *supra* have been complied with. It is also clear that, during his lifetime, the deceased gave his consent¹⁵ for the use of his gametes to create a family with the applicant. This is confirmed by Dr Gobetz who used the deceased’s sperm to fertilize oocytes of the applicant on two occasions, the last of which resulted in the birth of GGM. This being so, it is also clear that, at his passing, the deceased was the owner of the 11 sperm straws that had been cryopreserved.

[36] The use of the word “ownership” in Regulation 18 is, as I have said, unfortunate. We were informed at the hearing that the Minister of Health published draft regulations in 2021 in which Regulation 18 was removed, but these have yet to be implemented. Thus, Regulation 18, as it presently stands, has led to a conundrum on several issues the most notable of which are: can “ownership” of reproductive material be transferred? And what is meant by the word “ownership”? This is effectively the applicant’s argument: ie that the deceased’s transferred ownership of the 11 sperm straws to her in his last Will and Testament.

[37] It is important to note that there is no specific provision in either the Act or the Regulations that deal with the issue of transfer of ownership of gametes, save Regulation 18. As the DG states, whilst the legislation does not expressly prohibit it, it does not expressly allow it either. A further issue is that neither the Act nor the Regulations define “ownership”. Although Regulation 18 vests ‘ownership’ of the gametes in the deceased, it does not, it seems to me, exclude his right to determine its further use.

¹⁵ Although no written document is placed before us, on the probabilities, the consent was at least an express verbal consent.

[38] In an article titled “*Can Ownership of Reproductive Material be Transferred?*”¹⁶, Professor Thaldar argues that a broad interpretation of Regulation 18 should be followed that allows for a transfer of ownership. He terms this “the supple interpretation”. He argues that Regulation 18 determines the default positions regarding ownership of reproductive material which can be changed by the parties involved.¹⁷

[39] The so-called “rigid interpretation” is the permanent immutable default position regarding ownership of reproductive material.

[40] Prof Thaldar argues that our law differentiates between the original acquisition of ownership and the derivative acquisition of ownership.¹⁸ Original acquisition occurs when the subject matter has independent existence. He states “in the context of medically assisted reproduction, examples of new legal objects coming into existence would be when gametes are separated from a human body, or when an embryo is created...”.¹⁹

[41] The argument is the following: gametes exist as physical subjects prior to being separated from the human body. Once separated, they become legal objects. And finally, once a woman is inseminated with sperm or an embryo implanted, the gametes lose their status as legal objects and, once again, become part of the woman’s legal subject status.

[42] The point to the argument is that any separated reproductive material is external from the person, has the status of a legal object and is therefore subject to the control of the person who donated it, and therefore ownership of the reproductive material may be transferred from one person to another. This is in accordance with what the author advocates is a “supple interpretation” of Regulation 18.

¹⁶ Donrich Thaldar (2023) 140 *The South African Law Journal* (SALJ) page 495.

¹⁷ At page 499.

¹⁸ Where an owner acquires ownership from a previous owner e.g. when one buys groceries, the shop owner transfers ownership of the goods purchased, to the purchaser.

¹⁹ References excluded.

[43] However, Robbie Robinson²⁰ disagrees. He argues that the NHA does not indicate expressly the legislator's viewpoints on the status of an embryo or any of the products, including tissue and gametes, listed in Chapter Eight²¹ of the NHA. He argues that they should not be viewed as "property in the sense of legal objects" and that:

"... these provisions²² should not be understood as conveying a clear intention on the part of the legislature. In fact, it is submitted that the wording is instead indicative of a lacking apposite terminology to convey the true nature of the relationship. In the first place, one of the rules pertaining to the interpretation of statutes makes it clear that the legislator must alter the common law explicitly if it wishes to do so²³. If it goes without saying that the wording of the Act and Regulations does not meet this requirement..."

[44] Robinson also argues²⁴ that:

- a) the exact characterization of an embryo in South African law remains unknown and will have to be dealt with on a case-by-case basis taking into consideration relevant factors; and
- b) the use of the word "ownership" in the NHA Regulations "is problematic and should have been replaced with a 'proprietary interest', which denotes something different from the legal understanding of ownership²⁵."

[45] In my view, Robinson's argument as set out *supra* is persuasive. To argue, as Prof Thaldar does, that reproductive material is a "legal object" which can be

²⁰ In *The Legal Nature of the Embryo: Legal Subject or Legal Object* PER / PELJ 2018.

²¹ Which is titled "Control of use of blood, blood products, tissue and gametes in humans".

²² i.e., those of Regulation 18 and the use of the word "ownership".

²³ See e.g. *Gordon v Standard Merchant Bank* 1983 3 SA 68 (AD); *Seluka v Suskin and Salkow* 1912 TPD 265 and *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811, where the court explained on 823 that "[I]t is a sound rule to construe a statute in conformity with the common law rather than against it, except where and so far as the statute is plainly intended to alter the course of the common law." (italics added).

²⁴ With reference to Van Niekerk 2017 Obiter 170.

²⁵ Robinson at page 17 par 4.1.

acquired and in regard of which ownership may be transferred, may lead to legal and ethical considerations regarding, for example, the rights of the person who did not consent to the use of their genetic material for conception. This was also the argument advanced by the appointed *amicus curiae*.²⁶

[46] In most of the international law cases cited before us, the main issue courts were tasked with was vis-à-vis the fate of embryos created from the parties' genetic material. Some of those cases were decided based on written agreements entered into between the parties and thus those courts avoided an interpretation of "ownership" and rather enforced the terms of the parties' written agreements or prevailing legislation. It is not necessary for purposes of this judgment, and the conclusion reached, to cite all, but to illustrate the principle the following are of interest:

- a) in the Australian matter of *G v G*²⁷ the dispute arose because Mrs G wanted embryos to be discarded, while Mr G believed this to be his only remaining opportunity to procreate. Mr G requested that the embryos be transferred into his custody. His intention was not to use them personally, but rather to donate them to an infertile couple. However, prior to freezing the embryos, the couple had signed an agreement in which they indicated that the frozen embryos were to be discarded in the event of their separation. The court ordered that the embryos be destroyed based on the overriding consideration for the court's decision was that Mr G did not want to use the embryos to give effect to his own right to procreate and no decision was made on whether the embryos were "property";
- b) in *Findley v Lee*²⁸ a Californian Court was called upon to decide whether embryos could be classified as property. The dispute involved the disposition of embryos created by the parties after the wife had been diagnosed with breast cancer. In this case, the parties had entered into

²⁶ The Centre for Child Law.

