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A judicial perspective of the genetic link requirement for purposes of the confirmation of surrogate motherhood agreement

by

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I, David Tshokolo Mtshali, hereby declare that this dissertation is my original work and has never been presented in any other institution or by any person for any qualification. I also declare that no plagiarism has been committed in it and secondary information which is used has been duly acknowledged in this dissertation.

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I, Prof A Louw, do hereby declare that this dissertation by David Tshokolo Mtshali for the degree of Master Legum is accepted for examination.

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CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 Introduction

Surrogacy has been strictly regulated in South Africa in terms of chapter 19 of the Children's Act[1] (hereinafter referred as the Children's Act) since 2010 when the Act came into operation. Chapter 19 provides for the requirements that must be met in order for the court to confirm the surrogate motherhood agreement that will confer legal parental status on the commissioning parents at the birth of the commissioned child.[2] One of these requirements, encapsulated in section 294, generally referred to as the "genetic link requirement",[3] forms the focus of this dissertation.

According to section 294 at least one of the commissioning parents must be genetically related to the intended or commissioned child.[4] The provision states explicitly that without such a genetic link the surrogate motherhood agreement is invalid and the child born will for all purposes be deemed to be the child of the surrogate mother – not the commissioning parent(s).[5] This essentially means that a commissioning parent, who wants to commission a child but is unable to donate his or her gametes for reproduction,[6] cannot use surrogacy as a means to become a parent.[7]

The constitutional validity of section 294 was challenged for the first time in the high court in *AB and Another v Minister of Social Development* in 2016 (hereinafter referred to as *AB* HC).[8] In this case the anonymous applicant was a woman who was not only pregnancy infertile, but also conception infertile. On her behalf section 294 was challenged on the grounds that it violated a conception infertile woman's right to make decisions regarding reproduction, as well as her rights to equality, dignity and

[1] 38 of 2005.
[2] See ss 292 to 303 of the Children's Act in this regard.
[3] *AB and Another v Minister of Social Development* 2016 2 SA 27 (GP) par 5.
[4] According to this section, "[n]o surrogate motherhood agreement is valid unless the conception on the child contemplated in the agreement is to be effected by the use of gametes of both commissioning parents or, if that is not possible due to biological, medical or other 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."
[5] Section 297(2) of the Children's Act.
[6] The court in *AB and Another v Minister of Social Development* 2016 2 SA 27 (GP) par 28 distinguished between two kinds of infertility – "pregnancy-infertility" and "conception-infertility". In the latter type of infertility the person is unable to contribute gametes to the conception of the child and can therefore not comply with the genetic link requirement.
[7] *AB* HC par 27.
[8] 2016 2 SA 27 (GP).

access to health care.[9] The high court ultimately found section 294 constitutionally invalid on the grounds contended for.[10]

The high court order of constitutional invalidity of section 294 was then referred to the Constitutional Court for confirmation in terms of section 172(2)(a) of the Constitution.[11] After careful consideration, the Constitutional Court in *AB and Another v Minister of Social Development*[12] (hereafter *AB* CC) ultimately decided not to confirm the order of invalidity and held that section 294 was consistent with the Constitution.[13]

The decision in *AB* CC was, however, not unanimous. With the ratio of 7:4, the minority in *AB CC* came to the same conclusion as the high court that section 294 did not, in fact, serve a rationally connected legitimate government purpose.[14]

Shortly after the *AB* CC judgment, the South African Law Reform Commission (SALRC)[15] launched an investigation into the right to know one's own biological origins.[16] In the summary of the resultant issue paper that was published, the SALRC states that "[t]he Constitutional Court in *AB CC* adopted a more impartial approach in deciding the matter [in that rather than focussing on the rights of the intended parent, it considered the best interests of the child]. However, the SALRC went on to state that "[i]n light of the judgment of the Constitutional Court [in AB] one could argue that a more balanced approach is necessary when weighing the rights of a person or couple who wish to have a child via assisted reproduction and that of the intended child.[17] This SALRC's investigation into the right to know one's biological origin is still

[9] *AB* HC par 8.
[10] par 115.
[11] Section 172 (2) (a) of the Constitution provides that: "The Supreme Court of Appeal, the High Court of South Africa or a court of similar status may make an order concerning the constitutional validity of an Act of Parliament, a provincial Act or any conduct of the President, but an order of constitutional invalidity has no force unless it is confirmed by the Constitutional Court."
[12] 2017 3 SA 570 (CC).
[13] *AB* CC par 330.
[14] par 236.
[15] The SALRC is an independent advisory statutory body established by the South African Law Reform Commission Act 19 of 1973. Before this Act, the commission was simply called the South African Law Commission. Its mission is to reform the law of South Africa in accordance with the principles and values of the Constitution to meet the needs of a changing society operating under the rule of law.
[16] SALRC Issue Paper 32 on *The Right to Know One's Own Biological Origins* Project 140 (20 May 2017), hereinafter referred to as the SALRC Issue Paper on *Biological Origins* (2017).
[17] SALRC Issue Paper on *Biological Origins* (2017 iv.

on-going and hopefully this dissertation will add to the body of knowledge relating to genetics in surrogate motherhood and related issues.

1.2 Research Problem

This dissertation explores the way in which the courts have interpreted section 294 by analysing the recent court decisions in *AB* HC *and AB* CC. As will be shown in the discussions that follow, the AB cases approached the inquiry into the constitutional validity of section 294 very differently.[18] The divergent findings of the courts regarding this matter prompted the critical analyses of the judgments in this study.

1.3 Research Question

In order to deal with the problem indicated above, the research paper must answer the following questions: To what extent did the approach adopted in *AB* HC differ from the approach adopted by the Constitutional Court? Do these differing approaches reflect an underlying tension between the rights of parents and the rights of children and raise questions regarding the paramountcy of the best interests of the child in the context of surrogacy arrangements?

1.4 Research Methodology

The research is predominantly conducted through a critical analysis of the *AB* judgments[19] and desktop literature reviews of articles on surrogate motherhood in South Africa, that is, information that is already available on the internet or published in books and journal articles available at the library. The Children's Act and other relevant South African laws on surrogate motherhood are also reviewed in this dissertation. The method is qualitative in nature.

1.5 Chapter Outline

As the introductory chapter, chapter *one provides a brief background to this dissertation. It introduces the topic, the* research problem and questions as well as a brief overview of what the dissertation deals with and the manner in which it is structured. Chapter two provides a chronological explanation of the history and development of the regulation of surrogacy in South Africa in general. It will include a

[18] See Ch 3 of this dissertation for a full discussion of the divergent views referred to here.
[19] *AB* CC and *AB* HC.

discussion of the SALRC investigations and the factors that motivated the final provisions included in Chapter 19.[20] Chapter three narrows the focus on section 294 in particular and outlines the manner in which the judiciary approached the constitutionality of section 294. The chapter also includes an investigation into the original rationale for including the genetic link requirement as a prerequisite for the approval of a surrogate motherhood agreement as well as the differing views of the high court and the Constitutional Court in this regard. Chapter four provides a critical analysis of the two courts' approaches in relation to genetic link requirement and best interests of the child.[21] Lastly, Chapter five deals with the concluding remarks.

[20] See Ch 2.
[21] See Ch 4.

CHAPTER 2: HISTORY AND DEVELOPMENT OF THE REGULATORY FRAMEWORK OF SURROGACY IN SOUTH AFRICA

2.1 Introduction

This chapter provides a general overview of the development of the whole regulatory framework for surrogacy in South Africa. These developments are traced chronologically by discussing the position before and after the enactment of the Children's Act. Apart from a brief outline of the regulatory framework, the chapter also includes references to case law and literature reported and published since the enactment of chapter 19. The aim of the chapter is to show how the regulatory framework pertaining to surrogate motherhood was developed in general. The next chapter will focus specifically on section 294 and the rationale for its inclusion in the regulatory framework as a whole.

2.2 History of surrogacy in general

Surrogacy is not a new practice.[22] It existed even during biblical times.[23] During the slavery period years, African-American slaves would often act as surrogate mothers for their masters.[24] More recent developments in biotechnology have created possibilities for the creation of human life in ways that were previously unimaginable.[25] The new reproductive technologies have made it possible for a woman to fall pregnant without engaging in *coitus* and without being genetically related to the baby.[26] The first of such babies was born in England in 1978.[27] This was the first demonstration or evidence if you will, of the scientific breakthroughs of the 20th century on human reproduction.[28] The legal fraternity did not address the legal implications of having a child reproduced through surrogacy using the latest assisted reproductive methods.[29] The legal fraternity had not considered or expressly

[22] South African Law Commission Report on *Surrogate Motherhood* Project 65 (1992), hereafter simply referred to as the "SALC *Report on Surrogate Motherhood* (1992)" pars 4.9 and 8.1.2. See also *AB* CC par 35; Tager 1986 *SALJ* 383; Louw in Davel & Skelton (2007) 19-2; Louw LLD thesis (2009) 329; Lewis LLM dissertation (2011) 12.
[23] *Ibid*.
[24] *AB* CC par 36. See also Allen 1990 *Harvard Journal of Law and Public Policy* 144.
[25] Huxley (1932)p13.
[26] Singer and Wells (1984) preface v-vi.
[27] *Ibid*.
[28] Steptoe and Edwards 1978 *Lance*r 366. See also Eaton 1985 *The Law Teacher* 163.
[29] *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (Cmnd 9314 (1984) under the Chairmanship of Dame Mary Warnock DBE (the Warnock Report) ss 1.1, 1.9.

addressed the legal implications of artificial reproductive technologies ("ART")[30] and birth by a surrogate mother. ART was initially designed to assist individuals to overcome infertility; however, today people make use of ART not only to eliminate infertility, but also for purposes of creating human life without engaging in sexual intercourse.[31] One of these procedures or treatments include but are not limited to in vitro fertilisation (IVF) and zygote intrafallopian transfer, embryo transfer, gamete intrafallopian transfer, intracytoplasmic sperm injection, gamete and embryo cryopreservation, tubal embryo transfer, oocyte and embryo donation, and gestational surrogacy.[32] This method (IVF) is practiced across the world and IVF births have become a regular occurrence.[33] The particular risks that arise in the case of surrogacy are compounded by the fact that the commissioned child could have no less than seven (7) parents that could vie for parenthood: the male and female donors of the gametes used for the conception of the child, the surrogate mother and her partner and the commissioning couple.[34]

