

Surrogacy in South Africa

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〔紹介と要旨〕

本稿は、2018年9月29日に開催されたアマンダ・ボニフェース氏の講演のプロシーディングである。南アフリカ共和国では、従来、分娩した女性を法律上の母としていたが、子ども法 (Children's Act, Chapter 19 Act 38 of 2015) が、代理懐胎による出生子と依頼者との法律上の親子関係を認めた。従来規則では、ドナー提供の配偶子を用いた IVF が許容され、代理母はドナーではない第三者で生殖補助医療により懐胎する者とされていた。子ども法は、代理懐胎に関する定義を置かなかったが、第294条で依頼者と代理懐胎に用いられる配偶子との間に遺伝的な関連 (genetic link) があることを要件と定める。しかし、IVF により妻が懐胎・分娩する場合には、夫婦のいずれにも遺伝的な関連がないダブル・ドナー事例でも法律上の親子関係が認められるが、代理懐胎についてはダブル・ドナーが禁止されるという点が争いになった。ダブル・ドナーで妻への IVF を試みたが懐胎に至らなかった事例で、当事者は不妊を pregnancy-infertile と conception infertile に分類し、懐胎の不能には IVF、分娩の不能には代理懐胎により子をもうけることができるが、双方の不能が重なる場合には、ダブル・ドナーによる代理懐胎が認められないという点において平等原則に反し違憲であるという主張をした。高等裁判所判決 (AB and Another v Minister of Social Development 2016 2 SA 27 (GP)) は、当事者の主張を認めたが、最高裁は、少なくとも一人の依頼者と子の間の遺伝的な関連が必要であるとした (AB and Another v Minister of Social Development [2016] ZACC 43)。報告では、2つの判決を元に南アフリカで法制化されている同性婚を含めた家族の再定義を積極的に評価し、最高裁判決にみられる伝統的家族観への批判的な見解が示された。セミナー参加者からも多くの質問がなされ活発な議論が行われたが、なかでも不妊を pregnancy-infertile と conception infertile に分ける議論は大きな関心が寄せられた。

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1. Introduction

Good afternoon; goeie middag; sawubona; lumelang.

South Africa, sitting at the tip of the continent of Africa, is a diverse nation. We speak many languages. Our 11 official languages are Afrikaans; English; Zulu; Xhosa; Southern Sotho; Tswana; Northern Sotho; Venda; Tsonga; Swati and Ndebele. Our people also practice many religions including Christianity; Islam; Hinduism; Judaism and traditional African religions. South African Family Law operates within this diversity.

Legal origins of South African Law

South African civil law has its origins rooted in Roman Law and later Dutch law, which formed the Roman-Dutch law. Roman-Dutch law was received in South Africa when Jan Van Riebeeck came to the Cape on the 6th of April 1652. Furthermore, South African law was influenced by British Law (the Union of South Africa was created in 1909) but this did not influence Family Law much. British Law had a greater influence on company law and business law.

Sources of South African Law

The sources of South African Law are Statutory Law (Legislation); Case Law (Precedent = Lower Courts are bound by the decisions of the Higher Courts: The Constitutional Court – The Supreme Court of Appeal – The High Courts – The Magistrate’s Courts and other Lower Courts); The Common Law (mainly from Roman-Dutch law, referred to when no statutory law or case law governing a matter. Must be developed by the courts in line with the spirit, purport and objects of the Constitution); The Constitution of the Republic of South Africa (especially the Bill of Rights) and International Law (International treaties, conventions and charters to which South Africa is a signatory eg. The Convention on the Rights of the Child).

In this paper I will be discussing surrogacy in South Africa, to do this I will discuss the case of *AB and Another v Minister of Social Development* 2016 2 SA 27 (GP) that was decided in the High Court and the Constitutional Court decision on the same case (*AB and Another v Minister of Social Development* [2016] ZACC 43). I will briefly explain the facts of the case and the decisions of both courts as well as the reasons for the decisions.

