

SOUTH AFRICA / JUDGMENT

EJ and Others v Haupt NO (63756/2020) [2021] ZAGPPHC 556; 2022 (1) SA 514 (GP) (11 August 2021) [2021] ZAGPPHC 556

COURT

North Gauteng High Court, Pretoria

BEFORE

Neukircher

CASE / FILE NUMBER

63756/2020

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

Case number:

63756/2020
REPORTABLE
OF INTEREST TO OTHER
JUDGES
REVISED
11 AUGUST 2021

In the matter between:

EJ FIRST
APPLICANT
AWJ SECOND
APPLICANT
DHR THIRD
APPLICANT
and
ADV LC HAUP T SC
N.O CURATRIX
AD LITEM
CENTRE FOR CHILD
LAW AMICUS
CURIAE

REASONS FOR JUDGMENT

NEUKIRCHER, J

The application:

- [1] Stated in broad terms, this matter centred on the acquisition of responsibilities and rights of a couple[1], who were married in terms of the Civil Union Act[2], towards their daughter (A) who was conceived by artificial insemination[3] using a home insemination kit.
- [2] At the time that the application originally served before me, the first applicant was already approximately six-and-a-half months pregnant and I granted a rule nisi with certain immediate interim relief[4].
- [3] The minor child (A) was subsequently born on 10 March 2021.
- [4] In issue is whether section 40 of the Children's Act[5] makes provision for a spouse in a civil union marriage to automatically acquire parental rights and responsibilities of a child

born to the other spouse during the course of that marriage, but where the child shares no genetic link to her. By extension, in issue is also the question of whether s 40 of the Children's Act is unconstitutional.

- [5] In considering this matter the words of the courts in, respectively, *Ex parte WH and Others* (*Ex parte WH*)
- [6] and *Du Toit and Another v Minister of Welfare and Population Development and Others* (*Du Toit*)[7] are particularly apt:

5.1 in *Ex Parte WH* the court stated[8]:

"[4] Children occupy a special place in the social, cultural and legal arrangements of most societies. That this is so is understandable in recognition of both the vulnerability of children and the almost instinctive need to advance their wellbeing and ensure their protection, as well as the compelling human and social imperative to pursue and further their best interests as they are set on the path of developing their full potential and taking their rightful place as full and responsible citizens of society. The preamble to the United Nations Convention on the Rights of the Child provides that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.

- [5] In South Africa the social order recognises this commitment and it is given expression in a variety of ways in the Constitution as well as the legal framework that has followed the adoption of the Constitution. Both the preamble and the founding provisions of the Constitution evidence an intention to create a society based on fundamental human rights and freedoms, and the recognition of the inherent worth and dignity of each person. The Bill of Rights, beyond its unequivocal commitment to the achievement of equality and the prevention of unfair discrimination, deals extensively with the rights of children.

- [6] In very much the same way as society's architecture is structured to advance the best interests of the child, so too does it reflect and give response to the desire of many to have children of their own. For some it represents the fulfilment of the agency of their own lives and existence as they seek to continue their lineage and their legacy, while for others the vision of a family living and loving together is rendered complete with the arrival of a child. Of course there are those who for valid reasons of their own elect not to have children and the law, in similar vein, recognises the choices people may make not to have children.
- [7] To this end children play a vital role in how the values, cultures and traditions of a people are held in collective safekeeping and passed on to future generations, matters central to both the protection and the extension of the identity of a people. The law and social practices must accordingly and in an appropriate fashion be responsive to and facilitate, to the extent that it can, this process which in many respects represents the animating energy in the lifeblood and in the continuity of a people.
- [8] In all of this the role and place of the family as an important social unit around which relations are structured and nurtured has been acknowledged and recognised as pivotal. The Universal Declaration of Human Rights proclaims that 'the family is the natural and fundamental group unit of society and is entitled to protection by society and the State'. The International Covenant on Civil and Political Rights, as well as the African Charter on Human and Peoples' Rights, contain similar provisions which affirm and properly recognise the role and place of the family within the broader design of society.”; and

5.2 in Du Toit, Skweyiya AJ stated[9]:

“[19] The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.”

- [6] The latter is as true today, and in the context of the present application, as it was in 2003 when it was penned.
- [7] Since Du Toit was decided, the Children’s Act of 2005 was promulgated and the Civil Union Act[10] followed shortly after. But it is the Constitution that provides the substratum on which many matters are based:

7.1 section 9 of the Constitution provides:

“(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair”; and

7.2 section 28 of the Constitution[11] provides:

“(2) A child's best interests are of paramount importance in every matter concerning the child.”;

7.3 of course, section 7(1) of the Children’s Act cannot be ignored as it makes provision for the “best interest of the child standard” to be applied using a set out criteria set out in that section.

[8] It is against this backdrop that this application served before me.