²⁷ [2007] FCWA 80.

²⁸ No FDI-13-780539 (Cal. Super. Ct. Jan. 11, 2016).

an agreement with the IVF program in which they clearly indicated that, in the event of divorce, the embryos were to be destroyed. In respect of the status of the embryos as property, the court found that:

"To suggest that this Court should find that these five 'viable' embryos are simply property undermines not only the express language in the Consent & Agreement, but ignores the very reason couples undergo the emotionally and financially draining process of IVF to have a child.

It simply is not necessary in this case to categorize the embryos as 'life' or 'property.' The reality is that the embryos and their creators, Lee and Findley, deserve something more nuanced ... the embryos in this case represent the nascent stage of five human lives. They are not property, nor are they fully formed human beings. They are, in the construct of the law, *sui generis* and will be deemed as such in this statement of decision."²⁹

The parties were ultimately held bound to the contract they concluded and the embryos were destroyed.

[47] *Davis v Davis*³⁰ (*Davis*) is significant as it was the first case that set out an analytical framework for disputes between divorcing couples regarding the disposition of embryos. In *Davis*, the plaintiff filed for divorce from his wife. While the parties were able to reach an agreement regarding the terms of the dissolution of their marriage, they were unable to do so regarding the seven embryos stored in a fertility center. The Supreme Court of Tennessee began its analysis by attempting to clarify the legal status of the pre-embryos. It concluded that the pre-embryos were not persons or property, but in a special category that deserved "special respect because of their potential for human life." The court found that:

²⁹ Findlay v Lee para 82.

³⁰ Davis v Davis 842 S.W.2d 588 (Tenn. 1992).

- a) therefore, based on their interest in (rather than their ownership of) the pre-embryos, the parties have decision-making authority over its disposition;
- b) the Court examined the right to privacy and concluded that “the right of procreational autonomy is composed of two rights of equal significance – the right to procreate and the right to avoid procreation”;
- c) after balancing these two conflicting constitutional interests, the Court concluded that Mr Davis’s interest in avoiding genetic parenthood outweighed his ex-wife’s right to procreate by donating the embryos to another couple. The Court, however, noted that it would have reached a different outcome if Mrs Davis had wanted to use the embryos herself and had no other means of achieving parenthood. The court stated that:

“when weighed against the interests of the individuals and the burdens inherent in parenthood, the State’s interest in the potential life of these pre-embryos is not sufficient to justify any infringement upon the freedom of these individuals to make their own decisions as to whether to allow a process to continue that may result in such a dramatic change in their lives as becoming parents”.³¹

[48] In *Kass v Kass*,³² the New York court of appeal held that *Davis v Davis* required that a court first determine whether there is an agreement. If there is, it should be considered as valid and binding. Where no such agreement exists, the court must resolve the dispute by weighing the interests of both parties. In such a case, the choice of one party to avoid procreation should trump the other party’s right to procreation. However, this proposition is only appropriate where the party denied the opportunity to use the reproductive material has a reasonable possibility of achieving parenthood without having recourse to the embryos.³³

³¹ *Davis v Davis* at 602.

³² *Kass v Kass* at 179.

³³ *Davis v Davis* at 604.

[49] In *Parillo v Haly*³⁴ the applicant and her partner stored five embryos. After his death, she wanted to donate them for scientific research but the IVF clinic refused to release them as there was a legislative ban on the use of embryos. The applicant approached the European Court of Human Rights which ultimately decided that embryos cannot be reduced to “possessions” within the meaning of article 1 of Protocol 1.³⁵

[50] Posthumous use of embryos is prohibited in France in terms of the French Public Health Code.³⁶ In *Baret and Caballero v France*,³⁷ Ms Caballero, sought leave to export the remaining embryos, conceived using her and her deceased husband's gametes, to Spain where assisted reproduction is permitted posthumously. She had explicit written consent from her deceased spouse to use the embryos for posthumous reproductive purposes. Her request was denied by the French authorities due to the absolute ban on posthumous reproduction under French law, which also bans the cross-border movement of gametes and embryos for purposes prohibited on national territory. She then approached the European Court of Human Rights (ECHR) claiming that the French Public Health Code violates her rights to privacy under article 8 of the European Convention on Human Rights, which includes the right to make decisions regarding procreation. The ECHR found that the ban was legitimate. It balanced the applicant's interests in her pursuit of the parental plan she made with her deceased spouse against the general moral and ethical interests that French law aims to safeguard. The Court noted that a wide margin of appreciation should be afforded to the State given the ethical sensitivity of the issue at stake and the lack of a European consensus on posthumous reproduction.³⁸

³⁴ App no 46479/2011.

³⁵ "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

³⁶ Para 311.

³⁷ Articles L.2141-2 and L.2414-11.

³⁸ Simana, S "Creating life after death: should posthumous reproduction be legally permissible without the deceased's prior consent?" (2018) *Journal of Law and the Biosciences* 329 —354.

[51] Germany³⁹ has banned posthumous reproduction. Apart from a ban on artificial fertilisation using the sperm of a deceased person, the use of embryos is limited in respect of the number of embryos that may be created at one time and embryos may only be cryopreserved in extremely limited circumstances. Therefore, there is no possibility of the use of an embryo where genetic material is that of a deceased spouse.

[52] The one notable case cited by the *amicus* that is comparable to the case before us, is that of *Bazley v Wesley Monash IVF (Pty) Ltd.*⁴⁰ In this case, the husband froze his sperm while undergoing cancer treatment. He died before the sperm was used and after his death his wife sought to use his sperm to conceive a child through artificial insemination. As the deceased had not left behind a written expression of his intention, the respondent refused to assist her based on the Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research of the National Health and Medical Research Council of Australia. The court ultimately concluded that the semen straws were property, and that ownership had vested in the deceased while alive and in his wife after his death. However, full reasons for this decision were not set out by the court.

[53] It is therefore clear that courts internationally have, where possible, avoided a classification of genetic material as “property”. There have, therefore, been instances internationally in which the posthumous use of reproductive material has been prohibited.

[54] In my view, section 39(2) of the Constitution is relevant. It provides:

“(2) 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.”

[55] This is relevant as the intention of the legislature has been obscured by its use of the word “ownership” in Regulation 18. This is so because neither the NHA

³⁹ Section 1 and 4 of the Embryo Protection Act 1990.
⁴⁰ [2010] QSC 118.

nor the Regulations define what “ownership” is. If the Legislature indeed intended to confer true ownership of any nature, it is paradoxical that the ownership is restricted to living persons and that there is no provision for posthumous use in cases such as that *in casu*. But in my view, a reading in of such a provision would not be appropriate. It must be left to the Legislature to amend the NHA and/or its Regulations in circumstances where it has conceded that these provisions require proper consideration, are ambiguous and where it has already proposed an amendment which has yet to be effected.

