

Does the Genetic Link Requirement in Surrogacy Contracts Serve a Rational Purpose?

KB v Minister of Social Development
[2023] ZAMPMBHC 12; 2024 (5) SA 30 (SCA)

1 Introduction

Section 294 of the South African Children's Act 38 of 2005 (Children's Act) states that a surrogate motherhood agreement is invalid unless the conception of the child to be born is brought about by using the gametes of either both commissioning parents or, if that is impossible because of 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. Chapter 19 of the Children's Act contains the legislation on surrogacy applicable to South Africa and this legislation followed the South African Law Commission's (SALC) proposals that surrogate motherhood agreements should be allowed only if there is a genetic link between at least one commissioning parent and the child born from such surrogacy (South African Law Commission Surrogate Motherhood Report" Project 65 of 1992 par 6.6.4.7, 6.6.3.5, and 35). As a result of this Commission, a Parliamentary Ad Hoc Committee was formed in 1994. In its 1999 report, the Committee recommended that intending or commissioning parent (s) be required to contribute at least one of their own gametes in the case of surrogacy (South African Law Commission Report of 1992 par 36). One of the reasons provided for recommending the genetic link requirement was that it was believed to be in the best interest of such a child that the gametes of at least one of the commissioning parents should be used as this would "restrict undesirable practices such as shopping around with a view to creating children with particular characteristics" (South African Law Commission Report of 1992 par 35). The SALC also contended that if both the male and the female gametes used in the creation of the embryo were donor gametes, it would result in a similar situation to adoption, as the child or children would not be genetically linked to the commissioning parent or parents and that, in both partial and full surrogacy, it should be a pre-condition that the child or children should always be genetically linked to at least one of the commissioning parents (South African Law Commission Report of 1992 par 37). The genetic link requirement was then incorporated in section 294 of the Children's Act.

Chapter 19 of the Children's Act requires that surrogate motherhood agreements should be altruistic and confirmed by a High Court before the

surrogate pregnancy ensues. The High Court generally has a discretion as to whether to confirm a proposed surrogate motherhood agreement or not, but, if confirmed, there is legal certainty for the parties when the child is not biologically related to the surrogate mother (full surrogacy) as the child will be deemed to be the child of the commissioning parents from the moment of birth (s 297 of the Children's Act). This also applies when the child is biologically related to the surrogate mother (partial surrogacy). However, a surrogate mother who is also the genetic parent of the child may, at any time prior to the lapse of a period of 60 days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court (ss 298 and 299 of the Children's Act).

Chapter 19 of the Children's Act has not been substantially updated since its enactment. The SALC Report of 1992 did not consider that not all jurisdictions require a genetic link between the intended parent/s and the surrogate-born child. A genetic link is not required in Victoria (Australia) (Assisted Reproductive Treatment Act 2008, Part 4 (Victoria)), Ontario (Canada) (Children's Law Reform Act 1990, Part 1 (Ontario)), British Columbia (Canada) (Family Law Act 2011, Part 3 (British Columbia)), California (United States of America (USA)) (California Code, Family Code), or Greece (Greek legal commentators state that a genetic link is not required under Greek law: see Zervogianni "Surrogacy in Greece" in Scherpe, Fenton-Glynn and Kaan (eds) *Eastern and Western Perspectives on Surrogacy* (2019) 157–159). Until recently, a genetic link was also required in New Zealand, but the requirement has recently been removed (see New Zealand Advisory Committee on Assisted Reproductive Technology *Guidelines on Surrogacy involving Assisted Reproductive Procedures* (December 2013). In 2017, the Committee consulted on removing the genetic link requirement. As a result of this consultation, new Guidelines were issued in September 2020 that removed the requirement of a genetic link (New Zealand Advisory Committee on Assisted Reproductive Technology *Guidelines for Family Gamete Donation, Embryo Donation, the Use of Donated Eggs With Donated Sperm and Clinic Assisted Surrogacy* (September 2020).