Background:

[9] This application was originally set down in the urgent court on 8 December

2020. The first applicant was then 21 weeks pregnant. The matter was struck off the roll for want of urgency and a few weeks later I was allocated the matter. Given the urgency of the matter, as the first applicant was in an extremely advanced stage of her pregnancy, it was heard and a rule nisi granted.

[10] However, I had reservations in granting a final order and was of the view that the Minister of Home Affairs, the Minister of Social Development and the Minister of Justice and Correctional Services should be given notice of the application and afforded an opportunity to make representations should they so wish.

[11] I was also of the view that the voice of the child should be represented and, to that end, appointed Adv LC Haupt SC as curatrix ad litem to the unborn child (“Ms Haupt”) and lastly the Centre for Child Law was appointed as amicus curiae (“Ms du Toit”) to make representations on the constitutionality of s40 of the Children’s Act.

[12] The application and rule nisi were served as directed. All three government departments notified me that they would abide by an order made and elected not to make any submissions which is very unfortunate.

[13] Both Ms Haupt and Ms du Toit have made comprehensive submissions and have been of invaluable assistance to the court and they are thanked for their input.

The parties:

- [14] The first and second applicants[12] have known each other since 2007. They were friends until late 2015 when they became romantically involved and they started cohabiting in February 2016.
- [15] Because of first applicant's job, which took her out of the country for 15 months, the parties were only able to marry on 16 November 2019 in terms of the Civil Union Act.
- [16] They had always wanted children and it was decided that the second applicant would attempt to get pregnant first. To this end, the couple went to a fertility expert in Johannesburg in 2019. Unfortunately, because of her physiological issues and poor egg quality the attempt was not successful.
- [17] According to the report of the curatrix ad litem, because of the high costs of artificial inseminations at fertility clinics, which would not be covered by first applicant's medical aid, the applicants began to do research on other methods of artificial insemination and specifically home insemination.

The Gamete Donor and the applicants' personal circumstances

- [18] The second applicant has known DHR for the past 12 years and he has been a friend of the first applicant since late 2015 when the applicants' relationship started. He gave a toast at their wedding and, prior to lockdown on 26 March 2020, they would see him regularly. Given their relationship and "his kind-heartedness and the fact that he is a stable and trustworthy individual" they approached him to be a gamete donor.
- [19] All of them went for HIV, STD and other blood tests before they took a final decision.
- [20] The applicants did a home insemination[13] with a home insemination kit on 24 and 25 June 2020 and six weeks later a home pregnancy test confirmed that the first applicant was pregnant.
- [21] At a stage subsequent to the confirmation of the first applicant's pregnancy, the applicants consulted Mr Martin and it was brought to their attention that in terms of Regulation 7(j) of the Regulations: Artificial Fertilisation of Persons[14] under the National Health Act, 2003, they are required to enter into a Donor Agreement which DHR. This was then done[15].
- [22] The applicants started making provision for A when the pregnancy was confirmed. According to Ms Haupt, she was given full information regarding their income and salary and she confirmed that they are financially stable.
- [23] Furthermore:

23.1 she (A) would be registered on the first applicant's medical aid;

23.2 the second applicant works flexi hours from home; the first applicant works shifts and her workplace is ± 10 minutes from home. Sometimes her hours are 08h00 to 08h00 and then she has three days off;

23.3 they have taken out additional policies which would provide for A, were something to happen to them and they will make provision for A in their respective wills;

23.4 there are approximately 5 primary schools and high schools in their vicinity;

23.5 they both enjoy close relationships with their respective families; and

23.6 their home and their home life is conducive to raising a child.

[24] The applicants do not intend to have more children.

The rule nisi:

[25] Given my concerns about protecting the rights of the (as yet) unborn child, I granted a rule nisi on 9 February 2021 in the following terms:

“1. A rule nisi be and is hereby granted for parties to appear and to show cause to this court on 19 March 2021 at 10:00, before Neukircher J, or soon thereafter as the matter can be heard, why the following order should not be made final:

1.1 that any child(ren) born of either the First Applicant and/or Second Applicant, during the currency of their Civil Union, and pursuant to the insemination of a gamete of the First Applicant and/or Second Applicant and the Third Applicant and/ or an unknown donor is/are for all purposes the child(ren) of the First and Second Applicants from the moment of birth of the child(ren) concerned;

1.2 that it is declared that the First and Second Applicants shall have full parental rights and responsibilities in respect of the child(ren) to be born, whether in terms of the common law or the Children’s Act, 38 of 2005 (and any amendments thereto) and/or any other statute which may be promulgated or has been promulgated dealing with parental rights and responsibilities;

1.3 that the registration of births of the child(ren), as required in terms of Chapter II of the Births and Deaths Registration Act, 51 of 1992, shall be effected to register and reflect the First and Second Applicants as the parents of the child(ren) respectively, from the date of birth;

1.4 that no adoption procedures are required in respect of the child(ren) to be born;

1.5 it is declared that the Third Applicant is a gamete donor and shall have that no right, responsibility, duty or obligation arises between the child(ren) born of the First Applicant and that the Third Applicant does not obtain any right of parenthood or care in respect of the child(ren) and no right of contact with such child(ren) and that the child will have no claim for maintenance or of succession against the Third Applicant or any of his relatives;

1.6 that this application is declared to be confidential and:

1.6.1 the Court file and application be retained in the Chief Registrar’s office;

1.6.2 the identity of the parties to this application, or any facts which may cause them to be identified, shall not be published and/or made public.

