

SOUTH AFRICA / JUDGMENT

KB and Another v Minister of Social Development (966/2022) [2023]

ZAMPMBHC 12 (20 February 2023)

[2023] ZAMPMBHC 12

COURT

Mbombela High Court, Mpumalanga

BEFORE

Sibuyi

CASE / FILE NUMBER

966/2022

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FLYNOTES:

SURROGACY

AND GENETIC LINK REQUIREMENT

FAMILY

– Surrogacy – Genetic origin – Requirement that gamete of at least one of commissioning parents be used –

Applicants seeking to expand requirement to include a genetic link between siblings – Purpose of section to ensure genetic link

between a child and at least one parent – Section has nothing to do with right of minor child to have sibling with same genetic link – Children's Act 38 of 2005, s 294.

REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA MPUMALANGA DIVISION

MBOMBELA

(MAIN SEAT)

Case

Number: 966/2022

REPORTABLE:

NO

OF

INTEREST TO OTHER JUDGES: YES

REVISED:

YES

20/02/2023

In

the application between: KB
First
Applicant
HBB
Second
Applicant
and
MINISTER
OF SOCIAL DEVELOPMENT
Respondent
DONRICH
THALDAR
First
Amicus
Curiae
BONGINKOSI
SHOZI
Second
Amicus
Curiae

JUDGMENT

SIBUYI AJ

Introduction

- [1] This is an application to expand the genetic link requirement in s 294 of the Children’s Act, Act 38 of 2005 (“the Act”) to include a genetic link between siblings. The Applicants launched an application for direct access to the Constitutional Court under case number CCT182/21 wherein they sought the above relief. Direct access was refused and hence the current application to this Court.

The Parties

- [2] The Applicants are cited as “KB” and “KBB” pursuant to a Court order granted by this Court intended to protect their identity and or privacy. The first Applicant is an adult female who wishes to enter into a surrogacy agreement in order to have further children of her own. The second Applicant is the first Applicant’s husband. The application is brought by the Applicants not only on their own behalf but also on behalf of their three-year-old minor child (“the minor child”).
- [3] The Respondent is the Minister of Social Development (“the Minister”), cited in her capacity as the Minister responsible for the administration of the Act.
- [4] DONRICH THALDAR was admitted as the first Amicus Curiae. He is a visiting Scholar at Harvard Law School, currently domiciled in the United States of America.

[5] BONGINKOSI SHOZI was admitted as the second Amicus Curiae. He is currently a Postdoctoral Researcher at the University of California, San Diego, United States of America.

[5.1] I am grateful to the amici curiae for their contributions to these proceedings. They have been of valuable assistance on the subject matter.

The Supplementary Affidavit

[6] The Respondent filed a supplementary affidavit addressing some of the issues raised in the founding affidavit and sought leave to file the supplementary affidavit. The Applicants did not oppose the application for leave to file the supplementary affidavit and chose to abide by the Court's decision. At the commencement of the hearing, I granted the Respondent the required leave.

The relief sought

[7] The main relief sought in this application is set out in the Notice of Motion as follows:

"1. That s 294 of the [Act] be declared ... inconsistent with the Constitution of the Republic of South Africa

("the Constitution") to the extent that the section does not include the words:

'Or where the genetic origin of the child is the same as that of any of her siblings' at the end thereof after the words 'where

the commissioning parent is a single person, the gamete of that person'.

2. That, in s 294 of the [Act] the words:

2.1 'Or where the genetic origin of the child is the same as that of any of her siblings at the end thereof after the words 'where the commissioning parent is a single person, the gamete of that person'.

3. That it be declared that s 294 of the [Act] is to be read as follows: 'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be affected by the use of the gametes of both commissioning parents or, that it is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person the gamete of that person or where the genetic origin of the child is the same as that of one of any of her siblings'.

The brief factual background

[8] The Applicants are a married couple. They met in 1995 and got married in December

2011. The second Applicant has two adult children from his previous marriage. The Applicants have a son who is currently three years old. The first Applicant struggled with uterine growths which made it difficult for her to fall pregnant naturally. She had

her first myomectomy in 2009 followed by a further three myomectomies. The second Applicant had a previous vasectomy which was

reversed. However, in the year 2000 he was diagnosed with testicular cancer, for which he was medically treated. The couple tried for five years to have children. They had numerous attempts at in vitro fertilisation (IVF) and intrauterine insemination (IUI) but were unable to fall pregnant.