2. The High Court case

2.1. Introduction

According to the Children’s Act (Chapter 19 Act 38 of 2015) surrogacy agreement must be entered into between the commissioning parents and the surrogate. Thereafter this agreement

must be confirmed by the High Court. Section 294 of the Children's Act further makes it clear that there must be a genetic link between the commissioning parent or parents and the gamete or gametes used to impregnate the surrogate. The High Court judgment explored surrogacy and the constitutionality of the genetic link requirement for surrogacy that is specified in the Children's Act. Metz has previously questioned why there is a genetic link requirement for surrogacy in South Africa and argued that the law is unjust and should be revised (Metz "Questioning South Africa's 'Genetic Link' Requirement for Surrogacy" May 2014 *SAJBL* 34). Metz argues that the considerations that the genetic link requirement appears to be "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" does not provide a sound defense in the eyes of the law and submits that the law should be revoked. Metz (39) further stipulates that the reason why the genetic link requirement should be revoked is that there should be "respect for people's privacy and for their ability to create loving and intimate relationships".

2.2. Terminology

When dealing with surrogacy in South Africa the terminology that is of importance is that of In Vitro Fertilization (IVF) and surrogacy. A definition of IVF is a "medical procedure whereby an egg is fertilized by a sperm in a test tube or elsewhere outside the body" (*Oxford Advanced Learners Dictionary* 1992). (Parts of the summary of the High Court case are based on Boniface *The Genetic Link Requirement for Surrogacy: A Family Cannot be Defined by Genetic Lineage AB v Minister of Social Development* 2016 2 SA 27 (GP)" 2017 *TSAR* 190)

The South African *Regulations Relating to Artificial Fertilisation of Persons* (Government Notice R175 of 2012) define IVF as being the "process of spontaneous fertilization of an ovum with a male sperm outside the body, in an authorised institution". A "gamete donor" is defined in the regulations as a person whose gametes are used for artificial fertilization. A "surrogate" is described as a type of "recipient". The regulations define a "recipient" as a woman who is going to be artificially fertilised. Doodnath (*Surrogacy Genetic Link Requirement: Declaration of Invalidity* <http://hsf.org.za/resource-centre/hsf-briefs/surrogacy-genetic-link-requirement-declaration-of-invalidity> 8 October 2015) describes surrogacy as being where a third party carries a foetus in her womb for the commissioning parents.

The Children's Act (S3.13) describes a "surrogate motherhood agreement" as being:

"an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such child to the commissioning parent upon its birth, or within a reasonable time thereafter, with

the intention that the child concerned becomes the legitimate child of the commissioning parent”.

In the *AB* case the respondent and the applicants had different views with regards to their understanding of the meaning of the concept “surrogacy”. The applicants stated that surrogacy is “the provision of an opportunity to persons who cannot give birth themselves to become parents *irrespective* of whether the child will be genetically related to the parents or not” (par 31) but the respondent said that “surrogacy” is “an opportunity to persons who cannot give birth themselves to have a *genetically related* child” (par 31). The legislation of course states that there must be a genetic link between the donor (of at least one of the gametes) and the child. In the *AB* case

The *AB* case dealt with both “pregnancy-infertility” (“the inability of a woman to procure implantation or to carry a pregnancy to full term” par 28) and “conception-infertility” (“the inability to contribute one’s own gametes [or to contribute gametes of your partner] towards conception” par 28). The type of infertility needed so that a surrogate can be used is “pregnancy-infertility”.

2.3. Facts and legal question

In the High Court case the first applicant was not able to give birth to a child and she was unable to donate her own gametes so that she could use a surrogate. She was “pregnancy-infertile” and “conception-infertile” (par 29). She had unsuccessfully undergone 14 IVF procedures, where she used “double donors” (male and female donated gametes, par 9 and par 17). The applicant was later told that since she cannot carry a pregnancy and the medical condition cannot be fixed, that she must use a surrogate if she wants to become a parent. Adoption of course is another way in which one can become a parent in South Africa but in this case adoption was not considered a viable option (par 9).

In South Africa the requirements that must be in place for a surrogacy agreement to be valid are that the court must confirm the surrogacy agreement (S297) and “the commissioning parent or parents are not able to give birth to a child and the condition is permanent and irreversible” (S295). The applicant in the High Court matter could have complied with these requirements but the problem was that the further requirement, in order for the surrogacy agreement to be valid, is that there has to be a genetic link between the child and one or both parents (S294). This requirement seems unfair as in the case of IVF parent can use their own gametes or “double donor” gametes but cannot do so where there is a surrogacy agreement as that would result in their being no genetic link with the parents (par 7). Some persons could end up being discriminated against by the genetic link requirement, for example persons who have a genetic disease or genetic disability that they do not wish to pass onto their children (par 26). The author knows of a couple who decided not to have children biologically related to them as they both

carried a genetic eye defect that they did not want to pass on to their children. In terms of the genetic link requirement these persons would also not be able to make use of surrogacy.