2. Prayers 1.1 to 1.6 supra shall operate with immediate effect pending the finalisation of this matter.
 3. The Centre for Child Law is appointed as amicus curiae, to make representations in this application regarding the relief sought, or any amended relief.
 4. Advocate L C Haupt SC is appointed as curator ad litem to represent the interests of the unborn child(ren), with the following powers:
 - 4.1 to represent the interests of the child(ren) forming the subject matter of this application;
 - 4.2 to consult with any person(s) or parties or institutions she deems necessary for purposes of providing a report to this court in respect of what is in the interests of the child(ren);
 - 4.3 to provide the Court with her report by no later than Wednesday 17 March 2021.
 5. The applicants are directed to serve the application on the Minister of Home Affairs, the Minister of Social Development, the Minister of Justice and Correctional Services, the Centre for Child Law and on Adv Haupt SC.
 6. Any amendment to the relief sought in the main application shall be filed by no later than Friday 26 February 2021.”
- [26] Paragraph 6 of the order was included in order to preserve the applicants’ rights to file a Rule 16A notice in the event that they wished to have section 40 of the Act struck down for want of constitutionality – they elected not to do so.
- [27] The question then is whether this court has the power to do so mero motu or whether section 40 can, and should, be read as an inclusionary clause rather than an exclusionary one.

The Application:

- [28] The application states that the following issues have arisen by virtue of the applicants’ marriage vis-à-vis the provisions of sections 19 and 20 of the Children’s Act and the acquisition of parental responsibilities and rights towards A:
- 28.1 although section 19 of the Children’s Act provides that, as A’s biological mother, the first applicant acquires rights and responsibilities, the second applicant does not even though the applicants are legally married;
- 28.2 that, as a result, section 40 of the Children’s Act does not adequately deal with the issue of same-sex female couples (whether married or unmarried) obtaining parental rights and responsibilities by operation of law;
- 28.3 that the wording of sections 40(1) and 40(3) of the Children’s Act relate to a married heterosexual couple and do not apply to a same-sex female couple;

28.4 that although sections 292 to 303 of the Children's Act make provision for the acquisition of parental rights and responsibilities in respect of surrogacy (subject to judicial oversight) and include a single person^[16] and a "husband, wife or partner"^[17] the same does not hold true for the partner/spouse of a child born of artificial insemination;

28.5 that there are no other provisions of the Children's Act that deal with the automatic acquisition of parental rights and responsibilities other than sections 19, 20, 292, 293, 296 and 297 of the Children's Act vis-à-vis a same-sex female couple in the present circumstances;

28.6 that, in the absence of specific provisions regarding the acquisition of parental responsibilities and rights, the first and second applicants are left with only two options:

28.6.1 to either enter into a parental responsibilities and rights agreement in terms of section 22 of the Children's Act and have such an agreement made an order of court; or

28.6.2 the second applicant must adopt A under Chapter 15 of the Children's Act. This says the applicants "infringes on [their] rights to equal, human dignity and freedom and security of the person, more specifically the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction, as contained in section 12(2)(a)^[18] of the Constitution of the Republic of South Africa..."

The

Issues:

^[29] Thus, given the above, the following issues arise:

29.1 does section 40 exclude a same-sex female couple?

29.2 can second applicant be registered as A's parent at the Department of Home Affairs?

29.3 does the second applicant automatically acquire responsibilities and rights in respect of A or not?

Artificial Insemination:

^[30] Regulation 9^[19] of the regulations promulgated under the National Health Act no. 61 of 2003 ("the NHA") provides:

"(1) Artificial insemination or embryo transfer must only be effected at an authorised institution; and

(2) Only a competent person may effect artificial insemination."

^[31] They also define "artificial fertilisation" and "artificial insemination" as:

"artificial fertilisation" as "the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including:

- (a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or
- (b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person.”