[9] They were advised to make use of donor gametes in order to have children. They found donors that suited their requirements and had seven embryos fertilised. The first Applicant underwent her first transfer which resulted in the birth of the minor child at thirty-three weeks. The minor child was born at thirty-three weeks because her uterus ruptured during the gestation period. Once the first Applicant was medically cleared the second transfer was done. This resulted in a positive pregnancy. However, at six months she had to undergo emergency surgery during which she lost the baby. She had to do the emergency surgery because her life was in danger. During that process, she lost her uterus and is unable to carry the remaining three embryos. The Applicants are of the view that the only way for the embryos to be born would be via a surrogate mother. The

Applicants have sourced a willing surrogate who is prepared to assist them. A surrogate motherhood agreement has been drafted and will be signed by the parties if this application is successful. Their intention is to approach the High Court to authorize the surrogacy motherhood agreement.

[10] The Respondent opposes the application and contends that the Applicants have not made out a case for the relief sought and that the question relating to the constitutional invalidity of s 294 of the Act has already been decided by the Constitutional Court in the matter of *AB and Another v Minister of Social Development* (“*Ab and Another*”). With regard to the reading into the provision of s 294 of the Act, the suggested sentences, the Respondent contends that this is a polycentric legislative measure which must best be left for the executive to determine. In addition, the Respondent raised several “preliminary points” (my emphasis). For what it is worth, I will deal with them as such. I now deal with the “preliminary points” raised by the Respondent.

The first preliminary point: lack of jurisdiction

[11] The Respondent, in summary, contends that the Applicants brought this application before this Court against the Respondent whose principal place of business is in Pretoria. As a result, this Court lacks jurisdiction to adjudicate this matter. It is common cause that the Respondent’s principal place of business is in Pretoria and that the Applicants and the minor child resides within the jurisdiction of this Court.

[12] Ms De Vos, on behalf of the Applicants, submitted that the jurisdiction argument loses sight of the fact that the application is not only brought on behalf of the Applicants but also in the Applicants’ representative capacity on behalf of the minor child. She argued that it is trite that a high Court, as the upper guardian of children in its jurisdiction, has jurisdiction over a

child resident in its jurisdiction. A Superior Court has inherent jurisdiction to make orders in respect of matters that come before it, subject to certain limitations imposed in some instances by the common law and by statute. This inherent jurisdiction is now enshrined in Section 173 of the Constitution, which provides that a High Court has the inherent power to protect and regulate its own process and to develop the common law, taking into account the interest of justice. Each High Court has jurisdiction with regard to a specific territory within the Republic of South Africa. In this regard Section 19 of the Supreme Court Act provides that a provincial division shall have jurisdiction over all persons residing or being in and in relation to all causes arising and all offences triable within its area of jurisdiction and all matters of which it may according to law take cognisance. Although the general principle is that a plaintiff must go to forum of the defendant, it has long been accepted that the Court within whose area of jurisdiction a minor happens to be at the time of the hearing of a matter, will also have jurisdiction to hear the case as the Court exercises upper guardianship over a child.

[12.1] Furthermore, she argued that ss 29 and 45 of the Children's Act provides for jurisdiction of a High Court within whose area of jurisdiction the child concerned is ordinarily resident and this includes issues pertaining to artificial fertilization. The Children's Act also provides that every child has a right to bring and be assisted in bringing a matter to Court provided that the matter falls within the jurisdiction of the Court.

[13] Mr Mpshe, on behalf of the respondent, basically contended that neither of the requirements for jurisdiction had been established. He further submitted that the reliance on ss 29 and 45 of the Act is without merit because these provisions deal with specific statutory jurisdiction and does not cover the current application. That, properly construed, this case is about the first and second Applicants desiring to have another baby. It has nothing to do with the minor child. The minor child is only being used as a means to found jurisdiction.

[14] The determination of jurisdiction involves a two-stage inquiry: it has, first, to be established whether the Court is, as a matter of principle, competent to take cognisance of the particular case (that is, whether a recognised jurisdictional ground is present); and second, if a jurisdictional ground is established, whether an effective judgment can be given.