The applicants challenged the constitutionality of the genetic link requirement of section 294 of the Children's Act. The applicants contended that this requirement violated their "rights to equality, dignity, reproductive health care, autonomy and privacy", that there was no justification for limiting these rights (par 8) and that members of the sub-class should have the "same choice that those people who are using IVF outside of the surrogacy agreement context may have" (par 10). The legal question before the court was whether the fact that the first applicant is prohibited in terms of the Children's Act from using surrogacy as an option to become a parent due to her "inability to establish a genetic link with a child" (par 9) infringes the applicant's constitutional rights? The applicant's submission "specifically [took] issue with the special value that the legislature has assigned to genetic lineage" (par 32) and "submitted that the legal concept of a 'family' cannot be assigned special value to genetic lineage as families without a parent-child genetic link are as valuable as families with such a genetic lineage" (par 32). The second applicant, a group that assists in matching surrogates with commissioning parents and helping them with medical and psychological assessments and court applications to confirm surrogacy agreements (par 13), "submitted that the public at large has an interest in a legislative regime that regulates surrogate motherhood that is aligned with the values of the Constitution and which is not arbitrary, discriminatory and destructive of the human dignity of especially members of the sub-class". The respondent stated that the genetic link requirement exist is not unconstitutional and should not be declared invalid and that, in the alternative, if the provision is declared invalid that Parliament should be allowed to rectify this (par 11). The constitutionality of the fact that our law allows a person to use two donor gametes for an IVF procedure where the commissioning parent carries her child and gives birth but does not allow the commissioning parent to use two donor gametes when using surrogacy (par 21), needed to be explained based on constitutional principles. The first applicant had used two donor gametes for many years in order to fall pregnant through IVF but was not allowed to do so when using a surrogate, thus she contended that the current law is discriminatory and unfair towards women who are unable to carry a pregnancy to term (par 22).

There have been arguments made in support of the genetic link requirement and against it. In this article however I will concentrate on the decisions of the High Court and the Constitutional Court in this regard. (See further Metz "Questioning South Africa's 'genetic link' requirement for surrogacy" 2014 *SAJBL* 34 39 who states that privacy of people must be respected and Van Niekerk "Section 294 of the Children's Act: Do roots really matter?" 2015 *PELJ* 398 403-408 who stipulates that people have the right to make their own decisions regarding reproduction. See also Doodnath *Surrogacy Genetic Link Requirement: Declaration of Invalidity* <http://hsf.org.za/resource->

centre/hsf-briefs/surrogacy-genetic-link-requirement-declaration-of-invalidity (08-10-2015) who states that IVF and surrogacy were incorrectly used as synonyms by the court.)

The South African Law Commission (in 1992) suggested that surrogate motherhood agreements should only be allowed if there is a genetic link between the commissioning parent and the child born from such surrogacy (par 35). After this recommendation the genetic link requirement was then incorporated in section 294 of the Children's Act.

2.4. High Court decision

The High Court ordered that section 294 of the Children's Act is unconstitutional and thus invalid (par 115). The High Court's decision was based on the fact that the genetic link requirement encroaches on members of the sub-class' human dignity. The court stipulated that the genetic link requirement discriminates against these persons as it encroaches on their human dignity and their right to autonomy (par 76). Importantly, the court stipulated that there is not a legal difference between "surrogate-gestation" and "self-gestation" even though there is a factual difference between the terms (par 77). The High Court also examined the "Regulations Relating to the Artificial Fertilisation of Persons" and stated that in the case of IVF a person can use donor gametes and even go further and specify that they only want to use gametes from a person of a specific race or religion (par 78–79) but this is not the case in surrogacy as the genetic link requirement limits this.