[32] The Children’s Act defines “artificial fertilisation” as –

“‘artificial fertilisation’ means the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including –

- (a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or
- (b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person;”

[33] The Regulations published under the National Health Act[20] define artificial fertilisation as meaning

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

[34] It is important to note that the NHA and its Regulations make provision for a highly supervised *modus operandi* whereby –

34.1 the removal of gametes by any person other than a “competent person” is prohibited[21];

34.2 there is a restriction placed on the donation of gametes by Regulation 6 which provides, *inter alia*:

“6. A competent person –

- (a) shall not remove or cause a gamete to be removed or withdrawn, from the body of a gamete donor if the competent person has information or suspects that a maximum of six children have been conceived through the artificial fertilisation using the gametes of that gamete donor;
- (b) ...
- (c) must immediately relay all the information relating to such gamete donor, the removal or withdrawal of a gamete and the artificial fertilisation, to the central data bank contemplated in Regulation 5.”

2.01cm; text-indent: -1.01cm; margin-bottom: 0.21cm; line-height: 200%; text-decoration: none; page-break-before: auto"> 34.3 Regulation 7 sets out the prerequisites for the removal or withdrawal of gametes. These are:

"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-

- (a) ensure that if a gamete donor file has not previously been opened in respect of that gamete donor, open such a file, to which a unique identification number shall be allocated in respect of the gamete donor;
- (b) ensure that the information obtained in paragraph (a) is submitted to the central data bank;
- (c) in the case of a known donor, ascertain from the central data bank that not more than six children have been conceived through the artificial fertilisation of a person with the gametes of that gamete donor;
- (d) obtain a signed statement from the gamete donor stating whether the gamete donor has previously made a donation of gametes and, if so, where and when that donation of gametes took place;
- (e) obtain informed consent from the gamete donor relating to-
 - (i) physical examination and questioning by a competent person;
 - (ii) the removal or withdrawal a gamete for testing, analysing or other processing as the competent person may deem necessary;
 - (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;
 - (iv) to particulars contemplated in regulation 8(2)(c) being made available to the Director-General; and
 - (v) to particulars contemplated in regulation 8(2)(c) being submitted to the central data bank;
- (f) ascertain the age of the gamete donor;
- (g) ascertain that the gamete donor has on two occasions, not more than three months apart and one month prior to that donation of gametes, undergone-
 - (i) medical tests for sexually transmissible diseases; and
 - (ii) a semen analysis, in the case of a male gamete donor;
- (h) ascertain that in the case of a female gamete donor, the donor has undergone a gynaecological examination prior to stimulation for the withdrawal of gametes;

- (i) question such gamete donor concerning her or his family history, especially with regard to any possible genetic condition or carrier status and mental illness in respect of any child, brother, sister, parent or grandparent of such gamete donor; and
- (j) shall, in the event of a request in respect of which the donor and recipient are known to each other, ensure that there is-
- (i) written confirmation by both parties that they known [sic] each other;
- (ii) psychological evaluation of both parties.”

[35] It has been stated that “A law (which includes subordinate or delegated legislation) may be impliedly repealed 'by a later repugnant law of the same or a

superior Legislature'. R v Sutherland 1961 (2) SA 806 (A) at 815A; New Modderfontein Gold Mining Co v Transvaal Provincial Administration

1919 AD 367 at 397. If the later law 'professes, or manifestly intends, to regulate the whole subject to which it relates, it necessarily supersedes and repeals all former acts, so far as it differs from them in its prescriptions'. New Modderfontein Gold Mining Co v Transvaal Provincial Administration (supra at 397).”[22]

[36] Thus insofar as the procedure by which artificial insemination and fertilisation takes place it is clear that the provisions of the NHA and Regulations take precedence. However, whilst they regulate the procedures that take place in a medical facility itself, and in respect of an “at arms’ length” donor, the NHA and Regulations do not speak to artificial insemination in circumstances such as the present – i.e. home insemination where the gamete donor has agreed to the donation and is known to the prospective parents.

[37] In my view, the fact that the NHA and Regulations make no provision for a prohibition against home insemination means that there is none. It bears mentioning that in this matter the applicants and DHR have all complied with the spirit and intention of Regulation 7 of the NHA and have undergone tests[23] and counselling[24] to prepare themselves for A’s birth.

[38] Ms Haupt has submitted that the argument may be made that the fact that the NHA Regulations make provision only for a “competent person” to harvest eggs or sperm may well simply amount to an “over medicalisation” which has been defined as “the process whereby more and more of everyday life has come under medical dominium, influence and supervision.”[25]

[39] She argues that:

39.1 the regulations appear to protect a prospective mother who is relying on an unknown donor by requiring that the donor provides certain relevant information including that certain tests be done by a competent person;

39.2 the question arises: will all these questions have a specific objective in circumstances whether the donor is known to the intended mother (as is the present case);

39.3 that the issue is a contentious one which not only touches on the aspects of equality between homosexual and heterosexual family systems, but also on an individual's right to bodily integrity.

[40] Whilst these are certainly important issues, I am of the view that a decision of them at this stage is not required as a) that is not the thrust of the present application; b) although applicants were given leave to amend their papers to raise a Rule 16A issue regarding inequality and discrimination towards them as a homosexual couple, they chose not to do so; and c) the issue before this court is whether the interests of the parties and ultimately the minor child (A) are adequately protected and provided for by the current prevailing legislation[26].