[15] It is correct that the jurisdiction of Courts is regulated by s 169 of the Constitution read with s 21 of the Superior Courts Act. The Constitutional Court in *Mukaddam* held that:

"[28] ... However, Constitution guarantees everyone the right of access to Courts which are independent of other arms of government."

But the guarantee in s 34 of the Constitution does not include the choice of ... forum in which access to Courts is to be exercised.

This omission is in line with the recognition that Courts have an inherent power to protect and regulate their own process in terms of s 173 of the Constitution..." (Own emphasis)

[16] Section 169 of the Constitution deals with the divisions of the High Courts. Section 169 provides:

"[2] The High Court of Africa consists of the Divisions determined by an Act of Parliament, which Act must provide for-

- a. the establishment of Divisions, with one or two more seats in a Division; and
- (b) a sign of jurisdiction to a Division or a seat with a Division."

[17] Section 21 of the Superior Courts Act 10 of 2013 provides for the jurisdiction of the High Courts in both civil and criminal matters. The material portion of section 21 provides:

"(1) A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance . . ."

[18] However, jurisdiction of South African Courts is not determined solely by s 21 of the Superior Courts Act. Generally, the jurisdiction of our Courts has three sources; statutory, common law and inherent jurisdiction. Apart from the Superior Courts Act, matters of jurisdiction are dealt with in numerous statutory provisions. Whether the Act provides a statutory jurisdictional ground is a question which requires an interpretation of the Act, and in particular the ss 29 and 45 referred to by Ms de Vos. I agree with

the submission by Mr Mpshe that the reliance on ss 29 and 45 of the Act is without merit because these provisions deal with specific

statutory jurisdiction in respect of parental responsibilities and rights, and children's Court jurisdiction, respectively. They do not cover the current application proceedings.

[19] Now, is it correct to say that in the Applicants' case none of the jurisdictional facts in accordance with the principles of the law of domicile, the legal requirements of residence, as understood in procedural law are present? There is no doubt that the Gauteng Division, Pretoria, would have jurisdiction to hear this application on the basis that the Respondent is an incola of that Court. But the question is whether this Court also has the jurisdiction to hear the matter by virtue of the fact that the Applicants are domiciled within the jurisdiction of this Court. In terms of s 21 of the Superior Courts Act, this division has jurisdiction over the Applicants but has no jurisdiction over the Respondent, unless the Respondent, who is a resident of another division is joined as party to any cause in relation to which this division has jurisdiction. As upper guardian, this Court has jurisdiction to make whatever order it considers necessary for the protection of any child physically present within the area of its territorial jurisdiction whether such child is ordinarily resident here or not. It is clear from the authorities that the basis of the Court's jurisdiction in these children's matters is that it is the upper guardian of every child. The whole trend of authority seems to support this view.

[20] In this matter the children's minor child is a party to the proceedings represented by the parents. The purpose of these proceedings is to assert and or protect the child's rights. In line with the above authorities and as argued by Ms de Vos, this Court has jurisdiction to hear the application of the minor child. In terms of s 21 of the Superior Courts Act, this Court has therefore jurisdiction over the Respondent, who had been joined as a party to child's cause in relation to which this division has jurisdiction. Even if I were wrong in my interpretation of s 21 of the Superior Courts Act, this Court will still be entitled to hear the matter because in terms of the principle of *causa continentia*, where a Court has jurisdiction over part of the cause of action (the minor child's cause), considerations of convenience, justice and good sense justify it exercising its jurisdiction over the whole cause (the parent's cause) in respect of all the parties. Access to Court cannot be denied on technical defences. Especially so, when constitutional challenges are central to the cause of action. If this application is heard by this Court, instead of the Pretoria Gauteng Division, what practical and

jurisdictional difficulties can arise? I guess the answer is none. In that case, Justice Cameron had the following to say on this issue: "A further reason why the jurisdictional complaint is devoid of merit is its utter lack of practical import. Counsel for the province observed, correctly, that the Applicants were free to initiate the proceedings in the Ciskei High Court. That undoubtedly would have tied the entire class to the forum Court through the location or residence (*situs*) of the party against whom they were invoking legal process. But when pressed in argument to explain why being sued in Bisho rather than Grahamstown (where the Legal Resources Centre is located) would have made any difference to the legitimate interests and convenience of the provincial government, counsel was unable to give an answer". Without practical and jurisdictional difficulties, this Court can grant effective judgment on this application. I conclude therefore that this Court does have the requisite jurisdiction to deal with the matter. Therefore, jurisdiction point in limine does not succeed.