2.3 Practice of surrogacy in South Africa before the Children's Act

Prior to the enactment of the Children's Act, there was no legislation that regulated surrogacy in South Africa.[35] Surrogacy came into the spotlight in 1987, when it transpired that a woman was pregnant with offspring of her daughter who was unable to bear children of her own and was reluctant to use the services of another surrogate.[36] The woman gave birth to her daughter's triplets, and because there was no legislation regulating surrogacy at the time the triplets were born, the only way in which the daughter could acquire legal parentage was to adopt her own children from her mother.[37] While surrogate motherhood was unregulated, artificial fertilisation[38] in general was comprehensively regulated in terms of the Human

[30] ART is also referred to as collaborative reproduction or asexual reproduction: Kindregan 2008 *J Am Acad Matrimonial Law* 2.
[31] Van Niekerk 2017 *PELJ* 4.
[32] Van Niekerk 2017 *PELJ* 5.
[33] Hanahan 1984 *American Bar Association Journal* 50.
[34] Tager 1986 *SALJ* 382.
[35] South African Law Commission Report and Draft Children's Bill on the *Review of the Child Care Act* Project 110 (December 2002), hereafter SALC *Report on the Review of the Child Care Act* (2002) par 6.4. See also *AB* CC par 34; Louw in Davel & Skelton (2007) 19-4.
[36] *Ibid*.
[37] *Ibid*.
[38] The term was defined in s 1(1) of the now repealed Human Tissue Act 65 of 1983 as "the introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including – (a) the bringing

Tissue Act[39] and the Regulations to the Human Tissue Act.[40] The definition of artificial fertilisation as provided for in the Human Tissue Act[41], according to the SALC, was capable of being interpreted to include many of the procedures used to give effect to a surrogate motherhood arrangement.[42] Neither the Human Tissue Act nor its Regulations envisaged the artificial fertilisation of a surrogate mother.[43] As far as the children born from such procedures were concerned (artificial fertilisation) were regulated in terms of the, now repealed Children's Status Act.[44] The Children's Status Act[45] was also not intended to regulate surrogacy.[46] It meant that a commissioning parent could only acquire legal parenthood or parental responsibilities and rights as it is now called,[47] by adopting the intended child in terms of the then still applicable Child Care Act.[48] The commissioning parent(s) could become the legal guardian(s) of the intended child in terms of a high court order,[49] but this would not have placed them in the same position as a natural biological parent or an adoptive parent.[50] As far as the legality and enforceability of surrogate agreements were concerned, legal scholars were of the opinion that should the surrogate mother renege from the agreement, the commissioning parent would not have been able to enforce the terms of the agreement as surrogacy was considered a distortion of the concept of family and would therefore be considered *contra bonos mores*.[51]

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

[39] 65 of 1983.

[40] *Ibid*.

[41] 65 of 1983.

[42] SALC *Report on Surrogate Motherhood* (1992) par 7.

[43] Van Heerden in Van Heerden *et al Boberg's Law of Persons and the Family* (1999) 342 and authority quoted in fn 54. See also Pretorius 1996 *De Rebus* 117.

[44] 82 of 1987.

[45] *Ibid*.

[46] Van Heerden in Van Heerden *et al Boberg's Law of Persons and the Family* (1999) 342 and authority quoted in fn 54. See also Louw in Davel & Skelton Skelton (2007) 19-2. Louw LLD thesis (2009) 330.

[47] Section 1 (1) of the Children's Act.

[48] 74 of 1983.

[49] In terms of the court's inherent jurisdiction as upper guardian of all minors.

[50] This is because the high court order would not give effect to the intention of the parties, which is to vest the commissioning parents with full parental responsibilities and rights. For a discussion of acquisition of parental responsibilities and rights in terms of the repealed Children's Status Act 82 of 1987 and the Human Tissue Act 65 of 1983, see Louw LLD thesis (2009) pars 4.4.1, 4.4.2 and 4.4.3.

[51] See in this regard Tager 1986 *SALJ* 395; SALC *Report on Surrogate Motherhood* (1992) par 4.7.3; SALC *Discussion Paper on the Review of the Child Care Act* (2001) par 7.5.

In 1989, the SALC circulated a questionnaire on surrogate motherhood and subsequently published a working paper for comments on the topic of surrogacy.[52] The questionnaire was meant to assist the SALC in its investigation into surrogate motherhood.[53] The purpose of the SALC's investigation into surrogate motherhood was to determine whether surrogacy should be regulated in South Africa or not.[54] The arguments in favour of regulation of surrogacy referred to surrogacy as an arrangement which enables couples who want a family but are prevented by infertility from having one, to have a child.[55] Furthermore, according the SALC, surrogacy would offer some couples their only chance of having a child that will be genetically related to at least one of them.[56] It was further argued that if the commissioning couple were prepared to go to such unusual lengths to have a child, the child would probably have a better chance of being wanted and loved.[57] A couple who decided to make use of surrogacy, in the SALC's view, would not "drift aimlessly or accidentally into parenthood".[58] They would be forced to make a careful choice in planning a family because of the obstacles they would have to overcome.[59] It was also argued that if the commissioning couple were to be subjected to screening this would ensure that the child is placed with parents who sincerely wanted the child and were able to care for the child, and this would be morally acceptable to some people.[60] According to the SALC, children conceived by artificial fertilisation are brought into a loving environment and are more likely to be better adjusted than the unfortunate children conceived normally and born into an undesirable emotional environment.[61] In this way, the process of surrogacy would not devalue life, but would cherish it.[62]

After finalising the investigation, the SALC published a report on surrogate motherhood in 1992.[63] The SALC was of the opinion that surrogacy should not be fragmentarily regulated through various Acts and that it should rather be regulated

[52] SALC *Working Paper 38 on Surrogate Motherhood* 1989.
[53] SALC *Report on Surrogate Motherhood* (1992) par 5.1.
[54] SALC *Report on Surrogate Motherhood* (1992) par 1.1.4.
[55] SALC *Report on Surrogate Motherhood* (1992) par 2.3.1.
[56] SALC *Report on Surrogate Motherhood* (1992) par 2.1.2.
[57] SALC *Report on Surrogate Motherhood* (1992) par 2.3.
[58] *Ibid*.
[59] SALC *Report on Surrogate Motherhood* (1992) par 2.3.
[60] *Ibid*.
[61] SALC *Report on Surrogate Motherhood* (1992) par 2.3.
[62] *Ibid*.
[63] SALC *Report on Surrogate Motherhood* (1992).

through a single Act.[64] Given the unique nature of surrogacy arrangements, the SALC proposed that surrogacy should be regulated through unique principles determined to serve as a basis for legislation.[65] After considering all the risk factors inherent in surrogate motherhood, the SALC recommended that surrogate motherhood be available only as a last resort.[66] The SALC at the time recommended that the proposed Surrogacy Act only be made accessible to married couples.[67] The SALC also recommended that all parties to a surrogacy motherhood agreement be screened,[68] and perhaps most importantly, that surrogate motherhood agreement only be permitted if the commissioning mother was unable to conceive and give birth due to a medical condition.[69] The SALC also recommended that the commissioning married couple not have a living child or children, unless it can be proven that an addition of a child born through surrogacy would not prejudice other children.[70] The report also recommended that surrogate motherhood be permissible only if the commissioning parents' gametes or at least the gamete of one of them is used.[71] The SALC was further of the opinion that if donor gametes are to be used, those of the surrogate and/or her husband's should not be used,[72] thus no partial surrogacy should be allowed.[73] A Bill on Surrogate Motherhood drafted by the SALC along these lines was attached to the SALC *Report on Surrogate Motherhood* as Schedule A.[74]

The SALC *Report on Surrogate Motherhood* was subsequently referred to a Parliamentary *Ad Hoc* Committee in 1994 for further investigation. A further investigation was deemed necessary because, according to the *Ad Hoc Committee*, the SALC for the purposes of its original mandate was inappropriately constituted in terms of gender and race; that some of the recommendations made were not in line

[64] SALC *Report on Surrogate Motherhood* (1992) par 8.1.1.
[65] SALC *Report on Surrogate Motherhood* (1992) par 8.1.2.
[66] SALC *Report on Surrogate Motherhood* (1992) par 8.2.1.
[67] SALC *Report on Surrogate Motherhood* (1992) par 8.2.2.
[68] SALC *Report on Surrogate Motherhood* (1992) par 8.2.3.
[69] SALC *Report on Surrogate Motherhood* (1992) par 8.1.3.
[70] SALC *Report on Surrogate Motherhood* (1992) par 8.2.5.
[71] SALC *Report on Surrogate Motherhood* (1992) par 8.2.6.
[72] SALC *Report on Surrogate Motherhood* (1992) par 8.2.7.
[73] *Ibid*.
[74] SALC *Report on Surrogate Motherhood* (1992) 162.

with the Constitution and the consultation process followed had been inadequate. [7576] After a thorough investigation, including visits to countries such as the United States of America and the United Kingdom, the *Ad Hoc Committee* made some changes to the recommendations made by the SALC and published a report.[77] In terms of their report, the *Ad Hoc Committee* recommended that any competent woman should be permitted to act as a surrogate mother regardless of her marital status or sexual orientation.[78] This recommendation differed from that of the SALC which recommended that only a married woman should be allowed to act as a surrogate mother.[79] The *Ad Hoc Committee* further made a different recommendation in so far as any competent person wishing to become a commissioning parent should be allowed to do so regardless of his or her marital status or sexual orientation.[80] The *Ad Hoc Committee* agreed that it was important to enact legislation to protect the interests of all parties to a surrogate motherhood agreement, particularly the best interests of the child.[81]

At this stage the SALC had already launched another investigation into a comprehensive review of the Child Care Act[82] and ultimately recommended that all matters relating to children, including surrogacy arrangements, should be regulated under one statute.[83] As a result of both the *Ad Hoc Committee* report and the SALC Reports,[84] the Children's Act was enacted with a chapter regulating surrogate motherhood.[85]

2.4 Position after the Children's Act

The Children's Act makes provision for several procedural and substantive requirements to be satisfied by those who wish to enter into a surrogate motherhood