One of the arguments in favour of the abolition of the genetic link requirement is that this requirement poses a discriminatory barrier against those parents who cannot provide their own gametes or carry a child to term. The requirement discriminates against infertile persons and prevents the following persons from becoming parents through surrogacy: a male same-sex couple, if both are infertile; an opposite-sex couple, if both are infertile and the woman cannot carry a foetus to term; or a female same-sex couple where both women are infertile and neither can carry a foetus to term. The potential unfairness may be felt particularly acutely by single women who are both infertile and cannot carry a foetus to term and single infertile men who wish to have a child through a surrogate motherhood agreement (see *Ex Parte DW* [2022] ZAKZPHC 11), in which a single infertile man (who could not contribute his own sperm for in vitro fertilisation (IVF)) wished to have children through surrogacy and arranged for the import of sperm from an "identity release" sperm donor in the USA to ensure that the prospective surrogacy child would be able to know his or her genetic origins. The KwaZulu-Natal High Court reluctantly dismissed the application, as section

294 requires that the gamete of a single commissioning parent must be used in a surrogacy arrangement (par 16). By contrast, in South African law, single women who are infertile but who can carry a foetus to term can become mothers using both male- and female-donated gametes through IVF. Some writers do question, however, whether the situation of double-donation in IVF and surrogacy is entirely comparable. Although in IVF, there is no genetic relationship between the legal mother and the child, there is a gestational relationship. Arguments based on epigenetics are sometimes used to support the notion of an almost biological link between a gestational (not genetic) surrogate mother and the child born of the surrogate arrangement (Van den Akker *Surrogate Motherhood Families* (2017) 172–173 and 294).

In 2016, the genetic link requirement in section 294 was challenged in *AB v Minister of Social Development* (2016 (2) SA 27 (GP)) (*AB HC*). The High Court held that section 294 was unconstitutional. However, the Constitutional Court rejected the constitutional challenge by a seven-to-four majority (*AB v Minister of Social Development* 2017 (3) SA 570 (CC)) (*AB CC*). The majority judgment of the Constitutional Court (par 287) held that the genetic link requirement served to protect the best interests of the child born of the surrogacy agreement by the creation of a genetic link and bond with the commissioning parent(s). The Constitutional Court minority judgment held that the High Court that heard the specific surrogacy agreement confirmation application was in the most favourable position to determine whether the use of (anonymous) gamete donors would undermine a child's best interests (par 193).

In the light of the above background, in *KB v Minister of Social Development* ([2023] ZAMPMBHC 12) (*KB HC*), the genetic link again came under the scrutiny of the High Court. In this case note, the authors refer extensively and critically to the majority judgment in the *AB CC* case, which found in favour of retaining the genetic link, seemingly on the underlying premise that it was in the best interests of children born of surrogacy contracts to know their genetic origins. However, it is pointed out that this argument is not similarly required in regard to children born through IVF (see reg 10(2)(a)(ii) of the Regulations Relating to Artificial Fertilisation of Persons, 2012, made under the National Health Act 61 of 2003 GN R175 in GG 35099 of 2012-03-02). This regulation allows parents who are conception infertile (i.e., who cannot contribute gametes) but who can give birth to a child (i.e., are pregnancy fertile) to have IVF treatment using both male and female donor gametes. The argument that it is in the best interests of a child born of surrogacy to know its genetic origins is also inconsistent with the legislative restriction on disclosure of donors' identities without their consent (s 41(2) of the Children's Act and see Thaldar "The Right to Family Life: Why the Genetic Link Requirement for Surrogacy Should be Struck Out" 2022 15(3) *South African Journal of Bioethics and Law* (*SAJBL*) 84 at 89). Privacy laws relating to surrogacy agreements and section 41 of the Children's Act, therefore, fly in the face of this premise and render it irrational and incoherent (especially in regard to the suggestion in *AB CC* that the commissioning mother should find another partner to contribute his

gametes). The authors point to the right of the commissioning mother to privacy, the right to healthcare, and the right to private life, and conclude that there is no rational justification for the retention of the genetic link requirement on the basis of the best interests of the child.