Second preliminary point: non-compliance with rule 6(1) of the Uniform Rules of Court

[21] The basis for the above point in limine is that the Applicants failed to comply with rule 6(1) of the Uniform Rules of Court in that the founding affidavit in support of this application does not set out the facts upon which they rely for the relief sought. That the Applicants chose instead to attach a founding affidavit which was filed before the Constitutional Court to support the relief sought before this Court. The affidavit referred to in the Applicants' founding affidavit and filed in the Constitutional Court was filed in support of an application for direct access to the Constitutional Court. Further, that it is impermissible for a party to merely annexe to its affidavit documentation and to request the Court to have regard to it. The party seeking to rely on such a document is required to identify which of the portions of an annexure reliance is placed and an indication of the case which is sought to be made out on the strength thereof. As a result, it is argued that the Applicants' founding affidavit does not disclose a cause of action and the application must be dismissed with costs.

[22] In response, Ms de Vos argued that the above argument borders on the ridiculous. She argued on behalf of the Applicants that the Applicants have put two affidavits before this Court containing their cause of action and the facts upon which the application is based. The first affidavit made for the purposes of the Constitutional Court application is properly incorporated in the second affidavit made for the application before this Court in paragraphs 4 and 5 of the founding affidavit.

[23] The Applicant in motion proceedings must make out a proper case in the founding papers. I agree with Ms de Vos that the above point in limine has no merit. The specific constitutional challenge, the subject matter of this application is set out specifically in paragraphs 21 to 39 of the attached and referred to [Constitutional Court] founding affidavit. The Respondent, in a detailed response, answered the constitutional challenge. Therefore, the Applicants in these motion proceedings have made out a proper case in the founding

papers and the point in limine must fail. Even if I were wrong in concluding that the Applicants in these motion proceedings have made out a proper case in the founding papers, the Respondent's complaint regarding the founding affidavits are highly technical. A Court has discretion in a particular case to decide whether the Applicant's founding affidavit contains sufficient allegations for the establishment of his case. In the present circumstances of this matter, it is in the interest of justice that such discretion must be tilted towards the finding that a proper case is made out in the founding affidavit. On this ground also, the above point in limine must also fail.

Third preliminary point: there is a material dispute of fact

[24] It is argued on behalf of the Respondent that there is a material dispute of fact in the evidence of experts of both parties. That the experts hold divergent and irreconcilable opinions insofar as the contention that it is in the best interest of the minor child to have a sibling that is genetically related to the minor child. The Applicants assert that a genetic link between siblings is important for the upbringing and well-being of minor children. On the other hand, the Respondent's expert asserts that there are four factors which influence the upbringing of a child. In this regard the Respondent's expert concludes that one variable cannot be considered crucial to influence children's upbringing as there are many factors which come into play. More importantly, the Respondents expert concludes that "... having sibling who are not genetically related to a child has no bearing and effect in the upbringing." In the light of the above, it is argued that there are material disputes of fact that needs to be referred to oral evidence.

[25] It is trite that a referral for oral evidence can only be made where there is a genuine dispute of fact which is material to the determination of the case. The Constitutional Court in the matter of *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* held that a referral for oral evidence can only be made where there is a genuine dispute of fact which is material to the determination of the case. In accordance with the Plascon-Evans rule, a dispute of fact exists where it raises a real,

genuine or bona fide dispute of fact or which is not so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. On the version put forward by the Respondent one finds it so difficult to understand the origin of the dispute. The Applicants contends that a genetic link between the siblings is important for the upbringing and well-being of minor children. The Respondent's expert does not explicitly deny the above contention but qualifies the contention by stating that one variable (genetic link) cannot be considered crucial to influence children's upbringing as there are many factors which come into play. Now, where is the dispute, let alone a genuine one. In the above context, there is no genuine dispute.