[75] Report of the *Ad Hoc* Committee on the Report of SALC on *Surrogate Motherhood* (11 February 1999), hereafter simply referred to as the Report of the *Ad Hoc* Committee (1999), available at http//www. pmg.org.za/docs/1999/990211.saclreport.html.
[76] Report of the *Ad Hoc* Committee (1999) 2; Louw LLD Thesis (2009) 331 fn 25.
[77] Report of the *Ad Hoc* Committee (1999).
[78] Report of the *Ad Hoc* Committee (1999) par F4(1)(c).
[79] *Ibid*.
[80] Report of the *Ad Hoc* Committee (1999) par F4(1)(c).
[81] Report of the *Ad Hoc* Committee (1999) par F4(2)(d).
[82] 74 of 1983.
[83] *SALC Report on the Review of the Child Care Act* (2002) 56.
[84] The reports referred to here are the *SALC Report on Surrogate Motherhood* (1992), Report of the *Ad Hoc* Committee (1999) and the SALC *Report on the Review of the Child Care Act* (2002).
[85] Chapter 19 of the Children's Act regulates Surrogate Motherhood in South Africa.

agreement.[86] These requirements can be summarised as follows: Surrogate motherhood agreements must be in writing and confirmed by the high court;[87] consent of the wife, husband or partner of a party to the agreement must be obtained;[88] the gametes of both commissioning parents have to be used, if this is impossible the gametes of at least one of the parents and a donor have to be used.[89] Several factors must be considered by the court before it confirms a surrogate motherhood agreement.[90] Only after the agreement has been sanctioned by the court can the surrogate mother be artificially fertilised.[91] The artificial fertilisation must take place as prescribed by the National Health Act[92] and its regulations.[93] The legislative recommendations made by both the SALC and the *Ad Hoc Committee* ultimately formed the basis of the provisions included in chapter 19 of the Children's Act.[94]

In terms of the Children's Act, the effect of a valid surrogate motherhood agreement is that any child born as a result of the agreement is for all purposes deemed the child of the commissioning parents.[95] The Children's Act further makes provision for the termination of a surrogate motherhood agreement under certain prescribed circumstances,[96] and it also provides for the effect of such termination on all parties including the legal status of the child.[97]The aforementioned provisions which affect the legal status of the child born through surrogacy are fully discussed in chapter three (3) of this dissertation. The surrogate mother retains the right to terminate her pregnancy[98] in terms of the Choice on Termination of Pregnancy Act.[99] Payment in respect of surrogacy,[100] publishing or revealing the identity of parties to a surrogate

[86] See ss 292 to 303 of the Children's Act in this regard.
[87] Section 292.
[88] Section 293.
[89] Section 294.
[90] Section 295.
[91] Section 296.
[92] 61 of 2003.
[93] Section 296(2).
[94] See in this regard the reports of the SALC and *Ad Hoc Committee* on surrogate motherhood.
[95] Section 297.
[96] Section 298.
[97] Section 299.
[98] Section 300.
[99] Section 301.
[100] *Ibid*.

motherhood agreement,[101] and certain other acts[102] are prohibited to prevent the commercialisation of surrogacy and the sale and trafficking of children.

Despite the abovementioned strict requirements and preventative measures contained in chapter 19 of the Children's Act, the high court has recently been asked to confirm surrogate motherhood agreements that on the face of it do not strictly comply with the said requirements.[103] The very first cases which were brought before various courts for confirmation of surrogate motherhood agreement were never reported.[104] Although these cases were heard after the Children's Act came into operation in 2010, they were apparently not reported because it was clear that the proposed surrogate mothers had entered into such agreements with absolute altruistic motives,[105] and had complied with all other requirements for confirmation of their surrogate motherhood agreements.[106]

The first reported case that was urgently brought before the high court, soon after the Children's Act became operational, was *Ex Parte Applications for the Confirmation of Three Surrogate Motherhood Agreements.*[107] The applicants in this case sought to have their surrogate motherhood agreements confirmed by the high court.[108] The agreements were ultimately not confirmed by the court because there was a lot of information outstanding from the parties.[109] Due to lack of supporting documentation, the court postponed all three applications *sine die* to allow the applicants to correct and supplement their applications to properly comply with the

[101] Section 302.
[102] Section 303.
[103] *Ex Parte Applications for the Confirmation of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ). See also *Ex Parte WH* 2011 6 SA 514 (GNP); *Ex Parte MS and Others* 2014 ZAGPPHC 457*; Ex Parte HP and Others* 2017 4 SA 528 (GP).
[104] See the Western Cape High Court judgment where a surrogate motherhood agreement was confirmed Kassiem "New surrogacy law spawns happy events" IOL 20 September 2010, available at http://www.lawlibrary.co.za/notice/updates/2010/issue22/recentjudgments_wcc.html. Also see the South Gauteng High Court decision were a surrogate motherhood agreement was confirmed involving a gay couple Mooki "Triumph for gay couple" IOL 22 December 2010, available at http://www.iol.co.za/news/africa/triumph-for-gay-couple-1.1004191. In the Pietermaritzburg High Court Jappie J confirmed a surrogacy agreement between two couples who were close friends, for which see Oellermann "High court seals surrogacy deal" *The Witness* 27 August 2011, available at http://www.witness.co.za/index.php?showcontent&global%5B_id%5D=67272.
[105] Pillay and Zaal 13 *THRHR* 483.
[106] *Ibid*.
[107] 2011 6 SA 22 (GSJ).
[108] Par 1.
[109] Par 28.

provisions of the Act.[110] This case was reported particularly to provide guidance for confirmation applications – the court thus issued a general practice directive relating to the confirmation of surrogate motherhood agreements, pursuant to the *Ex Parte Application by three* judgment.[111]

In *Ex Parte WH and Others*,[112] the second reported case, the high court provided further guidance on the correct procedure to follow when applying for the approval of a surrogate motherhood agreement.[113] In its attempt to assist in achieving the intended objective, the high court requested submissions from other interested parties (i.e. the Pretoria Bar; Law Society of South Africa; and the Centre for Child Law).[114] *Ex Parte WH* concerned an application for the confirmation of a surrogacy agreement in terms of section 295,[115] brought by a gay couple ("the commissioning parents") who entered into a civil union[116] in terms of the Civil Union Act.[117] The surrogate mother and her life partner were joined as parties. The commissioning parents, surrogate mother and her partner were introduced to one another by an agency called Baby2mom.[118] The court requested additional affidavits relating to the process followed by and the compensation paid to the agency in order to ensure that the surrogacy was not of a commercial nature.[119] The founder of the agency accordingly filed a supplementary affidavit stating that the agency does not generate any income from facilitating surrogacy arrangements and that the agency was well aware of the prohibition against commercial surrogacy as provided for in the Children's Act.[120] The court noted that the commissioning parents had no children of their own, and that "both being male persons, are incapable of having children that are genetically related to them except through the process of surrogacy."[121] The court emphasised the importance of not discriminating against same sex couples

[110] *Ibid*.
[111] Par 27. See also Slabbert 2012 *SA Bioethics and Law* 28; Nicholson and Bauling 2013 *De Jure* 518.
[112] *Ex Parte WH and Others* 2011 6 SA 514 (GNP).
[113] Par 9.
[114] Par 10.
[115] Par 1.
[116] Par 14.
[117] 17 of 2006.
[118] Par 12.
[119] *Ibid*.
[120] Pars 12, 18 and 24.
[121] Par 16.

based on their sexual orientation, as that would be unconstitutional.[122] The court further stated that a same sex couple should not be subjected to a more stringent screening process than a hetero sexual couple as this would be discriminatory.[123] The high court held that the parties made out a proper case for the relief they sought, that the parties concluded a surrogate motherhood agreement for altruistic reasons, that the payments were in line with the Children's Act, and thus confirmed the agreement.[124] Legal scholars[125] criticised the judgment in *Ex Part WH* and opined that, contrary to its intended purpose, failed to provide guidance when dealing with an application for confirmation of a surrogate motherhood agreement.[126] According to Carnelley,[127] the judgment in *Ex Parte WH* ignored the basic requirements for a valid surrogate motherhood agreement.[128] According to this author, the court implied that the origin of the donor gametes was immaterial by confirming a surrogate motherhood agreement without knowing whether or not at least one of the commissioning parents' gametes will be used.[129] She said that the judgment does not satisfactorily deal with the fact that if neither of the commissioning parents was genetically related to the intended child, the agreement would be unlawful and result in the child being legally regarded as the child of the surrogate mother.[130] Similarly, Pillay and Zaal[131] were of the view that the judgment clearly illustrated that there were deficiencies[132] in the process for confirmation of surrogate motherhood agreements established by the Children's Act.[133] These authors further criticised the judgment for failing to fulfil its aim, which was to provide guidance. Instead the court failed to take a strict approach in relation to the suitability of the parties to and the financial expenses information disclosure in a surrogate motherhood agreement.[134] The authors concluded that the confirmation process was fundamentally flawed, and recommend that surrogate motherhood agreements be reviewed by a panel of

[122] Par 54.1.
[123] Par 54.2.
[124] Pars 79-80.
[125] Carnelley 2012 *De Jure* 179. See also Pillay & Zaal 2013 *THRHR* 475; Bonthuys and Broeders 2013 *SALJ* 485. Louw 2013 *THRHR* 564; Nicholson 2013 *De Jure* 510.
[126] *Ibid*.
[127] Carnelley 2012 *De Jure* 179.
[128] Carnelley 2012 *De Jure* p183.
[129] *Ibid*.
[130] Carnelley 2012 *De Jure* p183.
[131] Pillay and Zaal 2013 *THRHR* 475.
[132] Pillay and Zaal 2013 *THRHR* 482-483.
[133] Pillay and Zaal 2013 *THRHR* 476.
[134] Pillay and Zaal 2013 *THRHR* 482.

experts before they are brought to court for confirmation.[135] Bonthuys and Broeders[136] criticised the judgment for failing to appreciate the importance of substantive equality.[137] They argued that the court's inability to apply the principles of equality to the facts in *Ex Parte WH*, could cause confusion and set a bad precedent for other courts dealing with similar applications.[138] Bonthuys and Broeders opined that the factual findings of the court in *Ex Parte WH* did not reflect the degree of caution necessary to prevent the dangers of commercial surrogacy and the contravention of section 301 of the Children's Act.[139] It seems that this judgment attracted a lot of criticism precisely because it was meant to provide guidelines for future cases.