2 *KB v Minister of Social Development*

2.1 *The facts*

In this case, the applicants were a married couple with a three-year-old son. The mother had struggled with uterine growths, which made it difficult for her to become pregnant, and she had undergone four myomectomies. The father had had a previous vasectomy, which was reversed, but he had been diagnosed with testicular cancer, for which he was medically treated. As a result, the couple battled for five years to have children, with numerous attempts at IVF and intrauterine insemination. The couple was ultimately advised to use donor gametes. After the selection of donors, seven embryos were fertilised and the mother underwent her first transfer, which resulted in the birth of their son at 33 weeks due to the rupture of her uterus during the gestation period (par 9). During her second pregnancy with another of the embryos, the mother had to undergo emergency surgery during which she lost both the baby and her uterus. As a result, the only way for the couple to be able to use the remaining embryos was via a surrogate mother. The couple then sourced a willing surrogate. A surrogacy motherhood agreement was drafted, and the parties approached the High Court to authorise the surrogate motherhood agreement.

2.2 *The arguments of the commissioning couple*

The applicant couple sought an order that section 294 of the Children's Act be declared inconsistent with the Constitution of the Republic of South Africa, 1996 (the Constitution), to the extent that it did 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 of the section after the words "where the commissioning parent is a single person, the gamete of that person" (par 7). The applicants contended that the fact that section 294 currently denies their child a genetically linked sibling could not pass constitutional muster. The couple argued that it was in the best interest of the minor child to have a genetically linked sibling, as 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 counted as one of the most significant relationships in a person's life. To this end, sharing genetic material, having the same parents from birth, having shared memories and similar experiences contributed to a deep and lifelong understanding of each other (par 30). The couple did not allege and/or prove any violation of their own rights but argued that it would be beneficial to the interests of their existing son to have a genetically related sibling. Section 294, as it is currently framed, allegedly affected their son's right to have a family with genetically linked siblings, therefore infringing his right to dignity and equality. This was not and is not in his best interests (par 31–32). The

couple contended that, since the purpose of section 294 was to protect the child's best interests, any prohibition in that section that conflicted with those interests was unconstitutional. The rationale for section 294 did not take into account this type of situation, where there was already a child without a genetic link to the parents who was now denied the possibility of having a genetically linked sibling (par 32).

The applicants referred to the fact that the question of whether section 294 of the Children's Act violates the applicants' constitutional rights had already been answered in the affirmative by the minority judgment in *AB CC* in which the Constitutional Court found that section 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 (par 35).

2 3 The arguments of the Department of Social Development

The Minister of Social Development opposed the application on the grounds that the couple had not made out a case for the relief sought and that the question relating to the constitutional invalidity of section 294 of the Children's Act had already been determined by the Constitutional Court in *AB CC* (par 10). With regard to reading the suggested sentences into section 294 of the Act, the Minister of Social Development argued that this proposed alteration was a polycentric legislative measure that should best be left to the executive and the legislature to determine.

2 4 The judgment of the High Court in KB

The High Court (per Sibuyi AJ) held that the applicants had failed to elaborate on how the impugned legislation infringed their child's rights (par 32). The court pointed out that a constitutional challenge could not be made "in a vacuum": it was incumbent upon a party raising a constitutional challenge to identify the right allegedly violated and to provide the basis upon which it is allegedly violated (par 33). The court held that the applicants identified the rights allegedly violated by section 294 of the Act, but did not provide the court with the basis for contending that those rights were violated (par 34).

With reference to the minority finding in *AB*, the court pointed out that this minority judgment had nothing to do with a claim to have a genetically linked sibling and that judgment was (as stated by the applicants) decided in a different context (par 35). Section 294 of the Act, when examined in a purposeful context, had nothing to do with the right of an already-born child to have a sibling with the same genetic link. In *AB*, the question facing the Constitutional Court was whether the limitation in section 294 was justifiable in terms of section 36(1) of the Constitution. In the majority judgment, the Constitutional Court stated that the objective of the inquiry was to determine whether there is a rational link between the impugned provision itself and the genetic link requirement. The Constitutional Court then outlined the

approach to be adopted when legislative measures are challenged. The court was required to determine whether there was a rational connection between the means chosen and the objective sought to be achieved. To be found irrational, a legislative measure must be arbitrary or must manifest “naked preferences” that serve no legitimate governmental purpose (par 36 and 39). The Constitutional Court found that there was a rational connection that was to create a bond between the child and the commissioning parents or parent. The genetic bond was designed to protect the best interests of the child to be born, ensuring that the child would have a genetic link with its parents. The Constitutional Court found that this was rational. The High Court was therefore obliged to follow *AB CC* on the rationality issue, unless the applicants could indicate that the two cases were distinguishable on the facts or that *AB* did not apply to this case. The High Court pointed out that only the Constitutional Court may revisit its previous decisions and not the High Court (par 37).