- [26] On the second leg, the Respondent's expert opines that having siblings who are not genetically related has no bearing and effect in the upbringing [of the child]. This contention only covers the upbringing aspect and not the wellbeing of the child. Therefore, only that aspect is disputed. The basis for the denial is not articulated. Even if the Respondent was to deny that specific aspect, such denial would have no basis. On what basis would one suggest that it is not in the best interest of a minor child to have a genetically linked sibling for his upbringing? Such argument may safely be rejected by the Court. In the language of the Plascon-Evans rule the dispute alleged by the Respondent is not real, genuine or bona fide, it is so far-fetched and clearly untenable that this Court is justified in rejecting it merely on the papers.
- [27] On the same breath, it cannot be said that the Respondent's supplementary affidavit clearly sets out the real genuine and bona fide dispute of fact. The SCA in the matter of Wightman t/ a JW Construction held that: "A real, genuine and bona fide dispute of fact can exist only where the Court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed...". In the light of the above, this point in limine must fail.

Fourth preliminary point: Constitutional Court has already pronounced itself on the constitutionality of s 294 of the Act

- [28] It is correct that the Constitutional Court has already pronounced itself on the constitutionality of s 294 of the Act. The Applicants are challenging the constitutionality of s 294 and seeking an order that will allow a surrogacy motherhood agreement based only on a genetic link between the minor child and the child sought to be conceived through a surrogacy motherhood agreement. In the matter of AB and Another s 294 of the Act was challenged on the grounds that the "genetic link requirement" in the impugned provision violates the rule of law and AB's rights to equality, human dignity, privacy, reproductive autonomy and access to health care services. In this matter, s 294 of the Act is challenged on the basis that it unreasonably and unjustifiably infringes ESB's rights to dignity, equality and offends against the principle of paramountcy of the child's best interest. The main distinguishing factor between the two challenges is the fact that the second challenge is also based on the paramountcy of the child best interest. In fact, during argument, it became clear that the Applicants, in challenging s 294, solely rely on the best interest of the child

right. No argument grounded on the rights to equality, human dignity, privacy, reproductive autonomy and access to health care services was argued on behalf of the Applicants during the hearing. I guess such arguments, had they been presented, would have strengthened the Respondent's point in limine. Further, Applicants' heads of argument also draw the battle field around the best interests of the child.

- [29] Therefore, to say that the issues in this matter are the same as the issues dealt with in AB and Another is just an oversimplification. In the latter, there was no application based on s 28 of the Constitution by a minor child. I find that the issues raised in the two cases, though interlinked, are not the same. Hence, I am of the view that the above point in limine must fail.

The Merits

- [30] The only question, as formulated by the Applicants, is whether the prohibition contained in s 294 of the Act, which has the effect of denying the minor child a genetically linked sibling, passes constitutional muster. It is the Applicants case that it is in the best interest of the minor child to have a genetically linked sibling for the following reasons: a biological sibling could be a potential match for bone marrow, tissue or organs should there ever be a medical need in later life; and that the relationship between siblings counts as one of the most significant relationships one can have in one's life. To this end sharing genetic material, having the same parents from birth, having shared memories and similar experiences all contribute to a deep lifelong understanding of one another.
- [31] On the papers, the two parents, on their own, did not allege and or prove any violation of their rights. Under the heading "CONSTITUTIONAL CHALLENGE", they allege on paragraph 34 of the founding affidavit that "...it would be in [the minor child's] interest to have a sibling that is genetically linked to him. That the current prohibition impacts on his right to have a family with siblings that are genetically linked to him. This infringes on his right to dignity and equality for obvious reasons" (my emphasis).
- [32] In respect of the minor child, they contend that s 294 of the Act infringes on his right to dignity, equality and s 28(2) (best interest of the child) right. However, the Applicants failed elaborate how the impugned legislation infringes on child's rights. They contended "that, as the purpose of s 294 [of the Act] is to protect the best interest of the child, it follows that where the prohibition goes against the best interest of the child [s 294 of the Act] cannot pass constitutional muster. The rationale for the provision does not take into account a situation such as this one, where there is already a child with a genetic link to the parents who is now denied the possibility of having a genetically linked sibling" (my emphasis).
- [33] The Constitutional Court has held that Constitutional challenge cannot be done in a vacuum. To this end, it is incumbent upon a party raising a constitutional challenge to identify the right that is allegedly violated and to provide the basis upon which it is contended that the right is violated. In this matter, I agree with the Respondent that the Applicants simply identified the rights allegedly violated by s 294 of the Act without

providing the Court with the basis upon which it is contended such rights are violated. The bald allegations by the Applicants do not even trigger the Harksen approach. There is nothing to hang on the Harksen scale.