In *Ex Parte MS and Others*[140] the court confirmed a surrogate motherhood agreement in spite of the fact that the surrogate mother was already pregnant at the time of the hearing and the confirmation of the agreement.[141] Notably, the court's rationale for confirming an agreement which violated section 296(1) of the Children's Act was that it was in the best interest of the intended child and that section 295 (e) obliged the court to put the best interests of the intended child above all other considerations.[142] However, Louw[143] criticised the judgment in *Ex Parte MS*.[144] According to Louw, there was no need for the court to interpret section 292 and 295 in order to determine whether or not it could confirm a surrogate motherhood agreement post-artificial fertilisation of a surrogate mother.[145] In Louw's opinion the court could have made that determination in terms of section 295 (e) as the section confers a discretion on the court to confirm the agreement if "in general, having regard to the considerations mentioned in the section, the court is satisfied that the agreement should be confirmed".[146] Louw also questioned any existence of a justification for an implied constitutional interpretation of section 292 and 295 when

[135] Pillay and Zaal 2013 *THRHR* 484.
[136] Bonthuys and Broeders 2013 *THRHR* 485.
[137] See Currie and de Waal (2005) 233.
[138] Bonthuys and Broeders 2013 *THRHR* 489.
[139] *Ibid*.
[140] [2014] 2 All SA 312 (GNP).
[141] Par 4.
[142] Pars 53-58.
[143] Louw 2014 *De Jure* p110.
[144] *Ibid*.
[145] Louw 2014 *De Jure* p112.
[146] *Ibid*.

the court had already admitted that the two sections are constitutionally compliant.[147] Louw ultimately concluded by reiterating the fact that chapter 19 was carefully crafted and that by using the best interests of the child principle to ignore the provisions of chapter 19 only reinforces the claims[148] that the principle is being manipulated.[149] Similarly, Filander[150] opined that South African courts tend to ignore the basic statutory requirements and that there is a need for guidelines for the interpretation of the Children's Act in this regard.

In *Ex Parte HPP and Others*[151] the court had to consider two applications and determine whether the applicants in each case contravened section 301 of the Children's Act, where a surrogacy facilitation agreement had been concluded between the parties to a surrogate motherhood agreement and an agent.[152] Furthermore, the court had to determine whether surrogate motherhood agreements could be confirmed if the facilitation process[153] itself violated section 301 of the Children's Act.[154] The court held that the facilitator of the surrogacy agreement between the parties to a surrogate motherhood agreement, contravened section 301.[155] However, in spite of holding that section 301 was contravened, the court confirmed the surrogate motherhood agreements.[156] The court reasoned that the applicants were *bona fide* and had met all the other requirements for a valid surrogate motherhood agreement.[157] In contrast with *Ex Parte HPP and Others*,[158] the court in *Ex Parte KAF*[159] dismissed an application for the confirmation of a surrogate motherhood agreement for the reason that it violated section 301 of the Children's Act.[160] The court found "ND" unsuitable to act as a surrogate mother based on assessment reports relating to her psychological well-being.[161] The court suggested that she may not have been able to deal with the psychological

[147] Louw 2014 *De Jure* p112.
[148] Louw 2014 *De Jure* p117.
[149] *Ibid*.
[150] Filander LLM Dissertation (2016) par 2.4.3.
[151] [2017] 2 All SA 171 (GP).
[152] Par 3.
[153] The action undertaken by the agency to introduce the surrogate mother and the commissioning parents to each other.
[154] *Ibid*.
[155] Par 53.
[156] Par 71.
[157] *Ibid*.
[158] [2017] 2 All SA 171 (GNP).
[159] *Ex Parte KAF* 2017 ZAGPJHC 227.
[160] *Ex Parte KAF* par 30.
[161] *Ex Parte KAF* par 23.

consequences that may follow upon the birth of the child, the handing over of the child to the commissioning parents and the termination of surrogacy allowance.[162]

2.3 Conclusion

It seems that despite the strict requirements contained in Chapter 19 of the Children's Act, there is a need for courts to provide uniform guidelines (alternatively, regulations to Chapter 19 could be developed) on application for confirmation of a surrogate motherhood agreement. A re-drafting of legislation has also been suggested.[163] Notwithstanding the challenges presented by the abovementioned court judgments, the latest court challenge on the constitutional validity of section 294 (which is fully discussed in chapter 3 and critically analysed in chapter 4 of this dissertation) presents a different and novel challenge to the regulatory framework created in Chapter 19.

[162] *Ibid*.
[163] Carnelley 2012 *De Jure* p188.

CHAPTER 3: GENETIC LINK AND SURROGATE MOTHERHOOD IN SOUTH AFRICA

3.1 Introduction

This chapter narrows the focus of the investigation on section 294. The chapter explains the original purpose for its inclusion in in Chapter 19 of the Children's Act and its significance and impact on the regulatory framework of surrogacy as a whole. The second part of the chapter is devoted to a detailed discussion of the recent judgments in *AB*. A critical analysis of these judgments will follow in chapter 4.

3.2 The arguments for the inclusion of genetic link before the Children's Act

3.2.1 SALC Report on Surrogate Motherhood (1992)

The SALC's investigation into surrogate motherhood came soon after it had just completed its investigation into the legal position of children who were considered "illegitimate" in terms of South African law.[164] It appears the SALC at that point intended to provide a child born as a result of a surrogate motherhood agreement with the best possible status in order to ensure legal certainty for a *fait accompli* when it launched its investigation into surrogate motherhood in 1989.[165]

According to the SALC *Report on Surrogate Motherhood*, commissioning couples often made use of surrogacy because they wanted a child that was genetically linked to them.[166] In the SALC's view, such a genetic link speeds up the bonding process between the commissioning couple and the child.[167] The SALC thus concluded that at least one of the commissioning parent's gametes had to be used in order to promote the bond between the child and the commissioning parents, as this was in the child's best interests.[168] This bond was considered important to the future development of the child.[169] Requiring a genetic link between the child and the commissioning parents would also restrict undesirable practices, such as shopping around for gamete donors with a view to creating children with particular

[164] SALC *Report on Surrogate Motherhood* (1992) par 1.1.1.
[165] SALC *Report on Surrogate Motherhood* (1992) par 1.1.2.
[166] SALC *Report on Surrogate Motherhood* (1992) par 2.3.1: See also Lupton 1986 *De Jure* 150.
[167] SALC *Report on Surrogate Motherhood* (1992) par 2.3.3: See also Lupton 1988 *De Jure* 37.
[168] SALC *Report on Surrogate Motherhood* (1992) par 8.2.6.
[169] SALC *Report on Surrogate Motherhood* (1992) par 2.4.2.

characteristics.[170] The absence of a genetic link between the child and the commissioning parents could, in the SALC's view, cause the child to experience an identity crisis or a feeling of genetic rootlessness.[171] Furthermore, it was recommended that the surrogate mother's ovum should not be used as she might find it difficult to give up the child if the child is genetically linked to her.[172] As part of the requirements for surrogate motherhood, the SALC thus recommended that at least one of the commissioning parents' gametes be used so that the child can be genetically related to at least one of the commissioning parents.

3.2.2 Ad Hoc *Committee Report on Surrogate Motherhood (1999)*

As already explained in chapter two,[173] the *Ad Hoc* Committee conducted its own investigation and compiled a report on surrogate motherhood in 1999.[174] The *Ad Hoc* Committee considered, amongst other things, the conflicting interests of the parties to a surrogate motherhood agreement.[175] There was a view that where the surrogate mother was genetically unrelated to the child, the chance of her wanting to keep the child were considerably reduced.[176] It was thus argued that it was genetics that created a bond between the mother and the child, rather than gestation.[177] According to the Report of the *Ad Hoc* Committee, this view was confirmed by Ms K Cotton (the first surrogate mother in Britain) who was genetically linked to her first surrogate child but not to the twins she had afterwards.[178] On the other hand, the *Ad Hoc* Committee was also referred to a study by the American College of Obstetricians and Gynaecologists that found that the attachment of a mother who was genetically linked to the child would be just as great as it would have been if the mother was not so genetically linked.[179] The *Ad Hoc* Committee was also advised that the bonding of mother and child did not always happen, even in ordinary pregnancies and that the bonding between mother and child usually took place only after birth.[180] After

[170] SALC *Report on Surrogate Motherhood* (1992) par 8.2.6.
[171] SALC *Report on Surrogate Motherhood* (1992) par 2.4.3 See also Smit 1987 *Acta Aktueel* 24; Eaton 1986 *Neb LR* 708.
[172] *Ibid*.
[173] See 2.3 above.
[174] Report of the *Ad Hoc* Committee (1999).
[175] Report of the *Ad Hoc* Committee (1999) par E4.
[176] Report of the *Ad Hoc* Committee (1999) par E4(1)(b)(ii).
[177] *Ibid*.
[178] *Ibid*.
[179] *Ibid*.
[180] Report of the *Ad Hoc* Committee (1999) par E4(1)(b)(iii).

considering every submission related to genetics, the *Ad Hoc* Committee recommended that a genetic link between the commissioning parent and the child be inserted as a prescribed requirement for the validity of a surrogate motherhood agreement.[181]

3.2.3. SALC Discussion Paper on the Review of the Child Care Act (2001)

Contrary to both previous reports, the SALC criticised the genetic link requirement in the course of its investigation into the review of the Child Care Act.[182] The SALC expressed the view that this recommendation could possibly be found in violation of the right of an infertile person to make decisions concerning reproduction,[183] as well as the right to dignity[184] and privacy[185] if subjected to constitutional scrutiny.[186] Furthermore, the SALC indicated, albeit without reference to any authority, that prohibiting partial surrogacy (where the ovum of the surrogate mother is used) has been "convincingly criticized".[187] This prohibition, in the SALC's view, failed to take account of the fact that full surrogacy could possibly be potentially more exploitative of poorer women than partial surrogacy and, in addition, may be more attractive to wealthier couples who could commission a child genetically related to them.[188] The SALC furthermore argued that because full surrogacy entails complex and very expensive medical and surgical procedures with a relative low success rate (particularly in cases where the commissioning woman is infertile and a donated ovum has to be used), partial surrogacy will in many cases be the only practically and financially feasible option open to the commissioning person or couple.[189]

The SALC was further of the view that a surrogate mother should not be forced to give up the child despite the lack of a genetic link, as this would infringe her constitutional rights to dignity, privacy and to make decisions concerning reproduction.[190] According to the SALC's report on surrogate motherhood, a child born through surrogacy would find it easier to forget about his surrogate mother (who