[56] I thus agree with the submission of the *amicus*, and with the opinion of Robinson, that the court should adopt a purposive and contextual approach to the interpretation of Regulation 18 given the specific facts of each case. This being so, in my view and on the facts of this case it is unnecessary to expand the common law either.

[57] Furthermore, no hard and fast rule can be laid down as to what should happen to reproductive material in cases such as those *in casu*. It may well be that, given the facts of a different matter, a court would refuse the relief sought. However, from the facts of this matter, it is clear – and stands uncontested - that the deceased intended the straws to be used for the further expansion of their family. There is also no evidence before us that the deceased withdrew consent for use for that purpose at any time.

[58] I am also of the view that the notice of motion in this case (whether the main relief or the alternative) is couched in terms that are too broad and may be interpreted as laying down a general principle – this would not be appropriate.

[59] It is unfortunate that there is no formal contract or written instrument that sets out the express wishes of the deceased vis-à-vis the use of his sperm straws. Instead, we are left to infer his wishes and intentions from the facts set out in paragraph 35 supra. Thus, in my view, the applicant’s argument that the deceased’s will transfers ownership to her is simply an arrow in her quiver, but is not decisive of the matter.

[60] Given my views set out supra, it is clear that the deceased intended for his genetic material to be used with that of the applicant's to create their family. The applicant's case is therefore adequately made out on the papers and on the facts without the necessity to load the bow with the arrow of ownership.

[61] This being so, and in my view, there being nothing *contra bonos mores* in granting the relief in the restricted circumstances of this case, and it being the express wish of the applicant to produce a genetic sibling for GGM, I see no bar to granting the application, but in terms of the order set out below.

[62] As a result of the facts with which this court was presented, and the conclusion reached on those facts, the question with which we were tasked must be left open. This is not the appropriate case to lay down any hard-and-fast rule.

THE ORDER

[63] Thus the order is the following:

The applicant is entitled to use sperm straws of the deceased, C[...] M[...], for purposes of providing GGM⁴¹ with a biological sibling.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

J SWANEPOEL
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

⁴¹ For purposes of privacy, the minor child's name is redacted in this judgment, but the order given to the applicant will contain the full name of the minor child.

RETIEF J

INTRODUCTION

[1] I have read the judgment penned by Neukircher J which constitutes the majority judgment. I have reflected on the content and reasoning thereof and am grateful for the different perspective it brings to the set of facts. Having said that, save that I am in agreement with the majority view that the meaning of the word “ownership” is not defined in the NHA nor the applicable Regulations and that it is not to be interpreted as ownership in the true sense, our paths on how that should be applied to the facts, the relief sought and the applicable legislative prescripts, do not cross again. Having regard to our common ground, I am reminded that the provisions of the NHA⁴² clearly limit the use of gametes, the provisions prescribe the conditions within which gametes can be used and the provisions limit rights to dispose⁴³ gamete freely [limitations]. These limitations can apply to a gamete donor, a recipient, an authorised institution⁴⁴ or competent person.⁴⁵ Such limitations render the exercise of full and absolute control over a gamete impossible. Therefore, because of these limitations an intended meaning of the word ‘ownership’ emerges, even if the word is not specifically defined. On this basis, I agree that the meaning of the word ‘ownership’ where it appears in the Regulations⁴⁶ pertaining to reproductive material⁴⁷ is incapable of the common law meaning attributed to ownership of an object or *res*.

⁴² National Health Act 64 of 2003 [NHA].

⁴³ See section 56(1), 60(4), and 63 of the NHA.

⁴⁴ In terms of section 1 of the National Health Act, 61 of 2003 [NHA], an “*authorised institution*” means any institution designated as an authorised institution in terms of section 54. Section 54(1) of the NHA states that the Minister may, by notice in the Gazette, designate any institution other than an institution contemplated in section 63 as an authorised institution. Section 63, see par [40].

⁴⁵ “*Competent person*” in relation to artificial fertilisation means a person registered as such in terms of the Health Professionals Act, 56 of 1974; who is:

“(a) a medical practitioner specializing in gynecology with training in reproductive medicine;
(b) a medical scientist, medical technologist, clinical technologist, with training in reproductive biology and related laboratory procedures.”

⁴⁶ Regulation 18, National Department of Health, Notice 175: Government Gazette 2012 [R.175].

⁴⁷ Eggs, sperm and embryos.

[2] The applicant appreciated the existence of the limitations *per se* without dealing with them in any detail and, stated that as a result thereof, ‘ownership’ of embryos could never mean owning them as property. The applicant however confined this reasoning to embryos only and contended that gametes were different. She argued that a distinction lay in the fact that embryos had the potential to give life, seemingly then, gametes did not. Gametes she argued because of the difference, notwithstanding the limitations, could be viewed as property. Moving from this contention she argued that gametes, viewed as property which vested in the deceased estate at his death and were capable of being inherited [applicant’s case].

[3] Of interest, the applicant in support of her case does not challenge the provisions of Regulation 18.⁴⁸ She applied the provisions, moving from the premise that the deceased, at the time of his death, was the lawful owner of the sperm in as much as she accepted that she is the owner of the blastocytes in terms of Regulation 18⁴⁹ which she intends to use without seeking permission. Therefore, the applicant does not challenge the provisions of Regulation 18, it would simply be counterproductive. She, by aligning herself with the provisions of the regulation, demonstrates her right of ownership to the deceased’s sperm *via* succession upon his death.

[4] The applicant therefore did not call for the interpretation of Regulation 18, nor did she raise any Constitutional challenge. In this judgment I therefore deal with the applicant’s case as against the relief she prayed for. This is not only what is required but it too assists parties who may wish to test a proposition in circumstances of legal uncertainty. This stance is of particular importance when dealing with matters in developing fields like medical science, in particular reproductive medicine. Many matters, much like this application may, call for a re-analysis of the approach to how rights are viewed and exercised in relation to human bodies and body products.

[5] Moving from this stance the applicant does not pray for permission to use the sperm of her late husband, C[...] M[...] [the deceased]. If she had, she would have prayed for such permission and clearly set out the basis for the judicial oversight and

⁴⁸ Regulation 18(2)(b) of R.175.