- [34] The Applicants obtained a psycho-legal report by Voula Samouris which spells out that a biological sibling would have the result of better achieving the various stages of attachment to each other that siblings should go through. Based on that report, the Applicants, in a convoluted argument, contend that the Constitution provides that a child's best interest is of paramount importance in every matter concerning the child and that once it has been established that it is in the child's best interest to have a genetically linked sibling, any requirement in legislation prohibiting such will be unconstitutional. This bald contention alone does not assist the Applicants. Without the basis upon which it is contended that the minor child's rights are violated, this Court is unable to access the violation and the consequences thereof.
- [35] The Applicants simply contend that the question whether s 294 of the Act violates the Applicants constitutional rights has already been answered in the affirmative by the minority judgement in AB and Another wherein the Court found that s 294 of the Act objectively limits the right to psychological integrity and also that it harms the dignity of those who are both conception and pregnancy infertile. I fail to understand the relevance of the above argument because the minority finding in AB and Another had nothing to do with a claim to have a genetically linked sibling. Further, the Applicants have already distanced themselves from the AB and Another judgment on the basis that that judgment was decided in a different context. The Applicants cannot blow hot and cold. The above argument makes no sense and is accordingly rejected.
- [36] In AB and Another the Constitutional Court had already pronounced that the genetic link limitation on the right to dignity and equality is justified. In that case the question was whether the limitation is justifiable in terms of Section 36(1) of the Constitution. In the majority judgment the Court said that the objective of the inquiry is to determine whether there is a rational link between the impugned provision itself and the genetic link requirement. The provision within the legislation becomes invalid for being inconsistent in its own terms with the Constitution. The Court then stated as follows:

"The correct approach to be adopted when legislative measures are challenged is to determine whether there is a rational connection

between the means chosen and the objective sought to be achieved. A mere differentiation does not render a legislative measure

irrational. The differentiation must be arbitrary or must manifest 'naked preferences' that serve no legitimate governmental

purpose for it to render the measure irrational."

The Court then found that there is a rational connection as the requirement of donor gametes within the context of surrogacy serves a rational purpose namely:

“... the public good chosen by the lawgiver – of creating a bond between the child and the commissioning parents or parent. The creation of a bond is designed to protect the best interest of the child to be born so that the child has a genetic link with its parents. Therefore, a rational connection exists.”

[37] For what it is worth, I now deal with the argument by Ms de Vos that a court has every right to revisit any decision it has made in the past. On the point, Mr Mpshe argued that this Court is bound by the majority judgment in *Ab and Another* on the rationality issue and the minor child's case must fail. For legal certainty our Courts have laid down the *stare decisis* principle. A decision of any precedent setting Court binds that Court and Courts below it. As an exception, only the precedent setting Court can revisit its decision if such decision is clearly wrong. This Court is obliged to follow *AB and Another* findings on the rationality issue, unless the Applicants can show that the two cases are distinguishable on the facts or that *AB and Another* does not apply to this case. The Applicants contend that the above argument does not take into account that the Constitutional Court has every right to revisit any decision it has made in the past (see for instance the issue of maintenance claimable against the estate of a person to whom someone was not married at the time of his death). I must say that this argument on behalf of the Applicants is misplaced because on a proper reading of the *Volks* judgment, only the Constitutional Court may revisit its previous decision and not this Court.

[38] On the second leg, the Applicants contends that the *Ab and Another* case deals with the dignity and rights of a person in a completely different context than that of the current Applicants and the minor child, who is also an Applicant before this Court. And that the question to be answered differs from the questions in the *AB and Another* matter. I have already made a finding on this point wherein I agreed with the Applicants' latter contention that the context is not the same. In any event, assuming that s 294 of the Act does limit the child's rights, which I do not find on the facts, the question is whether the limitation is justified in the present context. Context and the relevant legislative scheme are therefore

important on deciding the rationality issue. I find it unnecessary to repeat the legislative scheme from which s 294 of the Act arose, as it had been clearly captured in paragraphs 246 to 257 of the *AB and Another* judgment.