[181] Report of the *Ad Hoc* Committee (1999) par F4(2)(b).
[182] SALC *Discussion Paper on the Review of the Child Care Act* (2001) 167.
[183] Section 12 (2) of the Constitution.
[184] Section 10 of the Constitution.
[185] Section 14 of the Constitution.
[186] SALC *Discussion Paper on the Review of the Child Care Act* (2001) 167
[187] SALC *Discussion Paper on the Review of the Child Care Act* (2001) 168.
[188] *Ibid*.
[189] *Ibid*.
[190] *Ibid*.

is genetically unrelated) than his/her genetic parents.[191] As part of its evaluation and recommendations, the SALC highlighted, the fact that recent international developments had centered on the child's right to genetic identity, which had been described as "an organising framework for holding together our past and present while providing anticipated shape to future life".[192] The SALC also acknowledged the psychological need in all people to know their backgrounds, their genealogy and personal history.[193] It is against this context that the SALC recommended that a child born through surrogacy be allowed access to his or her biographical and medical information concerning his or her genetic parents once he or she attains the age of majority.[194] The SALC also recommended that the surrogate mother, who is also a genetic parent of the child, be allowed to terminate the surrogate motherhood agreement, any time prior to the lapse of sixty days after the birth of the child.[195] This termination would then result in the surrogate mother being deemed the legal parent of the child for all intent and purposes.[196] In 2002, soon after the publication of their discussion paper, the SALC compiled a report on the review of the Child Care Act.[197] The report proposed a mirror provision of the one that was to be included in the Surrogacy Act, for inclusion in the Children's Bill.[198]

3.3 The significance of genetic link in Chapter 19 of the Children's Act

3.3.1 Section 294 of the Children's Act

In terms of this section, no surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by use of gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of them or, where the commissioning parent is a single person, the gamete of that person. This provision is a tangible expression of the view that surrogacy should be used not merely to have a child, but to have one that is genetically related to the commissioning parents.[199]

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[191] SALC *Discussion Paper on the Review of the Child Care Act* (2001) 172.
[192] SALC *Discussion Paper on the Review of the Child Care Act* (2001) 174.
[193] *Ibid*.
[194] SALC *Discussion Paper on the Review of the Child Care Act* (2001) 174.
[195] SALC *Discussion Paper on the Review of the Child Care Act* (2001) 176.
[196] *Ibid*.
[197] SALC *Report on the Review of the Child Care Act* (2002).
[198] SALC *Report on the Review of the Child Care Act* (2002) par 6.4.
[199] SALC *Report on Surrogate Motherhood* (1992) par 8.2.6 and Report of the *Ad Hoc* Committee (1999) par F3 (2); Carnelley and Soni 2011 *De Jure* par 5.

This provision echoes the views expressed in both the SALC's and *Ad Hoc Committee* reports that donor gametes must not be allowed where it is possible to use those of the commissioning parents, emphasising the idea that surrogacy should be used as a last resort.[200] It is argued that this provision is important as it prevents commercial surrogacy, commodification of children as well as ensuring that an adoption process is not circumvented emphasising the idea that surrogacy should be decision of last resort.[201] Furthermore, this provision is also deemed important as it has been said to promote the bond between the child and the commissioning parents and it attempts to restrict undesirable practices such as shopping around with a view to creating a child with specific characteristics.[202] It is further argued that the purpose of section 294 is to ensure that the child knows his or her genetic origin, something which is generally believed to be crucial for a child's identity.[203]

Section 294 has the effect of disqualifying commissioning parents who are unable to donate their gametes for the conception of a child to use surrogacy as an option for reproduction.[204] It is argued that section 294 creates a legal barrier between a conception infertile person and the use of surrogacy.[205] It is also argued that what disqualifies an infertile couple from using surrogacy is nothing but biological, medical and other reasons as indicated in section 294.[206]

The current legal position in South Africa regarding the genetic link requirement is that a surrogate motherhood agreement is only valid if it will result in at least one of the commissioning parents being genetically linked to the child.[207] A high court is prohibited from confirming a surrogate motherhood agreement if certain requirements listed in section 295 are not met.[208] The fact that section 295 makes no reference to genetic link requirement as one of those requirements, does not

[200] *Ibid*.
[201] SALC *Report on Surrogate Motherhood* (1992) par 8.2.6; See also *AB* CC par 25; *AB* HC par 35.
[202] *Ibid*.
[203] *AB* CC pars 29-30.
[204] par 91.
[205] *Ibid*.
[206] *AB* CC par 299.
[207] Par 330.
[208] See s 295 for the requirements that must be met before a high court confirms a surrogate motherhood agreement.

suggest that genetic link is not a requirement for confirmation as explained in the following paragraph.[209]

3.3.2 Section 295 of the Children's Act

This section prohibits a high court from confirming a surrogate motherhood agreement that does not meet the requirements for confirmation. As noted in paragraph 4.1 above, the requirements that must be met for confirmation make no reference to a genetic link.[210] However, a confirmation of such an agreement without the necessary genetic link will be invalid in terms of the provisions of section 294.[211] The high court has, however, confirmed a surrogate motherhood agreement which did not comply with section 294.[212] In *Ex Parte WH* the high court confirmed a surrogate motherhood agreement despite problematic issues relating to the information presented by parties.[213] The high court stated that the information relating to the origin of the gametes to be used to artificially fertilise the surrogate mother is not necessary to determine that application.[214] It is difficult to understand why the high court in *Ex Parte WH* deemed it unnecessary to scrutinise information relating to the origin of the gametes in a surrogate motherhood agreement.

3.3.3 Sections 298 and 299

In terms of section 298(1) a surrogate mother who is also a genetic parent of the child is allowed to terminate the surrogate motherhood agreement at any time before the lapse of a period of sixty (60) days after the birth of the child.[215] The effect of this termination will result in parental rights and responsibilities over the child vesting in the surrogate mother and her husband or partner, if any or if none, the commissioning father.[216] It is not clear in this section whether the words "if none" refers to a situation where both the surrogate mother and her husband or partner are

[209] Chapter 19 regulates surrogate motherhood and it provides that surrogate motherhood agreement that will result in a child who is not genetically linked to the commissioning parents is invalid in terms of s 294.
[210] See s 295 for the confirmation requirements.
[211] See s 294 in this regard.
[212] *Ex Parte WH*.
[213] *Ex Parte WH* par 80.
[214] par 22.
[215] The fact that the surrogate mother is permitted to terminate the surrogate motherhood agreement only if she is also the genetic parent of the child, also emphasises the importance of genetic link between mother and child.
[216] Section 299(a), (b) and (c).

none existent, and only then will the parental responsibilities and rights vest in the commissioning father.[217] This provision is ambiguous as it is capable of being understood to mean that parental responsibility and rights vest in both the surrogate mother and the commissioning father, which would be contrary to the intentions of the parties a surrogate motherhood agreement.[218]

Termination of the agreement by a partial surrogate mother accords with the view of the SALC that it is generally deemed in the best interests of a child to grow up with his or her genetic parents.[219] This obviously goes against the intentions of the parties to and the purpose of the surrogate motherhood agreement, which is to reproduce a child for the commissioning parents.

3.4 Interpretation by the judiciary

3.4.1 Introduction

This part of the dissertation discusses the interpretation of section 294 by the high court and the Constitutional Court in *AB* HC and *AB* HC respectively. It begins with a discussion of the majority decision in AB CC and thereafter discusses the minority decision in *AB* CC together with the high court decision in *AB* HC. The factual background refers to those discussed in both the high court and the Constitutional Court.

3.4.2 High Court judgment

3.4.2.1 Facts

In 2015, five years after the Children's Act came into operation, the high court heard an application challenging the constitutional validity of section 294 of the Children's Act.[220] In this application, an infertile woman ("AB") sought to have the section declared constitutionally invalid because it was said to violate her right to make decisions concerning reproduction, right to dignity and right to privacy.[221] AB underwent 18 IVF cycles between 2001 and 2011, which were all unsuccessful in

[217] See Ch 4 for a critical analysis of these sections.
[218] *Ibid*.
[219] See in this regard the SALC *Discussion Paper on the Review of the Child Care Act* (2001) 172.
[220] *AB* HC.
[221] *Ibid*.

helping her fall pregnant.[222] When AB attempted to use surrogacy to realise her wish of having a child, she was informed that unless she could use her gametes or those of her husband or partner, she would be prohibited by section 294 from entering into a valid surrogate motherhood agreement.[223] AB then approached the high court to declare section 294 unconstitutional. An agency called Surrogacy Advisory Group was joined as the second applicants and also representing the first applicant (AB).[224] The Minister of Social Development opposed AB's application and the Centre for Child Law was admitted as *Amicus Curiae*.[225]

3.4.2.2 Issue

Whether section 294 violates the rule of law, as well as rights to equality, human dignity, reproductive autonomy, privacy and access to healthcare.[226]

3.4.2.3 Ratio decidendi

3.4.2.3(a) Unfair discrimination

Basson J found that the genetic link requirement unfairly discriminates between persons as it excludes "members of the sub-class"[227] from accessing surrogate motherhood as a reproductive avenue.[228] He further found that the genetic link requirement prohibits permanently infertile persons from exercising their right to autonomy and that this reinforces negative psychological effects that infertility has on such persons, and it thus encroaches on the right to dignity of infertile persons.[229] Furthermore, according to him, the factual differences between self-gestation and surrogate gestation do not justify a legal differentiation between them especially since both procedures' objective is to enable an infertile person to become a parent.[230] He then referred to the fact that the "Regulations relating to the artificial fertilisation of persons" allow for double donor gametes in the case of artificial fertilisation whereas double donor gametes is prohibited in the case of surrogacy.[231]

[222] *AB* CC par 8 and *AB* HC par 17.
[223] *AB* CC par 10 and *AB* HC par 20.
[224] *AB* HC par 13.
[225] *AB* HC pars 14 and 15.
[226] *AB* CC par 12 and AB HC par 8.
[227] *AB* HC par 76.
[228] *Ibid*.
[229] *Ibid*.
[230] *AB* HC par 77.
[231] pars 78 – 82.