The High Court also made it clear that there is no "womb for hire" in South Africa so the respondent's submission that the surrogate mother hires her womb out is incorrect as surrogacy for payment is illegal in South Africa (par 82). The High Court was also further critical of the respondent's submission that people who cannot establish a genetic link can adopt children as this is not always easy to do and the purpose behind the legislator regulating surrogacy agreements was to allow people to have children and this same purpose was behind regulating IVF (par 87). Another factor considered by the court was whether the constitutional rights of the child would be infringed if a child does not know what their genetic origin is. The respondents argued that not allowing a child to know their genetic origins will infringe the child's right to dignity and that if children are born disabled they would be abandoned (par 83). It is submitted that the respondent's understanding of how surrogacy works and is regulated in South Africa leaves much to be desired, as surrogacy agreements are made an order of court and of course the court takes the best interests of the child into consideration. The High Court also disagreed with the respondent: "this constitutes an insult to all of those families that do not have a parent-child genetic link. Surely it can never be argued in the context of adoption that the absence of a parent-child genetic link is not in the best interest of the child" (par 84). The court concluded that the genetic link requirement violates the right to human dignity (par 89; par 93) and the right to

privacy (par 95) as well as the right to access health care (par 98–99). The High Court strongly criticized the genetic link requirement as “effectively pu[ting] persons’ personal lives and family-building plans on hold” (par 102). The court then struck down section 294 and declared it to be unconstitutional (par 106).

2.5. Is there a right to a family in South African law?

There is no specific right to a family contained in South African law, neither in the South African Constitution nor in other legislation or our common law. However, there is enough other rights and law surrounding the concept of a family that can be interpreted to indicate that there is indeed a right to a family (although it is not specifically stated as such). International documents, to which South Africa is a signatory, do expressly protect family life, for example provides Article 23 of the International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) and article 18 of the African Charter on Human and People’s Rights (adopted 27 June 1981, entered into force 21 October 1986) (Barratt, Domingo, Mahler-Coetzee, Olivier and Denson R *Law of Persons and the Family* (2012) 167). South Africa is obligated to protect children’s rights in accordance with the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). Article 20(2) ACRWC stipulates that the development of families must be supported. (Other international documents to which South Africa is a signatory also stipulate that the family needs to be protected and stress the importance of the role of the family for example, the United Nations Document Emerging Issues for Children in the Twenty First Century 4 April 2000; the African Charter on Human and People’s Rights 1981 Article 18(1)-(2), Article 27, Article 29; the Universal Declaration of Human Rights 1948 Article 12; the International Covenant on Economic, Social and Cultural Rights 1966 Article 10 and 11). The High Court did not rely on any of these documents during the proceedings.

The Constitutional Court has previously relied on other rights, such as the right to dignity, in order to hold that someone actually has the right to a family. In the High Court case the court also referred to a number of these Constitutional Court decisions. For example, in *Satchwell v President of the Republic of South Africa and Another* (2002 6 SA 1 (CC)) the court did not rely on the traditional view of a family but instead stated that “family” can mean “different things to different people” and that “the failure to adopt the traditional form of marriage may stem from a multiplicity of reasons- all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under law”. In *J v DG, Department of Home Affairs and Others* (2003 5 SA 621 (CC) par 44) the court also did not define the family in a traditional way. In this instance a woman used a sperm donor and IVF in order to become pregnant with twins. The court ordered that home affairs must register the non-biological female partner also on the birth certificate as a parent of the children. In *Satchwell v President of the Republic of South Africa and*

Another (2002 6 SA 1 (CC)) the Constitutional Court held that family can “mean... different things to different people [and] the failure to adopt the traditional form of marriage may stem from a multiplicity of reasons- all of them equally valid and all of them equally worthy of concern, respect, consideration, and protection under law”. *S v Makwanyane* (1995 3 SA 391 (CC) par 328) defined the right to dignity in South African law as meaning “that everyone has the right to be treated with respect and concern simply because he or she is human”. This right to dignity is broad enough to encompass the right to a family. *Chairperson of the Constitutional Assembly, Ex Parte: In re Certification of the Constitution of the Republic of South Africa* (1996 4 SA 744 (CC)) also found that there is a right to a family as it is found in the right to dignity. In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* (2000 3 SA 936 (CC)) the court also saw the right to a family as being included within the right to dignity. In the *Centre for Child Law v the Minister of Social Development* (2014 1 SA 577 (GSJ)) the court widened the view of a family to the adoption of a child by a step-parent.