Can this court raise the issue of the constitutionality of section 40 mero motu?

[41] Section 40 of the Children's Act states:

“(1)(a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.

- (b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.
- (2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
- (3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when—
 - (a) that person is the woman who gave birth to that child; or
 - (b) that person was the husband of such woman at the time of such artificial fertilisation.”

[42] Although the application complains of the discriminatory provisions of section 40[27] and the consequences visited on the spouse/partner of a same-sex female couple, the application does not ask for the section to be declared unconstitutional. Instead it asks for specific declaratory relief to be granted. As the applicants have chosen not to follow the Rule 16A route the question is whether I may exercise my discretion to raise any constitutional issue mero motu.

[43] Ms du Toit has submitted that a finding of unconstitutionality may be avoided under section 39(2) of the Constitution which states:

“(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.”

[44] In *Daniels v Campbell N.O.*[28] (“Daniels”) the Constitutional Court confirmed the principle laid down by Langa DP in *Investigation Directorate: Serious Economic Offences & Others v Hyundai Motor Distributors (Pty) Ltd and Others: In Re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N.O. and Others*[29] where he stated:

“...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.”[30]

[45] In *Daniels supra*[31], Ngcobo J put it thus:

“Section 39(2) of the Constitution contains an injunction on the interpretation of legislation. It requires courts when interpreting any legislation to 'promote the spirit, purport and objects of the Bill of Rights'. Consistent with this interpretive injunction, where possible, legislation must be read in a manner that gives effect to the values of our constitutional democracy. These values include human dignity, equality and freedom. Thus where legislation is capable of more than one plausible construction, the one which brings the legislation within constitutional bounds must be preferred.”

[46] In *Chisuse and Others v Director-General Department of Home Affairs and Another*[32], Khampepe J laid out certain principles relating to the interpretation of statutory provisions and stated, *inter alia*, the following:

“[46] In adjudicating the confirmation proceedings before us, the first step must be to interpret the impugned section to ascertain its meaning and, once that meaning has been established, to determine whether it is inconsistent with the Constitution.

[47] In interpreting statutory provisions, recourse is first had to the plain, ordinary grammatical meaning of the words in question. Poetry and philosophical discourses may point to the malleability of words and the nebulousness of meaning, but, in legal interpretation, the ordinary understanding of the words should serve as a vital constraint on the interpretative exercise, unless this interpretation would result in an absurdity. As this court has previously noted in *Cool Ideas*, this principle has three broad riders, namely —

'(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

- (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a).'

[48] Judges must hesitate 'to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation.'"

[47] It was also stated:

"[53] In De Beer NO this court articulated the proper approach when deciding between competing constructions of legislation:

'This court has accepted the well-recognised principle of constitutional construction that where a statutory provision is capable of more than one reasonable construction, one of which would lead to constitutional invalidity and the other not, a court ought to favour the construction which avoids constitutional invalidity, provided such interpretation is not unduly strained.'

[48] Thus it is clear that whilst this court does have a discretion to raise a constitutional issue mero motu, this discretion should be used sparingly and only in circumstances where the legislation cannot be read inclusively and where it is restrictive in its interpretation. Thus it falls to be asked whether I should raise it at all.

Whether the rule nisi should be confirmed

Legislation and interpretation

[49] There are certain provisions which have a bearing on the answer to this question. They are the following:

49.1 The Children's Act:

49.1.1 the definition of "marriage" as "... a marriage-

- (a) recognised in terms of South African law or customary law; or
- (b) concluded in accordance with a system of religious law subject to specified procedures, and any reference to a husband, wife, widower, widow, divorced person, married person or spouse must be construed accordingly."

49.1.2 the definition of "parent" as inter alia: "... in relation to a child, includes the adoptive parent of a child, but excludes-

- (a) ...
- (b) any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation; and

- (c) A parent whose parental responsibilities and rights in respect of a child have been terminated.”

49.1.3 section 19 which relates to parental rights and responsibilities of mothers and states:

“(1) The biological mother of a child, whether married or unmarried, has full parental responsibilities and rights in respect of the child.

(2) If-

- (a) the biological mother of a child is an unmarried child who does not have guardianship in respect of the child; and
- (b) the biological father of the child does not have guardianship in respect of the child, the guardian of the child's biological mother is also the guardian of the child.
- (3) This section does not apply in respect of a child who is the subject of a surrogacy agreement.”

Should A's birth certificate reflect both first and second applicants as her “parents”?

[50] The birth of a child is registered pursuant to the provisions of section 9 of the BDRA as read with Regulation 3 which states:

“Any South African citizen must give notice of the birth of his or her child within 30 days of the birth as contemplated in subregulation (3)...”