The court further found that the respondent's argument that allowing double donor gametes in surrogacy will be circumventing adoption laws is flawed because in surrogacy, the child becomes the child of the commissioning parents when the child is born and is not adopted.[232] The court found that there is no rational connection between this differentiation and a legitimate government purpose it is designed to achieve.[233] The court stated that the purpose of in vitro fertilisation in surrogacy and that of artificial fertilisation is the same, thus there should not be a genetic link requirement in one but not the other.[234]

3.4.2.3(b) Best interest of the child

The court further found that there is no evidence that shows that information relating to a child's genetic origin is necessarily in the best interests of the child.[235] The court further questioned the submission that the genetic link between the child and the commissioning parent is in the best interests of the child, said that this is offensive to adopted children since they are not genetically related to their adoptive parents.[236] It further stated that a child born through surrogacy where a single donor gamete is used will also not know the identity of the donor which becks the question why this is not perceived as contrary to the best interests of the child.[237]

3.4.2.3(c) Reproductive autonomy

The court found that the genetic link requirement infringes on the right to reproductive autonomy as it violates an infertile person's right to make decisions concerning reproduction.[238] Furthermore, the court found that the rights to human dignity and privacy of the commissioning parents has been infringed by the genetic link requirement, as commissioning parents' decision to use donor gametes falls within boundaries of privacy.[239] The court further found that surrogacy is a form of health care and that the constitution protects a person's right to access health care, thus the genetic link requirement infringes on this right.[240] The court concluded that

[232] *AB* HC par 82.
[233] par 87.
[234] *Ibid*.
[235] *AB* HC par 84.
[236] *Ibid*.
[237] par 85.
[238] par 89 – 93.
[239] *AB* HC par 95.
[240] par 98 – 99.

the genetic link requirement violates a person's right to human rights on a very personal and intimate level and found section 294 unconstitutional.[241]

3.4.2.3(d) Other jurisdictions

The court also dismissed the argument that in other jurisdictions the genetic link requirement is paramount in surrogacy arrangements.[242] The court was of the view that most countries where genetic link is a requirement for surrogacy, their legal system is fundamentally different from the South African legal system, thus the comparative value of such jurisdictions is minimal is this case.[243] The court said that on the contrary, most countries appear to be moving away from requiring genetic link between the child and commissioning parents.[244]

3.4.2.3(e) Decision

The high court ultimately held that section 294 unjustifiably limits AB's right to equality, right to dignity, right to make decisions concerning reproduction and right to access health care services.[245]

3.4.3 AB CC

The high court's finding that section 294 is constitutionally invalid as it violates the constitutional rights of a person who is conception and pregnancy infertile triggered the Constitutional Court's confirmation jurisdiction.[246] As a result of the decision in *AB* HC the matter was referred to the Constitutional Court for confirmation.[247] The submissions of the parties in *AB* CC were to a certain extent similar to those submitted in *AB* HC.[248] The minority stated that in order to determine the constitutionality of section 294 the following must be determined: Section 9(1) of the Constitution and the rationality of section 294; Whether AB's rights to equality, human dignity, reproductive autonomy and access to health care services limited by section 294?; and if so, whether the limitation of the rights is justifiable in terms of

[241] *AB* HC pars 102 – 106.
[242] Par 47 – 55.
[243] *Ibid*.
[244] *AB* HC par 53.
[245] Par 106.
[246] See section 172 of the Constitution.
[247] *AB* CC par 16.
[248] *AB* CC pars 269 – 272.

section 36(1) of the Constitution.[249] The majority stated that the case is about the validity of section 294 and not about whether the genetic link requirement relevance to the legal conception of family. It stated that the primary issue is whether the order granted in *AB* HC should be confirmed and thus deciding this question requires that regard be had to the text of the impugned provision to determine its legislative objectives.

3.4.3.1 Ratio Decidendi

3.4.3.2 AB CC: Majority decision

The majority decision was penned down by Nkabinde J.[250] According to this decision the AB case was about the validity of section 294 of the Children's Act, and not about whether or not the genetic link requirement in that section has relevance to the legal conception of family.[251] In deciding whether or not to confirm the court order, the majority dealt with the question whether the impugned provision is irrational in terms of section 9(1) of the Constitution; whether AB's implicated rights are limited by the genetic link requirement in terms of section 294 and if so; whether such limitation is justifiable in terms of section 36(1).[252] Nkabinde J stated that the correct interpretive approach is one that give words in the legislation their ordinary meaning and must be interpreted purposively.[253] She began her interpretive process by dissecting the meaning of section 294.[254]

3.4.3.2(a) Meaning of section 294

In dealing with the meaning of section 294, Nkabinde J stated that section 294 regulates the conclusion of a surrogate motherhood agreement.[255] The conception of the child contemplated in such agreement must be achieved by the use of gametes of both commissioning parents or the gametes of at least one of the commissioning parents, if both parents cannot donate gametes due to either biological, medical or other reasons.[256] Where there is one commissioning parent, as in this case, the

[249] *AB* CC par 33.
[250] *AB* CC pars 85-128.
[251] Par 273.
[252] *Ibid*.
[253] *AB* CC par 273.
[254] Par 275.
[255] Par 276.
[256] *Ibid*.

section requires the gametes of that commissioning parent in order to conclude a valid surrogate motherhood agreement.[257] She further stated that the scheme of Chapter 19 protects the interests of permanently and irreversibly infertile persons through the conclusion of a surrogate motherhood agreement.[258] She said that section 294 disqualifies fertile persons who are able to conceive without using surrogacy.[259] She further said that infertile persons are only disqualified from concluding a valid surrogate motherhood agreement, if no gametes of the commissioning parents are used,[260] and such disqualification accords with the objective captured in the heading of section 294.[261] Given the fact that the object of the Children's Act is to give effect to children's rights,[262] the court held that section 294 should be interpreted in conjunction with section 9 of the Children's Act and section 28(2) of the Constitution as a means to protect the best interests of the child.[263] Having dealt with the meaning of section 294, the court proceeded to deal with the question of the rationality of section 294.[264]

3.4.3.2(b) Is section 294 irrational?

In this regard, Nkabinde J stated that in order to determine the rationality of section 294,[265] the section must be tested against the Constitution.[266] This meant that it had to be established whether section 294 violates section 9(1) of the Constitution.[267] She also stated that the respondent correctly accepted that there is a differentiation between surrogacy legislation and IVF regulations. However, to interpret this differentiation as irrational would, in her opinion, not be correct.[268] According to the approach followed in previous cases,[269] section 294 could only be declared unconstitutional if there was an absence of a rational connection between the differentiation and a legitimate government purpose which the differentiation aims to

[257] *AB* CC par 276.
[258] Par 277.
[259] *Ibid*.
[260] *AB* CC par 278.
[261] *Ibid*.
[262] Par 279.
[263] Par 280.
[264] Par 282.
[265] Par 283.
[266] Par 284.
[267] *Ibid*.
[268] *AB* CC par 286.
[269] *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC).

achieve.[270] It was argued that the requirement of donor gametes within the context of surrogacy serves a rational purpose, which is to create a bond between the child and the commissioning parent or parents[271] that is in the best interests of the child.[272] The court thus concluded that a rational connection exists.[273] In the court's view, AB's disqualification from using surrogacy was rational because it protected the genetic origin of the child for the child's best interests.[274] It was argued that surrogacy and IVF cannot be compared as they are substantially different.[275] Nkabinde J accepted the fact that double donor conception is allowed in the context of IVF but mentioned that section 294 cannot be struck down based on the fact that another statute[276] allows double donor gametes in the context of IVF.[277] She hastened to say that the clarity of origin may be important to the self-identity and self-respect of the commissioned child, and that the risk to the child's self-identity is unquestionably all important.[278] She criticised the high court for accepting expert opinion on the harm that could occur to the child should there be no genetic link in the context of surrogacy.[279] She went on to say that courts do not rely on research or expert opinion in order to determine the constitutionality of legislation.[280] With regards to the applicant's submission that the liberal concept of the legal family was all important in determining the AB case, Nkabinde J stated that a court must examine the means chosen in order to determine whether they are rationally related to the public good it sought to achieve.[281] She reiterated the fact that the means chosen in section 294 is rationally connected to the public good sought to be achieved by government and that courts cannot interfere with it.[282] She further stated that the purpose of the enquiry is to determine whether the means chosen are rationally related to the objective sought to be achieved not whether there are other means that could have been chosen.[283] She was further of the view that the high

[270] *AB* CC par 287.
[271] Par 287.
[272] *Ibid*.
[273] *AB* CC par 287.
[274] Par 288
[275] *AB* CC par 289.
[276] National Health Act.
[277] *AB* CC par 290.
[278] *Ibid*.
[279] Par 291.
[280] *Ibid*.
[281] Par 292.
[282] *Ibid*.
[283] Par 292.

court ignored the objective of the Children's Act and overstated the interests of the commissioning parent(s), overlooking the purpose of section 294 and the best interests of the child.[284] The importance of the genetic link was stressed with reference to a Setswana adage,[285] loosely translated as "a child belongs not to the one who provides but to the one who gives birth to the child."[286] Nkabinde J also noted that the high court had acknowledged and endorsed the view that clarity regarding the origin of a child is important to the self-identity and self-respect of the child.[287] She then concluded that she did not support the high court's finding that section 294 constitutes an irrational legal differentiation which violates section 9(1) of the Constitution.[288] She then proceeded to deal with the question of whether section 294 could be seen as a violation of AB's right to equality.

3.4.3.2(c) Does section 294 limit AB's right to equality?

Having concluded that the impugned provision is rationally connected to a legitimate government purpose and thus not in violation of section 9(1) of the Constitution,[289] Nkabinde J proceeded to examine whether section 294 violated AB's right to equality.[290] She then examined whether section 294 discriminates against the right to equality. She referred to and applied the two-legged inquiry established in *Harksen v Lane NO*[291] and *Prinsloo v Van der Linde*[292] and found that section 294 did not limit AB's or infertile persons' right to equality.[293] Having found that section 294 does not limit the right of infertile persons to equality, she subsequently examined whether section 294 limits AB's right to reproductive autonomy.[294]

3.4.3.2(d) Does section 294 limit AB's right to reproductive autonomy?