In the High Court case the right to dignity approach was also followed, as this is infringed where a genetic link is required in the case of surrogacy but not IVF. However, the court should also have referred to all the relevant international documents dealing with the right to a family. The High Court concluded that “[f]amily cannot be defined with reference to the question whether a genetic link between the parent and the child exists [and] our society does not regard a family consisting of an adopted child or children as less valuable or less equal than a family where children are the natural or genetically linked children of the parents. A family can therefore not be defined by genetic lineage” (par 46).

2.6. The genetic link requirement in other countries

The High Court case did explore whether the law of other countries also requires a genetic link in the case of surrogacy and (par 47) stated that there is in recent years a moving away from the genetic link requirement. The Surrogacy Arrangement Act 1985 and the Human Fertilisation and Embryology Act 2008 in the United Kingdom require a genetic link. However surrogacy in the United Kingdom is only able to be used by couples and the High Court stated that this is not in line with South Africa’s constitutional values. In Australia two of the states require a genetic link but five states do not (par 50) and in the Netherlands surrogacy is limited to heterosexual couples and there must be a genetic link (par 51). Greece does not require a genetic link (par 52). In The United States of America some states require a genetic link but others do not (par 53) and Canada also does not require a genetic link in the case of surrogacy (par 54).

<http://www.saflii.org/za/cases/ZAGPPHC/2015/580.html>

SAFLII Southern African Legal Information Institute

3. The Constitutional Court Case

Unfortunately the Constitutional Court case did not confirm the invalidity of section 294 of the Children's Act 38 of 2005. Instead the court held that the genetic link requirement is constitutional. The minority decision stipulated that

“Having a child using double-donor surrogacy is thus not merely a difference in mechanics. Instead, the commissioning parent's involvement in the surrogacy process shapes the relationship between the child and parent. This difference goes beyond the superficial similarity that both processes result in a commissioning parent or parents having a child that is not genetically related to them. The decisions made by the commissioning parent or parents animate the relationship between parent and child. Premising the limitation of rights on this purpose is therefore misguided: since adoption and surrogacy are fundamentally different, it cannot be correct to limit surrogacy purely because the outcome is the same as adoption. The Centre [for child law], in short, contends that all children have the right to know”.

Furthermore the minority decision stated that

“it is section 41(2) of the Children's Act that stands in the way of children having access to this information... To argue that the purpose of section 294 – and therefore the purpose of the limitation of the rights in question – is to ensure that a child is never born without being able to determine her genetic origins, is, therefore, as explained above, an example of bootstraps logic. It bears repeating that there are good reasons for concluding that the purpose of section 294 is to prevent the circumvention of the adoption process and not to ensure that children are never born without being able to determine their genetic origins.”

However, the majority decision stated clearly that there must be a genetic link between the commissioning parent/s and the child. The reasons provided by the Constitutional Court for this decision include that the court stated that the case is about the validity of section 294 of the Children's Act and not about whether the genetic link requirement has relevance to the legal conception of family. The Constitutional Court thus looked at the text of the provision in order to determine its legislative provisions and limited itself to what the test was “reasonably capable of meaning” and concentrated on whether:

- “(1) the impugned legislation is irrational in terms of section 9(1) of the Constitution;
- (2) AB's implicated rights to equality; dignity; bodily integrity including the right to make decisions concerning reproduction; access to reproductive health care; and privacy are limited by the genetic link requirement in terms of section 294 and if so;
- (3) the limitation of the rights is justifiable in terms of section 36(1) of the Constitution”.