The High Court referred to the fact that the majority of the Constitutional Court in *AB CC* had pronounced that the means chosen in section 294 were rationally related to the public good sought to be achieved. This was 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 was a significant factor in the identity and self-respect of the child (par 40). It added that the provisions of section 294 of the Act could not be analysed in isolation but must be considered against this legislative history of Chapter 19 of the Children’s Act. The removal of the genetic link requirement from section 294 of the Act or the creation of an exception to that requirement would fundamentally depart from a lawfully chosen policy position (par 41).

Taking the legislative background of Chapter 19 into consideration, the High Court in *KB* concluded that it was not possible to interfere with the lawfully chosen measure on the grounds 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). Such interference would violate the principle of the separation of powers and impede the lawfully enacted legislative measure (par 41). Therefore, the constitutional challenge by the applicants and the *amici curiae* failed on the grounds that there was no finding that section 294 of the Act was unconstitutional, and so there could be no reading in of words into this legislative provision (par 42).

2.5 *The judgment of the Supreme Court of Appeal in KB*

According to the Supreme Court of Appeal (SCA) (per Mokgohloa JA), the issue before it was whether the right to have a genetically linked sibling existed, what was the source of that right, if any, and how it related to surrogacy as provided in Chapter 19 of the Children’s Act (*KB v Minister of Social Development* 2024 (5) SA 30 (SCA) par 13). Further, if there was any such right, whether to declare section 294 invalid to the extent of its inconsistency with the Constitution.

The appellants relied on section 28 of the Constitution, as well as the right to equality in section 9 and the right to human dignity in section 19. As in the High Court, the rights they alleged to have been violated by section 294 of the Children's Act were those of their minor child (already born) and not those of the child to be born via surrogacy. According to the appellants, it was in the best interest of the existing minor child to have a genetically linked sibling, if possible. The appellants contended that this fits together with the right to family life found in various international human rights agreements (see, e.g., art 16 of the Universal Declaration of Human Rights GA Res 217(III)A, UN Doc A/810 at 71 (1948). Adopted: 10/12/1948; par 10).

The respondent, the Minister of Social Development, submitted that section 28(2) of the Constitution (which gives paramountcy to the best interests of the child in all matters concerning children) was not violated in this case. Moreover, section 28(2) is subject to limitations that are reasonable and justifiable in terms of section 36 of the Constitution (par 11).

The SCA stated that it was plain from the language of section 294 that it seeks to create a bond between a child to be born and at least one commissioning parent. The context of this section is to assist fertile parents who cannot conceive a child because of biological, medical, or other reasons, to use their gametes or the gametes of one of them to conceive a child. This legislative scheme was confirmed by the majority in *AB CC* (par 17). The text and the context of section 294 reveal the purpose of this section. It is to protect the child to be born by ensuring that there is a genetic link between that child and the commissioning parent/s when that child is conceived. It further creates and establishes a genetic origin of the child to at least one of the commissioning parents, which is important for the self-identity of the child (par 20). The appellants' contention that the child to be born out of surrogacy can obtain a genetic origin from its siblings is not supported by the text, context, and purpose of section 294. It is the parent whose gamete is used who establishes the child's origin, not the sibling's genetic origin. The interests of the child referred to in section 294 read in context are not those of a child already born (par 20).

Concurring with the High Court, the SCA stated that it is incumbent upon a party raising a constitutional challenge to identify the right alleged to be violated and the basis for the alleged violation of that right. According to the SCA, there is no constitutionally sourced right for a minor child to have a sibling who is genetically related to them. The basis advanced by the appellants for that right was that a full biological sibling may be crucial in the event of possible illness the minor child could face later in life, for example, if the minor child needs a tissue or organ match. The SCA regarded this argument as compelling but stated that its importance does not give rise to a constitutional right (par 21).