Nkabinde J disagreed with the submission that section 294 violated AB's right to reproductive autonomy because, in her opinion, section 294 merely regulates the

[284] Par 294.
[285] The Setswana adage says "*ngwana ga se wa ga ka otla ke wa ga katsala*".
[286] *AB* CC par 294.
[287] *Ibid*.
[288] *AB* CC par 294.
[289] Par 295.
[290] *Ibid*.
[291] 1998 1 SA 300 (CC) pars 47-48.
[292] 1997 3 SA 1012 (CC) pars 24-26.
[293] *AB* CC par 295.
[294] Par 305.

conclusion of a valid surrogate motherhood agreement.[295] She indicated that the purpose of section 12(2) of the Constitution[296] was to ensure that the physical integrity of every person is protected.[297]. Reference was also made to the case *Certification of the Constitution*[298] where the Constitutional Court held that the right to bodily integrity is a universally accepted right.[299] In its rejection of a constitutional challenge to section 12(2), the court in *Christian Lawyers Association*[300] interpreted the right to bodily integrity as relating to people's ability to make decisions about their bodies, not another person's body.[301] Nkabinde J also cited scholarly articles and jurisprudence in other jurisdictions, which support this interpretation of section 12(2)(a).[302] She further acknowledged the need to respect the autonomy of commissioning parents in relation to the choices they make for the purpose of concluding a surrogacy agreement.[303] However, she subsequently said that section 12(2)(a) does not give anyone the right to bodily integrity in respect of someone else's body, and that even if this right extended to another person's body, it is difficult to see how section 294 could impair the right of someone who is unable to produce gametes.[304] The court held that section 294 protects the commissioning parents in a sense that where consent of the non-commissioning parent is required but is not obtained, the court can still confirm a surrogate mother agreement.[305] After critically analysing section 12(2)(a) She found that section 294 does not violate the right to bodily integrity.[306]

3.4.3.2(e) Does section 294 limit AB's right to reproductive health care?

Nkabinde J held that the high court reached its decision in this regard without analysing section 27(1) of the Constitution[307] and ultimately found that the genetic

[295] Par 306.
[296] Pars 307-308.
[297] *Ibid*. Referring to *Ferreira v Levin No and Others* 1996 1 SA 984 (CC) par 170 in this regard.
[298] *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 (4) SA 744 (CC) pars 59-62.
[299] *AB* CC par 279.
[300] *Christian Lawyers Association v Minister of Health* 2005 (1) SA 509 (TPD).
[301] *AB* CC par 313.
[302] *Ibid*.
[303] Par 315.
[304] *Ibid*.
[305] Par 317.
[306] Par 318.
[307] *Ibid*.

link requirement in section 294 does not limit AB's right to reproductive health care.[308]

3.4.3.2(f) Does section 294 limit AB's right to privacy?

Nkabinde J found that section 294 did not limit AB's right to privacy and referred to what was said in *S v Jordaan*[309] about autonomy and the right to privacy.[310]

3.4.4 AB CC minority decision

After providing a general overview of the legislative framework of surrogacy[311] the following issues were identified by the minority judgment in *AB CC* as delivered by Khampepe J.

3.4.4.1 Does section 294 limit AB's rights?

In her answer to this question, Khampepe J first of all considered[312] the importance of the constitutional value of freedom entrenched in section 1 of the Constitution and emphasised in cases such as *NM v Smith*,[313] *Barkhuizen v Napier*,[314] and *Jordaan.*[315] She argued that respecting the choices each person makes is one way of realising the constitutional value of freedom.[316]

3.4.4.2 Freedom and security of a person

Khampepe J then proceeded to interpreted section 12(2)(a) of the Constitution after noting that there is no judicial decision analysis of this subsection by the Constitutional Court or any other court.[317] She observed section 12(2)(a) has created a freestanding freedom right, one that focuses on the psychology *and* physical integrity of the person thus supporting a broad interpretation of the rights protected in the section.[318] With reference to case law relating to the ability to decide whether or not to terminate a pregnancy, Khampepe J emphasised the importance of protecting

[308] Par 322.
[309] 2002 6 SA 642 (CC) par 53.
[310] *AB* CC par 323.
[311] *AB* CC pars 34-47.
[312] Pars 49-50.
[313] 2007 5 SA 250 (CC).
[314] 2007 5 SA 323 (CC).
[315] 2002 6 SA 642 (CC).
[316] *AB* CC par 52.
[317] Par 53.
[318] Pars 59-61.

bodily, but more importantly psychological integrity.[319] She also cited instances where the bodily and psychological integrity of a person had been violated by the decisions of others, thus supporting the idea that stifling a person's ability to make a decision can be a violation of the person's right to psychological integrity.[320] After analysing section 12 Khampepe J concluded that the purpose of section 12 is to protect a person's decision concerning reproduction and that the possible implications of these choices are crucial to that person's psychological wellbeing.[321] She further found that a constitutional challenge of section 294 cannot be rejected on the basis of AB's inability to donate gametes and the fact that the process did not affect her physically.[322] According to Khampepe J, section 12(2) of the Constitution can, and should, be read broadly to cover the harm to the *psychological* integrity of a person, even if there is no harm to the body of such person.[323]

3.4.4.3 Section 294

Having provided the context against which the impugned provision (section 294) should be seen, Khampepe J stated that surrogacy has the effect of reducing the harm caused by infertility whereas the genetic link requirement in section 294 has the opposite effect. In her view, section 294 prevents infertile people who cannot contribute gametes for a surrogacy from concluding a valid surrogate motherhood agreement.[324] She further said that section 294 limits conception infertile people's ability to make decisions concerning reproduction, and should therefore be considered a violation of section 12(2)(a).[325] In contrast to the majority of the Constitutional Court, she held that it was section 294 that disqualified AB and others similarly placed by creating a legal barrier between infertile persons and the use of surrogacy.[326] Thus, section 294 infringed AB's right to make decisions concerning reproduction.[327] In light of this conclusion, the effect of section 294 on AB's right to equality was assessed.[328]

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[319] Par 66.
[320] Par 69.
[321] *AB* CC par 70.
[322] Par 71.
[323] Par 81.
[324] Pars 90-91.
[325] Pars 91-92.
[326] Par 93.
[327] *Ibid*.
[328] Par 97.

3.4.4.4 Equality

Khampepe J argued that by requiring a genetic link in the case of surrogacy, but not in the case of *in vitro* fertilisation (IVF) where double donor conceptions are allowed, section 294 differentiates between infertile persons.[329] She explained that this is because section 294 differentiates between persons who are pregnancy infertile but not conception infertile and those who are both conception and pregnancy infertile.[330]

She further criticised the majority judgment's analysis of the purpose of section 294.[331] She was of the view that if the purpose of section 294 was to ensure that there is genetic link between the child and the commissioning parent, then it is immaterial whether there is a gestational link or not.[332] Thus, requiring genetic link in the case of surrogacy but not in IVF simply because in IVF there is a gestational link is discriminatory.[333] She then held that section 294 infringes on an infertile person's right to dignity.[334] Subsequent to holding that section 294 discriminates against a conception infertile person, Khampepe J found the discrimination to be unfair,[335] and unjustifiable in terms of section 36 of the Constitution.[336]

3.4.4.5 Family

Khampepe J found that by requiring a genetic link, section 294 does not value alternative forms of family and that this was inconsistent with the legal conception of family.[337] She went on to state that family formations change through time as society develops, and that the Constitution accepted these various forms of family formations.[338] She cautioned that section 294 created a disparity between children that are genetically linked to their parents and those who are not, such as adopted children.[339]

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[329] Par 101.
[330] *Ibid*.
[331] *AB* CC pars 120-122.
[332] Par 122.
[333] *Ibid*.
[334] Par 124.
[335] Pars 125-127.
[336] Pars 129-138.
[337] Pars 115-118.
[338] *Ibid*.
[339] Pars 118-119.

3.4.4.6 The purpose of section 294

Subsequent to finding that section 294 unjustifiably infringes on an infertile person's right to make decisions concerning reproduction, the right to equality and dignity, Khampepe J proceeded to interpret the purpose of section 294,[340] and held that the purpose of section 294 could not have been to discourage commercial surrogacy, since there are already stringent provisions in the Children's Act meant to achieve that. She accordingly rejected the argument that section 294 discourages commercial surrogacy.[341]

In relation to whether section 294 is meant to deter people from creating designer babies, Khampepe J was of the opinion that not enough expert opinion has been placed before the court in *AB* CC. She stated that alleging that section 294 aims to prevent the creation of designer children is incorrect, because if this was the purpose, then it wouldn't make sense as to why a similar requirement does not exist in the context of IVF.[342]

Khampepe J criticised the submission that the purpose of section 294 is to protect the right of a child born through surrogacy to know his or her genetic origin.[343] She was not persuaded by the argument that this purpose of section 294 accords with the provisions of section 41 of the Children's Act.[344] According to Khampepe J, section 41 is self-contradiction as it provides for children born through artificial fertilisation or surrogacy to have access to their biographical and medical information concerning their genetic parents, but that such information must not reveal the identity of the donors.[345] She further said that this contradiction makes it difficult to see how the purpose of section 294 ensures that children born through surrogacy may know their genetic origin.[346] She said that this contradiction implies that there are two best interests of the child standards, one for children born through surrogacy and the other for those born as a result of artificial insemination.[347] She was further of the view that the contradiction suggests that the genetic origin of the child is not

[340] Par 145.
[341] *AB* CC pars 146-148.
[342] Pars 149-152.
[343] Pars 153-162.
[344] *Ibid*.
[345] Par 163.
[346] *Ibid*.
[347] Par 164.

important if such a child is born through double donor IVF.[348] She held the view that the explanation provided by the *Ad Hoc* Committee, that is, the absence of section 294 will result in a situation similar to adoption is more convincing and consistent with section 294.[349] She however, rejected the submission that section 294 promotes adoption by prohibiting so-called commissioned adoptions. After critically analysing the possible reasons for inclusion; the court ultimately concluded that the purpose of section 294 was to prevent the circumvention of adoption.[350]

3.4.4.7 The importance of the purpose of section 294

In assessing the importance of section 294, Khampepe J began by stating that the main goal of section 294 is to prevent a child from being born as a consequence of a surrogate motherhood agreement, without being genetically related to at least one commissioning parent.[351] According to her, this is meant to discourage the use of surrogacy where other sufficiently similar avenues are available.[352] Furthermore, she said that the importance of the purpose of section 294 depends on whether adopting a child is sufficiently similar to having a genetically unrelated child by way of surrogacy to render the limitation of AB's rights reasonable and justifiable.[353] Khampepe J was of the view that although double donor gametes in surrogacy may result in the child being genetically unrelated to the parents, which is similar to adoption, the two processes are fundamentally different.[354] Thus, limiting AB's rights simply because the outcome of a double donor conception is the same as that of an adoption (as they both result in the child being genetically unrelated to the parents) is misguided.[355]

3.4.4.8 Genetic origin

Khampepe J accepted that section 294 ensures, to some degree, that the child knows his or her genetic origin.[356] She, however, criticised the submission that it is better to not being born at all, than to be born genetically unrelated to your