[51] Subregulation

- (3) identifies the forms to be used and procedures to be followed when a birth is registered. Specifically, the two relevant forms are:

51.1 Annexure 1A to the regulations: DHA-24: the Application for a Birth Certificate within 30 days;

51.2 Annexure 1D to the regulations DHA-24/PB: the Proof of Birth.

[52] The form DHA-24 requires, inter alia, the following details:

52.1 Part A: Details of the child;

52.2 Part B: Details of the Mother (Parent A) which in the case of a Civil Union must be completed by the natural mother;

52.3 Part C: Details of the Father.

[53] The Proof of Birth form requires, inter alia, the following details:

53.1 Part C requires “Particulars of Mother/Parent A”;

53.2 Part D requires “Particulars of Father/Parent B”.

[54] It is important to note the generic references to “Parent A” and “Parent B” on each form.

[55] Ms du Toit has submitted that the inclusion of the terminology “Parent A” and “Parent B” in both forms is intentional and allows for same sex persons to register as the parents of a child. In my view, the fact that the DHA-24 form makes specific provision for the details of the natural mother in the event of a Civil Union marriage, means that Parent B would include the details of the spouse in a Civil Union. I also agree that the generic terminology referred to in para [54] supra is intentional and allows spouses married in terms of the Civil Union Act to be registered as the parents of a child born of the gametes of one of those spouses, and I am informed that the applicants were registered as the parents of A by the Department of Home Affairs without demur. (my emphasis)

[56] Thus it is clear that para 1.3[33] of the rule nisi must be confirmed.

Is section 40 unconstitutional?

[57] The Children’s Act was assented to on 8 June 2006 and was introduced in two parts:

57.1 on 1 July 2007, sections 1 to 11, 13 to 21, 27, 30, 31, 35 to 40, 130 to 134, 305, 307 to 311, 313 to 315 and Schedule 4[34]; and

57.2 on 1 April 2010, the remaining sections[35].

[58] The Civil Union Act was assented to on 29 November 2006 and commenced on 30 November 2006 and it thus pre-dates the provisions of sections 18, 20 and 40 of the Children’s Act. Thus, the provisions of the Civil Union Act, where there is reference to a specific gender for example “husband” (in section 40) should be read to incorporate a civil union spouse especially as the Children’s Act itself references the Civil Union Act in its definition of a “marriage”.

[59] What is important is that section 40 does provide for “spouses”. This is clear from the specific wording of section 40(1) itself.

[60] In my view the use of the word “husband” in section 40(3)(b) is deliberate as it is clear that in the present context, only a man will be able to provide the second gamete required to fertilise the ovum. Therefore, in order to prevent any common law obligation that arises between the sperm donor and the child, the legislation had to make provision that no right, responsibility, duty or obligation arises between the child born via artificial insemination and the gamete donor except when:

“(b) that person was the husband of such woman at the time of such artificial insemination.”

[61] Furthermore, had the legislature intended for section 40(1) to only refer to a man it would have specifically used the word “husband” and not the word “spouse” as it did in section 40(3), but this is not what it did.

- [62] What section 40(3)(b) does is to give legislative effect to the *pater est quem nuptiae demonstrant* maxim and thus the child born during the course of a marriage, even though conceived using the gametes of a donor, would be considered to be the child of the husband with all the common law and legislative responsibilities, rights, duties and obligations that arise from that relationship. This renders any obligation on the husband to adopt the child nugatory and unnecessary.
- [63] Because a “marriage” includes a Civil Union, the “spouse” referred to in section 40(1) must include a person married in terms of the Civil Union Act.
- [64] I cannot agree with applicants’ contention that section 40 does not apply to a same-sex couple as section 40(1) specifically states that the married couple is deemed to be the parents “as if the gamete or gametes of those spouses had been used for artificial insemination” and thus postulates a scenario where the gamete of only one of the spouses was used for artificial insemination.
- [65] The entire purpose of this is to create legal certainty regarding the acquisition of parental responsibilities and rights in respect of a child born as a result of artificial insemination.
- [66] In my view, the position is similar to that pertaining to adoption and surrogacy:
- 66.1 section 40 states that a child born as a result of artificial insemination “must for all purposes be regarded to be the child of those spouses...”;
- 66.2 an adopted child “must for all purposes be regarded as the child of the adoptive parent and an adoptive parent must for all purposes be regarded as the parent of the adopted child”[36];
- 66.3 where, for example, two men are the commissioning parents and conclude a court sanctioned surrogacy agreement in accordance with Chapter 19 of the Children’s Act, section 297 specifically provides that the child born is “for all purposes the child of the commissioning parent or parents”[37] and they thus both acquire parental responsibilities and rights.
- [67] In considering whether section 40 is unconstitutional, the following must also be borne in mind:
- 67.1 section 40 is the successor of section 5 of the Children’s Status Act 82 of 1987. The latter act contained provisions on inter alia paternity, guardianship and status of children including those conceived as a result of artificial insemination. It also included the circumstances when a person was presumed to be the father of an extramarital child unless proved otherwise;
- 67.2 the Children’s Status Act provided that children born as a result of artificial insemination of a woman with her husband’s permission were considered to be the legitimate children of that woman and her husband.