⁴⁹ Ibid.

the source thereof. Conversely the applicant requires this Court “-to declare that the ownership of the sperm straws vest in the applicant.” [declaratory relief]. In other words, she seeks a declarator to affirm that she is the lawful owner of the sperm straws⁵⁰ which she seeks Dr Gobetz⁵¹ to use in the process of artificial fertilisation. On the facts it appears that it is Dr Gobetz who requires the affirmation of her right to the sperm, notwithstanding her contention that she possesses such a right. Without commenting on the formulation of the prayer sought, a declarator moves from the premise of an existing, contingent or future right. In consequence there is no permission required merely the establishment of an interest in an already existing, or future or contingent right.

[6] The declaratory relief in its form was not the main relief sought but the relief in the alternative. At the date of the hearing, the applicant’s Counsel abandoned the main relief in which the applicant initially sought the Court ‘-to declare ownership of reproductive material to be transferrable.’ The abandonment occurred amidst the evidence by the applicant that: “I have been advised that there is uncertainty by academics as to whether ownership of human reproductive material can be transferred and that the focus of this application (own emphasis) is for the Honourable Court to declare that ownership is transferable”.

[7] Absent argument that abandoning the main relief effected the purpose of this application, if any, I appreciated the fact, if the application succeeded as pleaded, a principle relating to gametes will be established that gametes are property, and that ownership thereof is transferable in similar circumstances. In that way the alternate relief caters for the outcome of the main relief as it applies to gametes only and not embryos.

[8] In summary, the adjudication of this application requires an enquiry into whether the applicant, on the facts, has established an interest in a right to the deceased’s sperm, as pleaded. If successful, it will only then trigger an enquiry into whether this case is a proper one for the Court to exercise its discretion to grant the declarator in favour of the applicant. What is clear is that the nub of the issue turns

⁵⁰ 11 (eleven) straws.

⁵¹ A specialised reproductive specialist, the competent person. See footnote 45.

on the basis upon which the applicant asserts she has established an existing right because her interest in using the sperm is clear. The test set to be applied in this application was clearly set out in the Cordiant matter⁵² a matter supported by the applicant's Counsel in her written argument. I, therefore, as invited, apply this test to the facts to determine whether declaratory relief is successful.

[9] The adjudication of the declarator relief cannot be entertained in a vacuum either and must result in an effective order. The relevance thereof will become clearer but suffice to say at this stage that consideration of Regulation 7 and 8 of R.175 is required to ensure that the competent person possess the necessary statutory authority to perform the artificial fertilisation notwithstanding the recipient's intention.

[10] To commence then, a consideration of all the parties and their respective stance vis-à-vis the relief before dealing with the material legislative prescript and the argument advanced by the applicant.

THE PARTIES

[11] The applicant, a 40 year old widower⁵³ and mother of a single child conceived with the assistance of artificial fertilisation, she now wishes to extend her family to ensure that her daughter has a sibling. To realise her desire, the applicant intends to undergo an intended embryonic transfer of two cryopreserved⁵⁴ blastocytes.⁵⁵ These blastocytes were created with her own oocytes⁵⁶ and the sperm⁵⁷ of before his death. However, the applicant contends that if the embryonic transfers does not

⁵² *Cordiant Trading CC v Daimler Chrysler Finance Services (Pty) Ltd* 2005 (6) SA 205 (SCA) [Cordiant matter].

⁵³ A surviving spouse.

⁵⁴ In terms of National Department of Health, Notice 175: Government Gazette, 2012 Regulations dealing with the artificial fertilisation of persons [R.175], "*freezing or cryopreservation means freezing or cryopreserving genetic material including ova, sperm, embryos, ovarian tissue or stem cells by an authorised institution*".

⁵⁵ A pre-implantation embryo consisting of an outer layer, which forms the placenta and 30 to 200-cell mass which develops into the fetus.

⁵⁶ Female gamete commonly referred to as the egg.

⁵⁷ Male gamete.

result in a live birth, she wants to make use the deceased's remaining cryopreserved sperm for the process of artificial fertilisation *via* intracytoplasmic sperm injections.⁵⁸

[12] The *amicus curiae*, the Centre [*amicus*] made many insightful submissions, for which I am grateful but, sadly, didn't fully address, engage nor consider the basis upon which the applicant sought to establish her right of ownership to the sperm. The *amicus* did however engage with the main relief by discussing ownership of reproductive material, in general terms, it considered and weighed international trends on the subject matter. In conclusion, the *amicus*, *inter alia*, informed the Court that although it did not support the basis the applicant relied, in principle, it supported the notion that the applicant should be able to use of the deceased's sperm. Supporting the notion and not the basis, however noble, remains unhelpful.

[13] The first respondent, the Minister of Health [Minister of Health], the delegatory power, did not oppose the application but elected to file an explanatory affidavit. What the evidentiary weight of such an affidavit remains unclear as uniform rule 6 certainly does not provide for such an affidavit. However, what is clear is that the Minister of Health's intention was not to oppose the relief but to primarily refer to the applicable provisions. The Minister of Health in speaking to Regulation 18 merely stated that the NHA did not explicitly state whether ownership of reproductive material could be transferred. Other than the that the Minister of Health did not engage with the basis advanced in support of the relief nor did the Counsel. As such, the Minister's input was unhelpful.

[14] The second respondent, the Minister of Social Development, simply filed a notice to abide. This is a pity considering that chapter 19 of the Children's Act 38 of 2005 [Children's Act] speaks directly to the process of artificial fertilisation of a surrogate mother. Such artificial fertilisation includes circumstances of a surrogate mother being the genetic parent by using her own gamete in the process of artificial fertilisation. This donation is for the benefit of others, the intended parents. Surrogacy, although not the subject matter of this application, can statutorily only take place by means of artificial fertilisation and because a surrogate mother is

⁵⁸ A microscopic procedure to bring about fertilisation of an egg with a male sperm outside the body in an authorised institution.

entitled, in terms of section 298 of the Children's Act, to terminate a surrogate motherhood agreement based on the recognition given to her by the Legislator of her genetic input *via* her gamete donation, it may have provided another perspective through which ownership and use of a gamete, in general terms, could be viewed. It was not argued and as such not considered in this judgment.

THE RELEVANT LEGISLATIVE FRAMEWORK AND DISCUSSION

[15] The control, use, prescribed conditions and further limitations of the use of gametes is primarily governed by the NHA in Chapter 8 and the applicable regulations. The NHA was repealed and replaced with the Human Tissue Act, 65 of 1983 and came into operation on the 2 May 2005. Chapter 8 thereof was however only fully enacted on the 2 March 2012.