According to the SCA, no evidence had been led as to how the minor child's rights to equality and dignity had been breached. The appellants did not succeed in identifying the constitutional right violated and the basis for the alleged violation. The finding of the High Court in this regard could not be

faulted. The SCA did not get to the limitation analysis because no violation of a right had been identified (par 22 and 23).

Referring to what the Constitutional Court stated when dealing with the rationality of section 294, the SCA stated that the means chosen to achieve the purpose of section 294 was the choice of the legislature and that courts could not interfere with that choice on the ground that it would have considered a different purpose and means. To do that would be for the judiciary to usurp the powers given to the other arms of the state and to violate the doctrine of the separation of powers. According to the doctrine of precedent, the High Court was bound by the Constitutional Court's interpretation of section 294, even if it held a different view (par 25 and 26).

The appellants were seeking an order that certain words be read into the provisions of section 294 of the Children's Act, to the effect that a surrogate motherhood agreement would be valid where the genetic origin of the child to be born is the same as any of his or her siblings. However, the reading in of words into a legislative provision had to be preceded by a finding of constitutional invalidity. Without such a finding, such a reading in could not be made (par 27). As a result, the appeal was dismissed with each party to pay its own costs (par 34).

3 The High Court and Constitutional Court's judgments in *AB*

AB concerned a woman who was pregnancy infertile (being unable to carry a foetus to term) and conception infertile (being biologically unable to contribute her own gamete for conception and not involved in a sexual relationship with someone who could contribute a gamete). She was therefore unable to meet the genetic link requirement of section 294 for a valid surrogacy agreement. The High Court (*AB HC supra*, per AC Basson J) was asked to consider whether section 294 unreasonably and unjustifiably limited her rights to: equality before the law and equal protection and benefit of the law (s 9(1) of the Constitution); human dignity (s 10); non-discrimination (s 9(3)); privacy (s 14); access to healthcare services, including reproductive health care (s 27(1)(a)); and the right to bodily and psychological integrity, which included the right to make decisions concerning reproduction (s 12(2)(a)). The High Court in *AB HC* held that there was no evidence that information relating to the child's genetic origin was necessarily in the best interests of the child (par 84). The High Court also questioned why this information was important in the case of surrogacy and not in the case of double-donor IVF (par 84). The judge pointed out that it could never be argued in the context of adoption that the absence of a parent-child genetic link is not in the best interest of the child (par 84) and, furthermore, it was clearly envisaged by the legislature that a child born of surrogacy would never know the identity of one of the donors (par 85). The High Court found that the genetic link requirement infringed autonomy, a part of human dignity (par 89), and further violated the right to human dignity by infringing the right of persons to make decisions concerning reproduction (par 93).

In addition, the court found that the right to privacy of the commissioning parents was infringed by the genetic link requirement (par 95) as the commissioning parents' decision to use donor gametes fell within the boundaries of privacy and should not be interfered with, especially as parents who use IVF may use double-donor gametes, without any infringement of their right to privacy. The court further pointed out that surrogacy is classified as a form of reproductive healthcare, and the commissioning parents' right to access healthcare was a constitutionally protected right, which could be infringed by the genetic link requirement (par 98, 99, and 102).

On appeal to the Constitutional Court in *AB CC* the majority of the court (per Nkabinde J) upheld section 294 on the basis that its genetic requirement did not breach the equality right in subsection 9(1) of the Constitution, because the differentiation it brought about passed the established test of being rationally connected to a legitimate governmental purpose (see *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) par 22). In particular, the majority held that section 294 serves the best interests of children by giving them "clarity" about their origins, in the form of knowing who their genetic parents are, which the majority said was "important to the self-identity and self-respect of the child" (par 294). The majority also found that the genetic requirement does not discriminate against commissioning parents who are conception infertile, as infertility was not one of the specified grounds mentioned in subsection 9(3) of the Constitution (par 298 and 301).