The Constitutional Court further stipulated that the objectives of the National Health Act and the Children’s Act are different and hence the “obvious differences between IVF and surrogacy” and that a statutory provision cannot be measured against regulations under different legislation to decide whether it is rational or consistent with the Constitution. “ It is only when the regulatory measure does not serve a legitimate government purpose that it can fall foul of section 9(1) of the Constitution.it cannot be disputed that the conditions in section 294 are the means to establishing a genetic link between the commissioning parents and the child to be born as contemplated in the surrogacy agreement. Nor can it be questioned that establishing a genetic link is a legitimate government purpose. The High Court disregarded the object of the Children’s Act. It overemphasised the interests of the commissioning parent(s) and overlooked the purpose of the impugned provision and the best interests of children despite it being established that cases involving children are pre-eminently of the kind where one “must scratch the surface to get to the real substance below”. Here, the substance below the surface is the need for a genetic link between a child and at least one parent. The importance of this genetic link is affirmed in the adage “*ngwana ga se wa ga ka o tla ke wa ga katsala*” (loosely translated the adage means “a child belongs not to the one who provides but to the one who gives birth to the child”). Hence clarity regarding the origin of a child is important to the self-identity and self-respect of the child. Unsurprisingly, this was correctly endorsed by the High Court. There is a rational nexus between the purpose of the legislative scheme, including section 294, that provides a framework within which individuals are able to have children and become parents in circumstances where they would otherwise not have been. For all these reasons, I do not support the conclusion by the High Court that section 294 constitutes an irrational legal differentiation that violates section 9(1) of the Constitution. The rationality challenge must fail. It cannot be safely said that all these negative effects of infertility are attributable to the legislative measures contemplated in section 294, specifically the genetic link requirement in that provision. It needs to be stressed that section 294 merely regulates the conclusion of a valid surrogate motherhood agreement. What disqualifies AB, and others similarly placed, is nothing but the biological, medical or other reasons as contemplated in section 294. The impugned provision does not disqualify commissioning parents because they are infertile. It affords infertile commissioning parents the opportunity to have children of their own by contributing gametes for the conception of the child contemplated in the surrogate motherhood agreement. In the case where the commissioning parent is single, the impugned provision provides for that parent, where a gamete of that parent can be used in the creation of the child. But if that parent cannot contribute a gamete, the parent still has available options afforded by the law: a single parent has the choice to enter into a permanent relationship with a fertile parent, thereby qualifying the parent for surrogacy. If the infertile commissioning parents, or parent, decide not to use the available legal options, they have to live with the choices they make.”

The Constitutional Court did not agree that section 294 of the Children's Act limits the commissioning parent's right to reproductive autonomy or to make decisions concerning reproduction in terms of section 12(2)(a) of the Constitution. The Court also stated that the challenge based on AB's right to privacy, in terms of section 14 of the Constitution, must also fail because this right is not limited by the genetic link requirement in section 294 of the Children's Act.

4. Conclusion

The *AB* case is significant as it is the first South African judgment that analyzed the genetic link requirement for surrogacy, as contained in section 294 of the Children's Act. The High Court declared the genetic link requirement to be unconstitutional, as it violated the commissioning parent's right to dignity. Additionally, the court relied on the right to privacy and the right to health care of the commissioning parent to declare the genetic link requirement to be unconstitutional. On the 1st of March 2016 the Constitutional Court heard the application requesting that the High Court order in *AB* case, declaring section 294 of the Children's Act invalid and not in line with the Constitution, should be confirmed by the Constitutional Court). In the second applicant's heads of argument in the Constitutional Court the applicant argued that the "legal conception of the family cannot allocate special value to genetic lineage" and that "families without a parent-child genetic link are just as valuable as families without such a link" (pg. 5 heads of argument) and "[t]he court a quo held that 'a family cannot be defined with reference to the question whether a genetic link between the parent and the child exists'".

It is further submitted that the judgment by the High Court in the *AB* case was correct in that it emphasized that the commissioning parent(s) have the right to dignity, which has often been used in South Africa's courts instead of the right to a family. A genetic link is not the alpha and omega when it comes to the formation of a family. It is suggested that the Constitutional Court, as it has in the past, should have recognized that the traditional view of a family has changed and that families can be formed in many ways. Unfortunately the Constitutional Court case did not contribute to an understanding that families are formed in many ways and that social parents are as important as biological parents. Instead the decision of the Constitutional Court discriminates against persons who are both "pregnancy-infertile" and "conception-infertile" and additionally states that persons must live with the consequences of their choices (these seem to include whether they are married to a fertile person or not)! It is submitted that the Constitutional Court did not take the LGBTQI community into account at all in its judgement and instead adopted an archaic version of how a family is constituted, that is not in line with the current trends in South African Law.

<https://collections.concourt.org.za/bitstream/handle/20.500.12144/3819/Pre-hearing%20summary-25646.pdf?sequence=25&isAllowed=y>