[16] This application concerns the specific reproductive healthcare process of artificial fertilization and therefore demands a closer look at the interplay between a donor, a recipient and the competent person who will affect the artificial process.⁵⁹ To understand the process and the interplay is to familiarise oneself with the relevant legislative framework. In doing so doing it is helpful to answer the following questions: What is a gamete? What is the purpose of gamete removal and, what are the limitations of use its once removed? What is the relevance of the prescribed conditions at the stage when artificial fertilization is about to take place? As against these answers, the applicant's argument and relief will be considered.

What is a gamete?

[17] According to the NHA a gamete is one of the two generative cells essential for human reproduction.⁶⁰ The one generative cell male [sperm] and the other female [oocyte]. A gamete in the NHA is not regarded as tissue nor as an organ by specific

⁵⁹ "Artificial fertilisation" means the introduction by either the natural means of a male gamete or gametes into the internal reproductive organs of a female person for the purposes of human reproduction and includes artificial insemination, in vitro fertilisation, gamete intrafallopian tube transfer, embryo intrafallopian transfer or intracytoplasmic sperm injection.

⁶⁰ Section 1 of the NHA definition of a "*gamete*" means either of the two generative cells essential for human reproduction.

exclusion.⁶¹ A gamete in the Regulation R.175⁶² is not defined however, sperm is and, is defined as a male gamete as too an oocyte which is defined as a female gamete. In the Regulations Relating to the use of Human Biological Material⁶³ [Regulation R.177] a gamete is considered biological material which includes, *inter alia*, cultured cells, embryos and small tissue biopsies. In the Regulations regarding the General Control of Human Bodies, Tissue, Blood, Blood Products and Gametes,⁶⁴ [Regulation R.180] a gamete is not specifically defined. Finally in the Regulations Relating to the Import and Export of Human Tissue, Blood, Blood Products, Cultured Cells, Stem Cells, Embryos, Fetal Tissue, Zygotes and Gametes,⁶⁵ [R.182] a gamete together with tissue, blood and blood products is defined as ‘a substance’.

[18] In short, it is a generative cell essential for human reproduction and purposefully, by exclusion, it is not considered to be human tissue nor an organ. It flows then that a gamete is essential to give life unlike human tissue or an organ that is required to sustain another’s life. In consequence the applicant’s contention that a gamete should be considered differently from an embryo because it is only the latter which gives life, is flawed. A gamete is an essential cell for human reproduction. Both gametes and embryos are defined as reproductive material because both possess the ability to reproduce a human and as such possess the ability to result in life.

What is the purpose of gamete removal and, what are the limitations of its use once removed?

[19] The provisions of the NHA⁶⁶ and R.180 are clear that the use of a gamete which has been withdrawn from a living purpose may only be used for prescribed

⁶¹ Section 1 of the NHA defines “*tissue*” means human tissue, and includes flesh, bone, a gland, an organ, skin, bone marrow or body fluid, but excludes blood or a gamete. An “*organ*” in terms of section 1 of the NHA means any part of the human body adapted by its structure to perform any particular vital function, including the eye and its accessories, but does not include skin and the appendages, flesh, bone, bone marrow, body fluid, blood, or a gamete.

⁶² *Supra* footnote 54.

⁶³ National Department of Health, Notice 177: Government Gazette, 2012 [R.177].

⁶⁴ National Department of Health, Notice 180: Government Gazette, 2012 [R.180].

⁶⁵ National Department of Health, Notice 182: Government Gazette, 2012 [R.182].

⁶⁶ Section 56(1) of the NHA.

medical and dental purposes which include artificial fertilisation⁶⁷ and in terms of R.177 for genetic testing. This is the only identifiable purpose. Artificial fertilisation is a prescribed medical purpose.

[20] Logically to use a gamete for a prescribed purpose entails that the gamete/s be removed or withdrawn from a human body. Such act of removal and withdrawal results in the physical detachment of the gamete from a specific donor's body. The detachment must be performed under prescribed conditions. Turning to explore such conditions in the NHA, Section 55 states that:

“55. Removal of tissue, blood, blood products or gametes from living persons.

A person may not (own emphasis) remove tissue, blood, a blood product or gametes from the body of another living person for the purpose referred to in section 56 unless it is done –

(a) with the written consent of the person (own emphasis) from whom the tissue, blood, blood product or gametes are removed granted in the prescribed manner; and

(b) in accordance with the prescribed conditions (own emphasis).”

[21] The person contemplated in section 55(a) who must provide written consent is the gamete donor. A gamete donor in Regulation R.175 means: “a living person from whose body a gamete or gametes are removed or withdrawn, for purposes of artificial fertilisation.” The person who is to remove the gametes in accordance with the prescribed conditions is a competent person.

[22] Section 55 speaks both to written consent for the removal in terms of section 56, such removal to occur in prescribed conditions. The latter conditions are prescribed in Regulation R.175.

⁶⁷ Section 56(1) of the NHA read with Regulation 3(1)(c) of Regulation R.180.

[23] Section 56(1) referred to in section 55 as previously mentioned, limits the purpose of the removal of gametes to medical or dental purposes only and reads:

“Use of tissue, blood, blood products or gametes removed or withdrawn from living persons.

56. (1) *A person may use tissue or gametes removed or blood or a blood product withdrawn from a living person only for such medical or dental purposes (own emphasis) as may be prescribed.”*

[24] Both section 55 and section 56(1) limit the freedom to use of a gamete in the hands of both the donor and the competent person and, the provisions introduce the fact that certain conditions are imposed when exercising that limited use.

[25] Not only is the use of a gamete limited but section 60(4)(a) unequivocally prohibits the ability of a gamete donor to receive financial remuneration or other reward for the donation itself other than reasonable costs incurred by such donor to provide the donation. In other words, a gamete itself as a reproductive product, in the hands of the donor, in terms of section 60(4)(a) can't be reduced to cash.

[26] Section 60(4)(b) furthermore restricts the commercial viability of a gamete even further by prescribing that no person, which includes the donor, is entitled to sell or trade in gametes, except as provided for in Chapter 8. Section 60(1)(a) in Chapter 8 which deals with the import and export of *inter alia* gametes, does not, by definition, include a gamete donor. In consequence, a gamete as a reproductive product cannot be reduced to cash nor sold nor sold for profit in the hands of the gamete donor. In consequence, it has no commercial value in these circumstances. It can therefore not be regarded as an asset in the hands of a donor. Of significance is that non-compliance of section 60(4) attracts a criminal sanction for non-compliance.