The majority concluded that the less favourable treatment of commissioning parents who cannot contribute a gamete did not amount to discrimination against them (par 304). With regard to section 12(2)(a) of the Constitution, which guarantees the right to bodily and psychological integrity, including the right to make decisions about reproduction, the majority suggested that section 12(2)(a) focuses on the woman's own body and not the body of another woman (par 313). Any decision to enter into a surrogacy agreement would not affect AB's body (presumably because she would not be contributing a gamete), and so her right to make decisions concerning reproduction was not restricted by section 294 (par 314 and 315). This argument is arguably misplaced since it was AB's rights to access a surrogate motherhood agreement which were at stake and she was denied the right to make decisions about reproduction, including surrogacy, which also violated her right to equality and dignity (see, also, Van Niekerk "Section 294 of the Children's Act: Do Roots Really Matter?" 2015(18) *PELJ* 398 403–408).

Finally, the majority dismissed AB's arguments that her right to have access to healthcare services, including reproductive healthcare (in terms of s 27(1)(a) of the Constitution), had been violated and that her right to privacy had also been violated, stating that the state was obliged to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights (par 320). The court held that section 27(1) of the Constitution had to be read alongside section 27(2). The

obligation imposed on the state regarding healthcare was “dependent upon the resources available for such purposes, and ... the corresponding rights themselves are limited by reason of the lack of resources” (*Soobramoney v Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC) par 11). Regarding privacy, although the majority acknowledged that the right to privacy includes the right to make autonomous decisions, it concluded that AB’s right to privacy was not limited by section 294 (par 323).

The minority (per Khampepe J) agreed with the majority that section 294 serves the best interests of children and is therefore rationally related to a legitimate purpose (par 104), but held that the section limits the right to psychological integrity by preventing AB and others like her from making decisions about reproduction (par 73–97). The minority was concerned about the differentiating approach by the law to double-donation of gametes under the surrogacy scheme in comparison to the IVF scheme, which, as stated above, permits infertile parents who can give birth to a child (pregnancy fertile) to have IVF treatment using both male and female donor gametes. The minority held that the discrepancy between the surrogacy scheme (prohibiting double-donation of gametes) and the IVF scheme (allowing double donation) amounted to unfair discrimination against AB (par 120–127). Having found that section 294 limits the rights to equality and psychological integrity, the minority concluded that these limitations were not reasonable and justifiable in terms of section 36(1) of the Constitution (par 129–213).

4 Best interests of the child

Thaldar noted that the Constitutional Court majority in *AB CC* did not give adequate weight to the evidence properly before it in regard to the best interests of the unborn child of the surrogacy arrangement (Thaldar 2022 *SAJBL* 84–91; Thaldar “The Constitution as an Instrument of Prejudice: A Critique of *AB v Minister of Social Development*” 2019 9 *Constitutional Court Review* 343–361). Expert research had established that assisted reproduction families were functioning well and children’s adjustment from early childhood through to adolescence was stable, illustrating that positive parent–child relationships were more significant than biological bonds in conducting to the well-being of children conceived by third-party assisted reproduction (Golombok “Love and Truth: What Really Matters for Children Born Through Third-Party Assisted Reproduction” 2021 15 *Child Development Perspectives* 103–109). Furthermore, it is submitted that this argument of the majority judgment in *AB CC* was irrational in relation to adopted children and those conceived by double-donor gametes, especially since section 41(2) of the Children’s Act, read together with regulation 19, does not permit donor-conceived children any knowledge of their genetic origins.

5 The right to family life and international law

It could be argued that the right to family life is protected by the constitutionally enshrined rights to privacy and dignity, and by international law (art 23 of the International Covenant on Civil and Political Rights 999