[68] J and Another v Director General, Department of Home Affairs and Others[38] (J and Another) dealt with the situation of children born via artificial insemination to a lesbian couple in a permanent life partnership. The court in that matter ruled that a partner who was not the biological parent was to be regarded as a natural parent and guardian and that the children were legitimate in law. The court ordered the Department of Home Affairs to register both parents as parents on the children's birth certificates.

[69] In J and Another the Constitutional Court specifically ordered inter alia that:

69.1 section 5 of the Children's Status Act is declared inconsistent with the Constitution to the extent that the word "married" appears in that section and to the extent that that section does not include the words "or permanent same-sex life partner" after the word "husband" wherever it appears in that section;

69.2 the words "as if the gamete or gametes of that woman or her husband were used for such artificial insemination" are struck out.

[70] But where J and Another differs from this matter is that in 2003 the Civil Union Act had not been promulgated and the word "marriage" did not include one concluded in terms of that Act; the word "spouse" also did not include a same-sex couple. Thus, where section 5 was struck down in J and Another because it failed to include same-sex couples, the same cannot hold true for its successor, the Children's Act.

[71] It appears to me, for the reasons set out in paras [59] to [64], that the use of the word "spouse" in section 40(1) is not contradictory to the use of the word "husband" in section 40(3)(b) as each provision has its own separate legal focus.

Do the applicants acquire joint responsibilities and rights?

[72] This, of course, must be answered in the context of whether the second applicant, who is not the biological parent of A, automatically acquires responsibilities and rights. Both Ms Haupt and Ms du Toit referred me to sections 19 and 20 of the Children's Act in their development of an argument as to whether these sections can be used to confer responsibilities and rights on the applicants. But in my view sections 19 and 20 do no more than affirm the common law position that:

72.1 "The biological mother of a child, whether married or unmarried, has full parental rights and responsibilities in respect of the child"[39];

72.2 "The biological father of a child has full parental rights and responsibilities in respect of the child if:

- (a) he is married to the child's mother; or
- (b) he was married to the child's mother at
- (i) the time of the child's conception;

(ii) the time of the child's birth; or

(iii) anytime between the child's conception and birth.”[40]

[73] The use of the word “spouse” in section 40(1), instead of the word “husband”, points to the intention of the legislature to include same sex female couples. This being so, it then confers automatic rights and responsibilities on the spouses of a child born of artificial insemination. Thus the limited application of section 40(3)(b) has no bearing on the present factual matrix.

[74] It is a *sine qua non* that, as A's biological parent, the first applicant automatically acquired responsibilities and rights at her birth and, for the reasons stated *supra*, the second applicant is conferred with the same rights and responsibilities as first applicant in respect of A from the moment of A's birth and no adoption is thus required.

[75] As a result, no declaration of invalidity or unconstitutionality is required.

Court sanctioned artificial insemination

[76] Both Ms du Toit and Ms Haupt are of the view that each artificial insemination matter in respect of a same-sex couple should come before court to be considered in much the same way as surrogacy applications.

[77] Surrogacy has been specifically provided for in Chapter 19 of the Children's Act. It has its origins in the sometimes contentious situation where a third party carries and delivers a child for another couple (married or not) or a person. The whole purpose of Chapter 19 is the prevention of the commercialisation of this practice and prior to the enactment of Chapter 19 it would appear that the only way in which commissioning parents could acquire responsibilities and rights of the child was by way of adoption.[41]

[78] This issue does not arise here as the applicants (and specifically the first applicant) is able to conceive and carry a child to term.

[79] In my view, to impose the restrictions sought by Ms Haupt and Ms du Toit would trespass on the doctrine of separation of powers which must be jealously guarded. In my view, had the Legislature intended to provide for only court sanctioned artificial insemination, it would have provided for this in the Children's Act, as it did with surrogacy. The fact is that it did not, and therefore no such restriction can be read into section 40 - to do so would create an absurdity against which Chisuse & Others warns.