[27] The use of and the donation of a gamete is prescriptive in the NHA⁶⁸. It is therefore of interest that the Legislator appears to have purposefully excluded the possibility of *mortis causa* donation of reproductive material in Section 62⁶⁹ of the NHA. This purposeful exclusion is repeated in R.180, by definition, in that the word '*donation*' used in context,⁷⁰ is limited to the donation of a human body, blood or any specific tissue of a deceased in accordance with the NHA.

[28] It appears then that no provision in the NHA nor the regulations deal with the donation of reproductive material *mortis causa* whether by a last will, whether by a signed document nor, for that matter, whether by oral statement in the presence of two competent witness.⁷¹ This may be due to the fact that reproductive material, as discussed, gives life and is not donated by a deceased to sustain another life. Yet, regarding gametes there may also be another logical explanation. Meaning that, if the prescribed conditions in the Regulations⁷² and the NHA are complied with, at the stage of removal of the gametes from a living donor as envisaged, then nothing precludes a recipient from undergoing the artificial process and, no prohibition exists for the competent person to assist her even if the donor at the time of artificial process has passed away. Death of the gamete donor is not an impediment under these circumstances.

[29] The prescribed conditions referred to in section 55 and 56 dealt with in R.175 and are also prescriptive attracting criminal sanction for non-compliance. The provisions of R.175 appear not only to regulate the entire process artificial fertilisation of persons, the before and the after, but reference to persons included the protection of the donor's interest in future parentage, the recipient and guide for the competent person through all the stages. In this way giving credence to the object of the NHA.

⁶⁸ Section 63 confines the donation of gametes by person in terms of section 55(a) and by purpose in terms of section 56.

⁶⁹ Section 62(1)(a) permits donation of the human body and tissue by means of a Will, in a document signed by the competent donor and by at least two witnesses or by an oral statement in the presence of two witnesses.

⁷⁰ See Regulations 6, 7 and 8 of R.175.

⁷¹ See footnote 73.

⁷² See Regulations 7 and 8, 10 and 11 of R.175.

What is the relevance of the prescribed conditions at the stage when artificial fertilization is about to take place?

[30] The relevance of the prescribed conditions is not only apparent at the time of the removal of the gametes but, as will be demonstrated, relevant every time the process of artificial fertilisation is to be performed with the same donor's gametes. This is of relevance to a competent person who may be precluded from affecting the process when he/she is unable to determine compliance.⁷³

[31] Regulation 6 of the R.175 places a restriction on the donation of gametes. The provisions of Regulation 6 restrict the ability of process of a competent person to remove gametes from a donor, no matter what their wishes,⁷⁴ if the donor's gametes have been used in the conception of a maximum of six (6) children through artificial fertilisation already.⁷⁵ The regulations are practical in that the provisions which follow from Regulation 6 set out, *inter alia*, how a competent person can comply with both Regulation 6 in respect of ascertaining the number children born from the same gamete donor and/or compliance of the donor's own wishes of parentage (of how many times their gametes may be used in the process of artificial fertilization).⁷⁶

[32] The prescribed conditions and how fulfilled are important considering the Regulation 6 restrictions and informed consent in terms of Regulation 8(1)(iv) because a lapse of time may occur between the moment of the removal of gamete/s and the actual processes of artificial fertilisation to be affected thereafter. Of course, it too is envisaged that gametes from one donor can be used several times assisting several or one recipient. The Regulations in certain circumstances have tried to cater for the time lapses and uncertain outcomes by trying to control the conditions at each stage of the process when the same gamete donor's gametes are used repeatedly over time. The regulation purposefully provides mandatory instructions directed to the competent person.

⁷³ Regulation 10(1)(b) of R.175 read with paragraph [39].

⁷⁴ With reference to number of uses of a donor's gametes to secure live births.

⁷⁵ See Regulation 6(a)-(c) of R.175.

⁷⁶ Regulation 8(1)(iv) of R.175.

[33] Regulation R.175 specifically sets out these prescribed conditions. Reference only to the most relevant sub-regulations having regard to this application will be dealt with. Having regard to Regulation 6, 7 to 10 follows.

[34] Regulation 7 stipulates that a competent person who intends to remove or withdraw a gamete from the body of a gamete donor must follow certain mandatory steps. Sub-regulation 7(e)(iii) states that a competent person must obtain informed consent from a gamete donor to make available to the competent person who is to affect the artificial fertilisation and to the recipient, certain particulars contemplated in Regulation 8(1)(a)(ii), (iii) and (iv), (b), (c) and (f). This informed consent is to be in written form.

[35] Regulation 7(e)(iii) clearly and unequivocally states that:

“7. Prerequisites for removal or withdrawal of gametes

A competent person who intends to remove or withdraw a gamete, or cause a gamete to be removed or withdrawn from the body of a gamete donor, shall before such removal or withdrawal (own emphasis), –

(a)-(d)

(e) obtain informed consent from the gamete donor relating to –

(i) –(ii)

(iii) particulars contemplated in regulation 8(1)(a)(ii), (iii) and (iv), (b), (c) and (f) being made available to the recipient and the competent person who is to perform the artificial fertilisation (own emphasis);”

[36] Regulation 8, in particular, Regulation 8(1)(a)(iv) and (e) referred to in 7(e)(iii) states that:

“8. Gamete donor files, availability of information and destroying of gametes

- (1) The competent person must immediately record (own emphasis) the following information and documents in the gamete donor's file before (own emphasis) a gamete is removed or withdrawn.
- (a) the gamete donor's –
- (i) –(iii).
- (iv) subject to regulation 6(a), wishes in respect of the number of artificial fertilisations for which he or his gametes may be used (own emphasis);
- (b) –(d)
- (e) the informed consent and documents (own emphasis) contemplated in regulation 7(e) (own emphasis)."

[37] Applying Regulation 7(e)(iii), the competent person, before the removal of any gamete/s, must have obtained informed consent from the gamete donor regarding his/her wishes of parentage (how many times his/her gametes may be used in the process of artificial fertilization). This is not a record of a donor's wish to use his gametes to start a family. This informed consent must be recorded and must be made available to the competent person and the recipient. Because these documents are to be made available to the competent person who is to perform the artificial fertilisation, it logically must be provided at the time or time leading up to when the artificial fertilisation is to be affected. This means every time the same gametes are to be used as, in this way, the monitoring of compliance of Regulation 6 restriction and the donor's wishes of parentage are possible. Dr Gobetz and the applicant are silent on such compliance. The facts infer that both the applicant and Dr Gobetz do not know the deceased's wish of parentage.