UNTS 171; 1057 UNTS 407; [1980] ATS 23; 6 ILM 368 (1967). Adopted: 16/12/1966; EIF: 23/03/1976) (ICCPR); Thaldar 2022 *SAJBL* 85–86). The right to family life contained in South Africa's international law obligations includes the right to establish a family. Article 23 of the ICCPR states that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the state”. Article 18 of the African Charter on Human and Peoples' Rights (1520 UNTS 217; 21 ILM 58 (1982). Adopted: 27/06/1981; EIF: 21/10/1986) further stipulates that “[t]he family shall be the natural unit and basis of society, and it shall be protected by the state”. The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child, although they do not define family, recognise and protect the child's right to a family and impose a duty on the state to support the establishment and development of families and protect the family (art 20(2) of the African Charter). There would seem to be no reason why infertile persons should not have the right to establish a family by using donor gametes for IVF and surrogacy. Interference with this right, by requiring infertile persons to contribute their own gametes for conception, arguably infringes on infertile persons' right to family life. The legal conception of the family should not allocate special value to genetic links since many families without a parent–child genetic link are no less significant than those without such a link, such as those with adopted children or children born as a result of double-donor IVF treatment.

6 The right to autonomy, dignity, and equality

The Pretoria High Court's decision in *AB HC* to strike out the genetic link requirement was welcome (Boniface “The Genetic Link Requirement for Surrogacy: A Family Cannot Be Defined by Genetic Lineage” 2017 1 *TSAR* 190–206). This judgment by the High Court was correct to emphasise the commissioning parent(s)' right to a family in terms of their right to dignity (Boniface 2017 *TSAR* 190–206). It is agreed with Boniface that a genetic link is not the “alpha and omega in the formation of a family” and that social parents are frequently as significant as biological parents in South African families (Boniface 2017 *TSAR* 190–206). Moreover, the value of the diversity of South African family law has frequently been stressed in our case law (see, e.g., *Dawood v Minister of Home Affairs*; *Shalabi v Minister of Home Affairs*; *Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC)).

Section 294 infringes the equality right in section 9(1) of the Constitution (Meyerson “Surrogacy, Geneticism and Equality: The Case of *AB v Minister of Social Development*” 2019 9 *Constitutional Court Review* 317). It is not rationally connected to the legitimate goal of protecting children's best interests, but rather appears to serve the purpose of enforcing a disputed bio-normative understanding of the family. Meyerson correctly points out that the *AB CC* majority failed to recognise the flaws in the provisions of section 294 because it incorrectly identified the purpose of section 294 and then appeared to attribute the problems facing the commissioning couple in such circumstances to their medical conditions and personal preferences as opposed to the discrimination against them.

7 The justice of the genetic link requirement

In 2014, Metz questioned why there was a genetic link requirement for surrogacy in South Africa and argued that the law was unjust and should be revised (Metz "Questioning South Africa's 'Genetic Link' Requirement for Surrogacy" 2014 5 *South African Journal of Bioethics and Law* 34). Metz listed the reasons for the genetic link requirement as "the prospect of harm to the child; a slippery slope towards systemic eugenics; a principle of respect for human nature; and a principle of developing one's humanness" (Metz 2014 *South African Journal of Bioethics and Law* 39). Metz argued that these four considerations did not provide a sound defence in the eyes of the law and stated that the provision should be repealed as it failed to respect the right of infertile persons to privacy and the ability to create loving and intimate relationships.

8 Conclusion

It is concluded that the case of *KB* illustrates that section 294 of the Children's Act is unfairly discriminatory against infertile persons, serves no legitimate purpose, and leads to situations such as the one in *KB* where counsel resorted to tacking clumsy wording onto section 294 to avoid its effects. In line with the judgment of Sachs J in *S v M* (2008 (3) SA 232 (CC)) (and see art 10(1) of the International Covenant on Economic, Social and Cultural Rights 993 UNTS 3; [1976] ATS 5; 6 ILM 360 (1967). Adopted: 16/12/1966; EIF: 03/01/1976), it is argued that there is an urgent need to holistically focus on the commissioning parents and the unborn child. The best interests of the child, while paramount, must be applied in the context of situations and with regard to the rights of others. It is further argued that the bio-normative conception of a family envisaged and supported by the majority judgment in *AB CC* does not apply in South Africa, and that the biological link is not endorsed in current legislation. The purpose of section 294 would not appear to be based on upholding the best interests of the child, but rather is an outdated and discriminatory view of what constitutes a family. Ultimately, as witnessed in *KB*, this provision leads to contorted arguments by legal counsel, which serve only to illustrate its arbitrary and irrational effects.

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