[80] Given the above, the following order was handed down on 21 May 2021:

”1. The rule nisi granted on 9 February 2021 is made final in the following respects:

1.1. that the minor child (A), born on 10 March 2021, is considered to be the child of the First and Second Applicants from the moment of her birth;

1.2. that it is declared that the First and Second Applicants shall have full parental rights and responsibilities in respect of A as is provided for in terms of the Children's Act 38 of 2005 as from the moment of A's birth;

1.3. that the registration of birth of A, as required in terms of Chapter II of the Births and Deaths Registration Act, 51 of 1992, shall be effected so that the register shall reflect the First and Second Applicants as A's parents respectively, from the date of her birth;

1.4. that no adoption procedures are required in respect of A;

1.5. it is declared that the Third Applicant is a gamete donor and no right, responsibility, duty or obligation arises between him and A, nor shall the Third Applicant obtain any right of guardianship, parenthood, care or contact in respect of A;

1.6. it is declared A will have no claim for maintenance or of succession against the Third Applicant or any of his relatives.

2. This application is declared to be confidential and:

2.1 the Court file and application shall be retained in the Chief Registrar's office;

2.2 the identity of the parties to this application, or any facts which may cause them to be identified, shall not be published and/or made public. “

JUDGE B NEUKIRCHER

JUDGE OF THE HIGH COURT

Matter heard on: 9 February 2021 and 30 March 2021

Date of order: 21 May 2021

Date of judgment: 11 August 2021

Delivered: This judgment was prepared and authored by the Judge whose name is 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 11 August 2021.

For the Applicant :

Adv Randall

Instructed by :

Andrew Martin & Associates

Curatrix ad litem :

Adv LC Haupt SC

: Adv Nchabeleng

Amicus Curiae :

Adv du Toit

Centre for Child Law

[1] And in particular, the second applicant

[2] Act No. 17 of 2006

[3] Using the gametes of first applicant and third applicant

[4] This is dealt with further in paragraph 24 below

[5] Act No. 38 of 2005

[6] (29936/11

[2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP); [2011] 4 All SA 630 (GNP) (27 September 2011)

[7](CCT 40/01) [2002] ZACC 20; 2002 (10) BCLR 1006; 2003 (2) SA 198 (CC) (10 September 2002)

[8] Although stated in the context of surrogacy applications, these words hold true for all matters in which the best interests of a child are considered

[9] Where the application involved the issue of the adoption of two children to a lesbian couple

[10] 17 of 2006

[11] Act 108 of 1996

[12] Also interchangeably referred to as “the applicants” in this judgment. As the third applicant elected not to actively participate in the hearing, and only filed a confirmatory affidavit,

he is referred to as DHR

[13] They state that no fertility clinic or genealogist was involved in this process

[14] GN R.175 GG 35099 of 2 March 2012

[15] Although a copy of the Donor Agreement was attached to the application, it was not dated ,but the application and the confirmatory affidavit by DHR specifically provide for the termination of any of DHR’s parental responsibilities and rights towards A

[16] Section 292(1)(c)

[17] Section 293(1)

[18] Which provides “(2) Everyone has the right to bodily and psychological integrity, which includes the right – (a) to make decisions concerning reproduction...”

[18] Which provides

“(2) Everyone has the right to bodily and psychological integrity, which includes the right –

(a) to make decisions concerning reproduction...”

[19] GN 175 of 2 March 2012

[20] GN35099 on 2 March 2012

[21] “Competent person” in relation to artificial fertilization means a person registered as such in terms of the Health Professions Act, 1974 (Act No. 56 of 1974), who is-

(a) a medical practitioner specializing in gynaecology with training in reproductive medicine;

(b) a medical scientist, medical technologist, clinical technologist with training in reproductive biology and related laboratory procedures;”

[21] “Competent person” in relation to artificial fertilization means a person registered as such in terms of the Health Professions Act, 1974 (Act No. 56 of 1974), who is-

(a) a medical practitioner specializing in gynaecology with training in reproductive medicine;

(b) a medical scientist, medical technologist, clinical technologist with training in reproductive biology and related laboratory procedures;”

[22] Mthembu v Letsela and Another (71/98) [2000] ZASCA 181; [2000] 3 All SA 219 (A) (30 May 2000) at para 28

[23] All three applicants

[24] The first and second applicant

[25] Zola, IK – Social Medical Enquiries Philadelphia; Temple University Press, 1983, at p295

[26] With specific emphasis on section 40 of the Act

[27] And specifically section 40(1) and 40(3)(b)

[28]

[2004] ZACC 14; 2004 (5) SA 331 (CC)

[29]

[2000] ZACC; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC)

[30] At paras 21-22

[31] At para 43

[32] 2020

(6) SA 14 (CC) at paras [46] and further

[33] In para [25] supra

[34] Gazette 30030 of 29 June 2007

[35] Gazette 33076 of 1 April 2010

[36] Section 242(3)

[37] Even though both cannot be a gamete donor (except perhaps in the case of each one's gamete fertilizing an ovum and twins resulting from the pregnancy)

[38] (CCT46/02) [2003] ZACC 3; 2003 (5) BCLR 463; 2003 (5) SA 621 (CC) (28 March 2003)

[39] Section 19(1)

[40] Section 20

[41] Ep WH at par 35 and par 43 - 52 as regards international law

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