[38] In terms of Regulation 8 the informed consent is to be recorded. The records making up the gamete donor's file must, in terms of Regulation 8(2)(a), be kept in safekeeping and the competent person is not entitled to destroy the file except, with written permission of the Director-General. Regulation 8(2)(b) again reiterates that the competent person must make available, *inter alia*, the particulars referred to in Regulation 8(1)(a)(ii), (iii) and (iv), (b), (c) and (f), to the recipient and the competent person who is to affect the artificial fertilisation.

[39] Of importance, non-compliance of Regulation 7(e) prevents a competent person from using the gamete for artificial fertilisation. This preclusion is set out in Regulation 10(1)(b). Regulation 10 speaks of, *inter alia*, the competent person's control over artificial fertilisation and sub-regulation (1)(b) states that no gamete from a gamete donor may be used for artificial fertilisation if the tests, analysis or examination referred to in Regulation 7(e) to (g) are not yet available. Regulation 7(e) to (g) not only refers to the outcome of a physical examination but examination of the donor through questioning and recorded responses (Regulation 7(e)(i) and (iii)). This includes recorded particulars contemplated in terms of 8(1)(a)(ii), (iii) and (iv), (b), (c) and (f).

[40] A competent person who wishes to affect the artificial fertilisation too, must ensure compliance with Regulation 8(1)(a)(i) to (iv) before effecting the artificial fertilisation. Regulation 11 deals with the requirements for artificial fertilisation and embryo transfer. Sub-regulation (c)(1) states that the competent person who effects must ensure that, *inter alia*:

“11(c)(1) *The gamete donor's particulars and/or wishes referred to in regulation 8(1)(a)(i) to (iv) (own emphasis) are conformed with.*”

[41] Mandatory compliance of the sub-regulations of Regulation 8(1)(a) by both the competent person who removes and who effects the process is repetitive and inescapable. No distinction is made between a known recipient or an unknown recipient at the time of the removal and/or at the time of the artificial fertilisation. Flowing from the Regulations then ownership of a gamete is not the barometer through which a right to use a gamete is measured and absent compliance of Regulation 7-8, notwithstanding a donor's wishes as prescribed, the competent person is prohibited from performing artificial fertilisation.

[42] Without such information an effective and competent order, no matter how granted, is not possible

BACKGROUND FACTS AND DISCUSSION OF THE EXISTING RIGHT RELIED ON

What are the material facts?

[43] The deceased and the applicant were married to each other on the 25 October 2015. However, prior to that, the deceased was diagnosed with Hodgkin's lymphoma, a form of lymphatic cancer for which he underwent chemotherapy and a bone marrow transplant. The bone marrow transplant took place early in 2015. Prior to his chemotherapy, although the date is not set out, the deceased "*was advised to freeze his gametes (sperm) for later use should he want children in the future*". Following such advice, the applicant states that "*C[...] donated sperm at Cape Fertility Clinic for fertility preservation. Thirteen straws were frozen.*" Other than that fact, no further facts were provided, in particular compliance with the prescribed conditions in terms of the Regulations by Cape Fertility Clinic nor a copy of the deceased donor's file.

[44] Dr Gobetz, who the applicant asked to affect the artificial fertilisation deposited to an expert affidavit. This was attached to and referred to in the founding papers. Unfortunately, Dr Gobetz was silent on whether the content of the deceased's file in terms of Regulation 8 has been made available to him or for that matter the applicant as the proposed recipient.

[45] Be that as it may both the applicant and the deceased consulted with Dr Gobetz on the 28 December 2015 as they wished to start a family. At the time, the deceased's cancer was in remission and because they were unable to conceive naturally and, considering the sperm preservation she underwent fertility treatment to stimulate the recovery of her eggs. On the 8 February 2016 a total of 16 (sixteen) eggs were retrieved from the applicant, only 9 (nine) of the eggs were mature and the others had to be discarded because they were not suitable for intracytoplasmic sperm injection. Two sperm straws were used for the latter procedure.

[46] Eleven sperm straws and 6 (six) embryos as blastocysts were cryopreserved. In March 2016, the applicant underwent her first double embryo transfer at Vitalab by Dr Gobetz. Such a transfer was without success. The second transfer was performed in May 2016 which was successful and resulted in the live birth of the

applicant and the deceased's daughter (GGM) on the 2 February 2017. After the birth of GGM, 2 (two) blastocysts and 11 (eleven) sperm straws remained cryopreserved. The deceased's known wish regarding the use of his gametes for the process of fertilisation, as provided orally, and not in compliance of Regulation 7 to 8 of R.175 appeared to be achieved prior to the date of his death. No further information is provided as required from this date.

[47] Shortly after GGM's birth and on the 4 June 2017, the deceased signed his Last Will and Testament [Will]. According to paragraph 5 of the Will, the bequeathed his entire estate to his wife, the applicant. The deceased sadly passed away on the 10 August 2017. According to the applicant, the deceased in his Will did not deal with the remaining 11 (eleven) sperm straws, nor did they, prior to his death, enter into an ownership disposition agreement. The applicant nor her legal team expanded on the terms of a disposition agreement and how the conclusion thereof would change the present position and the applicable law. However, Dr Gobetz does state under oath that the applicant and deceased did not enter into any agreement with Vitalab Clinic about what should happen with the gametes in the event of the deceased's death. No further explanation of what the terms of the envisaged agreement would regulate was provided. However, because of such omission Dr Gobetz explained that he was not to proceed with the process and informed the applicant that he is concerned that Regulation 18 *"-is silent as to a deceased donor's ownership of the gametes that it should be advisable to obtain independent legal advice -"*. As it turns out it is not Regulation 18 silence but the silence of compliance of Regulation 7-8 of R.175.

[48] Returning to the intention of the applicant, she tells this Court that she first intends to make use of the remaining two embryos to achieve her goal to provide GGM with a sibling and only, in the event that such intended procedure does not result in a positive pregnancy and viable birth, is it her intention to use the 11 (eleven) remaining straws to achieve artificial fertilisation *via* intracytoplasmic sperm

injection.⁷⁷ The applicant pins her right to own these straws in terms of paragraph 5 of the Will *via* succession.

What is the origin of the existing right relied on?

[49] The legal advice which the applicant received from her attorney was that Regulation 18 is silent about “-a deceased donor’s ownership (control)” and that it is assumed that upon the donor’s death, the ownership will then devolve in terms of succession law, thus advised her attorney, the gamete vests in the estate.