[39] On the approach to be adopted when legislative measures are challenged the Constitutional Court in the matter of *AB and Another* held that: “The correct approach to be adopted when legislative measures are challenged is to determine whether there is a rational connection between the means chosen and the objective sought to be achieved. A mere differentiation does not render a legislative measure irrational. The differentiation must be arbitrary or must manifest “naked preferences” that serve no legitimate governmental purpose for it to render the measure irrational.” Moseneke DCJ [as he then was] aptly puts it thus in *Law*

Society: “It is by now well settled that, where a legislative measure is challenged on the ground that it is not rational, the Court must examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved...It remains to be said that the requirement of rationality is not directed at testing whether legislation is fair or reasonable or appropriate. Nor is it aimed at deciding whether there are other or even better means that could have been used. Its use, is restricted to the threshold question whether the measure the lawgiver has chosen is properly related to the public good it seeks to realise. If the measure fails on this account, that is indeed the end of the enquiry. The measure falls to be struck down as constitutionally bad.”

- [40] The Constitutional Court in *AB and Another*, as already indicated above has already pronounced that the means chosen (s 294) is nationality related to the public good sought to be achieved. That the Court cannot interfere with a lawfully chosen measure. There is factually and legally nothing new in this matter to justify interference with the lawfully chosen measure. The purpose for which s 294 of the Act was enacted is to protect the child by ensuring that a genetic link exists when that child is conceived, to ensure the need for a genetic link between a child and at least one parent so that there is clarity regarding the origin of a child which is important to the self-identity and self-respect of the child and to assist parents who are conception or pregnancy infertile. I agree with Mr Mpshe that s 294 of the Act, properly, purposefully, and contextually read, has nothing to do with the right of a minor child to have a sibling with the same genetic link. That is another subject altogether. It requires to be explored by the legislature.
- [41] Courts must endeavour to be as faithful as possible, within constitutional constraints, to the purpose of legislation. The impugned legislation has its own purpose. The Applicants in both *AB and Another* and this case miss the point. In their constitutional challenges, they all ignore the purpose of s 294 of the Act. The provisions of s 294 of the Act cannot be analysed in isolation but must be considered against the entire provisions under the self-explanatory heading: Genetic origin of child (my emphasis). It is against this legislative history of Chapter 19 that a determination of the constitutional validity or otherwise of s 294 of the Act must be made. The removal of the genetic link requirement from s 294 of the Act or the creation of an exception thereto, will in essence be a fundamental departure from lawfully chosen policy position. This Court cannot interfere with the lawfully chosen measure on the ground that the Legislature should have taken other considerations into account or that it should have considered a different decision that is preferable (the right to have a genetically linked sibling). I agree that the relief sought by the Applicants, if granted, will violate the principle of separation of powers and interfere with the lawfully chosen measure by the Legislature.

[42] In the light of the above, the constitutionality challenge by the Applicants and or the amici curiae must fail. Since there is no finding that s 294 of the Act is unconstitutional, there can be no reading-in. The reading-in of words into a legislative provision must be preceded by a finding of constitutional invalidity. For the same reasons, the reading-in argument / suggestion by Professor Shozi, must fail.

[43] Therefore, the application by the Applicants must fail.

The Costs

[44] The Applicants and the Respondent asked for costs against each other. The Applicants only succeeded in respect of the points in limine but are unsuccessful in respect of the constitutional challenge. The “ordinary rule is that where litigants unsuccessfully raise important constitutional issues against the State, costs will not be awarded against them”. The rationale for this is to ensure that the parties are not dissuaded from challenging the constitutionality of laws that limit their rights in fear of being mulcted with costs. If an application is not frivolous or vexatious or in any other way manifestly inappropriate, as is the case here, the Applicants should not be ordered to pay costs. A costs order against the Applicants may have a chilling effect on constitutional litigation. In my view, there should therefore be no order as to costs.

The Order

[45] The following order is made:

- 1 The application is dismissed.
2. There is no order as to costs.

H W SIBUYI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA DIVISION, MBOMBELA

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HEARD ON: 30 AUGUST 2022

COUNSEL:

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