[50] The applicant argues that a person’s right to gamete could be viewed as a right which is exercised over property and as such, gametes can be viewed as property. To advance this argument the Court was invited to consider Yearworth v North Bristol NHS Trust⁷⁸ [Yearworth matter]. The applicant then, applying Regulation 18 of R.175 and accepting that a gamete is property argued that, at the deceased death, he *de facto* was the owner of his sperm. At this point it is important to mention that reference to Regulation 18(2) in the applicant’s Counsels written argument and to 18(2) in the founding papers where it appears, is incorrect as Regulation 18(2) deals with ownership embryos after the process of artificial fertilization has taken place, which is not the applicant’s case. This is an unfortunate mistake which was not correct in argument however, having regard to the application, it must have been a typographical error as reference to Regulation 18(1)(b) would be the correct reference. Regulation 18(1)(b) deals with ownership of a gamete before artificial fertilisation. The subject matter of this application.

[51] Moving from this premise, the applicant then argues that applying paragraph 5 of the Will the sperm formed part of the deceased’s property, vested in his estate which she inherited applying paragraph 5 of the Will. Considering herself the owner of the sperm, she now wants to exercise her ownership rights to use the sperm for the purpose of artificial fertilisation to provide a sibling for her daughter.

⁷⁷ This is a microscopic procedure where one sperm is inserted in an egg with a glass needle which is 14 times thinner than a human hair. Notwithstanding the fact that this microscopic technology occurs outside the body it is included in the definition of artificial fertilisation in the Regulations to the NHA.

⁷⁸ [2009] EWCA Civ 37.

[52] To unpack the argument, as invited, I consider the Yearworth matter where the Court sat as a Court of appeal in London, United Kingdom. The reason for the invitation by the applicant appears to be because the appeal was upheld and the Court considered the applicant's sperm, for the purpose of their claims of damages for the destruction of thereof as a product of their body, their own property. Relying on this outcome the applicant contended that the ownership of gametes referred to in Regulation 18 was ownership of property and as such, developed her argument. At first blush, the reliance and argument appeared persuasive but, considering the reasoning of the Court of appeal gives further perspective to the outcome. The Court was clear that it was only seized with the consideration of whether the common law principles applicable in tort (delict) and bailment⁷⁹ applied in respect of damage to bodily substances, namely sperm of the applicants and their intended use of it in the future, and that they were not invited to consider if there would be a significant difference between their claims and those in which the sperm was intended for use by other persons, for example donated sperm. In other words, and in the facts, all the applicants were men who had been treated for cancer who had placed their sperm in the safekeeping with the respondent's storage facility for a possible later use. If a possibility of use did not arise or if the applicant did not want to use his sperm, the Court determined that such applicants could, at their own discretion even destroy their own sperm. In other words, the property right to use or to destroy the applicant's own sperm could be identified as property rights in the hands of those who, themselves alone, had generated and ejaculated the sperm with the object that might later be used for their benefit.

[53] On the facts, the deceased possessed the right to use or to destroy his own sperm. Relying on the Yearworth matter to determine whether those rights (use and destruction) to his own body product translated into transferable ownership of such property with such rights to another and *via* succession is another enquiry all together and one which the Court in the Yearworth matter clearly did not entertain.

⁷⁹ "*Bailment*" refers to a legal relationship where one person (the bailee) takes temporary possession of another person's property (the bailor) for a specific purpose, with the obligation to take reasonable care of the goods and return them in the same condition once the purpose is fulfilled. Essentially it is the legal framework governing the temporary transfer of possession of personal property while maintaining ownership with the original party.

Thus, distinguishable on fact and law. The Court by reference and exclusion was not invited to entertain any claim of whatever nature other than that which was vested in the applicant at a time when they could still exercise such rights. The proposition of the applicants' death and the ability to transfer those rights was also not envisaged. I am not convinced that the Yearworth matter is therefore a foundation for the proposition relied on by the applicant. Furthermore any reliance the applicant placed on the academic articles, which reliance is not clear, written by Professor Donrich Thaldar titled "*Can ownership of reproductive material be transferred?*" and by Prof Robbie Robinson titled: "*The Legal Nature of The Embryo: Legal Subject or Object*" do not assist with the foundation the applicant wished to achieve with reference to the Yearworth matter, namely that gametes as property which automatically vest in an estate of a deceased and therefore are capable of being inherited.

[54] Even if I am incorrect, the applicant failed dismally to convince me that sperm, even if viewed as property, vested in a deceased's estate at his death and therefore capable of being inherited. The applicant's Counsel did not even deal with the provisions of the Administration of Estates Act, 66 of 1965 to give support to the argument that the sperm are capable, *per se*, of forming part of the deceased's estate.

[55] To appreciate the argument compels one to enquire what is meant by an "estate." Briefly, the application of the Administration of Estates Act, 66 of 1965 is concerned with the custody, control, realisation and distribution of the assets of a deceased person which are within the borders of the Republic of South Africa at the time of the deceased's death. Simply put, when a person dies leaving assets of any sort, such assets constitute the estate which must be wound up in accordance with the laws of the country where those estates are situated. Assets are commonly defined as anything tangible or intangible that has a positive economic value. In other words, that it can be converted into cash.

[56] Applying the provisions of section 60(4) of the NHA, a gamete does not have a positive commercial value in the hands of the deceased and therefore can never be regarded as an asset forming part of his estate. The applicant's argument must fail.

CONCLUSION

[57] Applying the test in the Cordiant matter the applicant has failed demonstrate an existing right, future or contingent right as pleaded to the deceased's sperm from which an interest therein can be established. She certainly has an interest in the use of the sperm, but she has pinned her vested right of ownership by applying paragraph 5 of the Will.

[58] Failure of the first stage of the Cordiant test means that an exercise of discretion is not triggered. Furthermore, considering the applicant's failure to assure this Court of the compliance of Regulations 7-8 and applying Regulation 10, Dr Gobetz is not statutorily authorized to commence with the artificial fertilisation with the use of the deceased's sperm. Such use will attract the possibility of a criminal sanction, notwithstanding any permission obtained by the applicant to use the sperm.

[59] Permission of use without considering and being satisfied of compliance is to overlook the provisions of the legislative prescripts and is not a competent nor effective. The applicant's application, at this stage, and how sought stands to be dismissed, each party to bear their own costs.

L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judges whose names are reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 14 April 2025.

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Instructed by	:	Office of the State Attorney
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Instructed by	:	The Centre for Child Law
Matter heard on	:	10 September 2024
Judgment date	:	14 April 2025