[348] *Ibid*.
[349] Par 165.
[350] *AB* CC pars 167-171.
[351] Par 173.
[352] *Ibid*.
[353] Pars 174-175.
[354] Pars 176-180.
[355] Pars 181-185.
[356] Par 186.

parents.[357] She was of the view that arguing that the non-existence of a child is better than being born genetically unrelated to your parents, does not accord with section 295(e) of the Children's Act.[358] This is because section 295(e) requires a high court not to confirm a surrogate motherhood agreement unless, after considering the best interests of the prospective child, is of the view that, generally, the agreement should be confirmed.[359] According to Khampepe J, the best interests of the child standard in section 7(1) of the Children's Act envisages a situation where a child is already born.[360] Thus, any enquiry into the best interests of the child before a child is even conceived does not accord with section 295(e).[361] Furthermore, she held that it cannot be concluded that it is better to not be born into a psychologically harmful situation in every case.[362] She then held that what stands in the way of a child, born through surrogacy, is section 41(2) which prohibits access to information that may reveal the identity of the donors.[363] She went on to say that therefore, it is the constitutionality of section 41(2) that should be challenged.[364] Khampepe J ultimately found that the limitation of AB's rights, created by section 294 is unjustifiable in terms of section 36 of Constitution.[365]

3.4.4.9 Remedy

In relation to the submission made that once section 294 is declared invalid, the Constitutional Court must suspend the declaration of invalidity; Khampepe J held that the Constitutional Court is not obliged to suspend the declaration of invalidity.[366] She ultimately held that the declaration of invalidity of section 294 must be suspended given the implications on the legislative scheme of the Children's Act.[367] Khampepe J concluded that in light of her analysis and interpretation of the constitutional validity of section 294, she would have confirmed the *AB HC* order and suspended the declaration of invalidity for 18 months.[368]

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[357] Par 187.
[358] Par 188.
[359] *AB* CC par 192.
[360] Pars 193-195.
[361] *Ibid*.
[362] Pars 196-198.
[363] Pars 199-207.
[364] *Ibid*.
[365] Pars 208-2013.
[366] Pars 214-225.
[367] *Ibid*.
[368] Par 236.

3.5 Conclusion

This chapter provided an exposition of the original rationale for making a genetic link a requirement for the confirmation of a surrogate motherhood agreement in South Africa as well as the different approaches adopted by the judiciary in deciding whether the requirement violates the constitutional rights of commissioning parents and the child born as a result of the surrogacy agreement. The next chapter will at the outset provide a comparison between the arguments for and against the inclusion of the genetic link requirement as well as a critical analysis of the *AB* judgments.

CHAPTER 4: CRITICAL ANALYSIS OF BOTH HIGH COURT AND CONSTITUTIONAL COURT APPROACHES ON INTERPRETING SECTION 294

4.1 Introduction

The purpose of this chapter, in the first place, is to consider the arguments that have been advanced for and against the inclusion of the genetic link requirement. While some of these arguments were raised after the AB judgments, most of the arguments were made in anticipation of the judiciary's pronouncements. The chapter will then proceed to critically analyse the approaches taken by courts in determining the constitutionality of section 294 and the extent to which the best interests of the child influenced the two courts' judgments. To achieve this purpose, the focus will be on what, according to the courts, was the rationale for the inclusion of the genetic link, the effect and importance of the genetic link in the context of the provisions of Chapter 19 as a whole and the relation between the genetic link and the best interests of the child.

4.2 Arguments in favour of and against retaining the genetic link

4.2.1 Arguments in favour of retaining the genetic link

Apart from the Constitutional Court's support of the genetic link requirement, only two authors advanced arguments in favour of it, and then only indirectly.

According to Slabbert[369] the genetic link requirement can prevent the practice of commissioning parents "shopping around" with the intention to create children with specific characteristics.[370] This view accords with that of the SALC and the *Ad Hoc Committee* in their respective reports on surrogate motherhood.[371] Khampepe J in her minority decision criticised this view on the basis that it implied that children who are not genetically related to their parents are "designer babies".[372]

According to Nicholson[373] the fact that people are ignoring the requirement for the agreement to be confirmed by the high court *before* the artificial fertilisation of the

[369] Slabbert 2012 *SAJBL* 27.
[370] Slabbert 2012 *SAJBL* 31.
[371] See in this regard SALC *Report on Surrogate Motherhood* (1992) par 8.2.6 and the Report of the *Ad Hoc* Committee par F.4(2)(c).
[372] *AB* CC pars 149-152.
[373] Nicholson and Bauling 2013 *De Jure* 510.

surrogate mother, is problematic. This is because such an agreement is invalid and would result in the child being the child of the surrogate mother in terms of section 297(2), despite not being genetically linked to the child.[374] The fact that a surrogate mother may be able to acquire parental responsibilities and rights over the child despite the absence of genetic link between herself and the child (if such a practice is allowed), is problematic, because it results in the child growing up with a parent or parents who are not genetically linked to the child.

4.2.2 Arguments against the genetic link in surrogacy

In addition to the objections raised in *AB* HC and the minority of the *AB* CC, Lewis[375] argues that there is a need to consider the interests of all parties to the surrogate motherhood agreement and that in her view the interests of the commissioning parents far outweighs those of the child. Lewis argues that the genetic link is unnecessary given the fact that the Children's Act allows the child to access information relating to his or her origins, albeit non-identifying.[376] It is difficult to see how section 41(1) (allowing for access to non-identifying information of parents) can play the same role as the genetic link to at least one commissioning parent. This is because section 41(1) is meant to allow a child (born as a result of artificial fertilisation or surrogacy) to access any medical or any other information concerning that child's genetic parents once the child is 18 years old. Section 294 is meant to ensure that the child grows up with both, or at least one of the commissioning parents, because this is what is deemed to be in the best interests of the child.[377] It is for this reason that a surrogate motherhood agreement must be confirmed by the high court in terms of section 295, *before* the artificial fertilisation of the surrogate mother.[378].

Similar to the arguments advanced by the *AB* HC and *AB* CC minority, Metz[379] is of the view that the genetic link requirement in surrogacy should be revoked out of respect for people's privacy and their ability to create loving and intimate

[374] Nicholson 2013 *De Jure* p523.
[375] Lewis LLM dissertation (2011) par 3.8.
[376] *Ibid.*
[377] See pars 3 and 5 in Ch 3 of this dissertation for a discussion on the reason why genetic link in surrogate motherhood agreements is required.
[378] The court in *Ex Parte MS* par 4, however, confirmed a surrogate motherhood agreement despite the fact that the surrogate mother had already been artificially fertilised at the time of the hearing. For a scathing criticism of this judgment, see Louw 2014 *De Jure* 110.
[379] Metz 2014 *SAJBL* 34.

relationships.[380] Metz argues that ethical rationales (such as the prospect of harm to the child) for the inclusion of genetic link requirement is a slippery slope towards system eugenics, a principle of respect for human nature and a principle of developing one's humanness, fail to provide sound defence for the inclusion of the genetic link provision or surrogacy. The genetic link requirement, in Metz's view, is unjust and should be revised.[381] Notwithstanding the fact that ethical reasons were discussed in all the SALC reports on surrogate motherhood and the review of the Child Care Act respectively, the argument in favour of the genetic link requirement based purely on ethical consideration can be questioned. As already indicated before, the original reason for the inclusion of a genetic link provision was to ensure that the child would be genetically linked to at least one of the commissioning parents. The knowledge of knowing and being raised by at least one the commissioning parents is considered to be in the best interests of the child as it ensures that the child's self-respect and self-identity is protected,[382] it creates a bond between the child and his or her commissioning parents[383]

Similar to the findings in *AB* HC, Van Niekerk[384] is of the view that section 294 is discriminatory as people have the right to make decisions concerning reproduction, including the right to decide to make use of a surrogate and donor gametes.[385] In her view, section 294 infringes people's right to equality as well as their right to dignity.[386] Furthermore, Van Niekerk states that it is incorrect to say that the existence of a genetic link ensures the child's best interests are protected because the surrogate motherhood agreement still has to be confirmed by the high court.[387] One of the prerequisites for confirmation is the determination of what is in the best interests of the child.[388] Thus, if a genetic link between the surrogate and the child satisfies the best interest requirement then, in Van Niekerk's view, there would be no need for the high court to confirm the agreement.[389] Van Niekerk recommends that in cases where there is a genetic link between the child and the commissioning parents, the

[380] Metz 2014 *SAJBL* 39.
[381] *Ibid*.
[382] See *AB* CC par 294.
[383] See *AB* CC par 287.
[384] Van Niekerk 2015 *PELJ* 389.
[385] Van Niekerk 2015 *PELJ* 403-408.
[386] Van Niekerk 2015 *PELJ* 309-414.
[387] *Ibid*.
[388] Van Niekerk 2015 *PELJ* 418-419.
[389] Van Niekerk 2015 *PELJ* 420.

court confirmation should be dispensed with.[390] Confirmation of the agreement by the high court, in her opinion, should only be required in cases where the agreement will result in the child not being genetically related to any of the commissioning parents.[391] It appears as though Van Nierkerk in her criticism of the genetic link requirement implies that as far as surrogate motherhood agreements are concerned, the best interests of the child can be satisfied solely on the basis of a genetic link between the commissioned child and the commissioning parents. This view seems unacceptable given the fact that it assumes that a genetic link is the only factor to be considered when determining whether the surrogate motherhood agreement is in the best interests of the child.

Before the Constitutional Court judgment was handed down, Boniface[392] was of the view that the Constitutional Court should confirm the high court declaration of constitutional invalidity based on the argument that a family cannot be defined by genetic lineage alone.[393] Boniface concluded that requiring a genetic link between a child and the commissioning parents does not accord with the constitutional concept of "family"[394] and that the Constitutional Court should find that section 294 is irreconcilable with the constitutional concept of "family". This view accords with the *AB* HC judgment and the minority decision in *AB* CC.[395] The majority of the Constitutional Court, however, rejected this view and held that the *AB* case is about the validity of section 294 of the Children's Act and not about whether the genetic link requirement in that section has relevance to the legal concept of family.[396]

4.3 Critical analyses of *AB* judgments

4.3.1 Introduction

This paragraph will critically analyse the *AB* judgments in relation to the rationale for the inclusion of the genetic link, the effect and importance of the genetic link in the context of the provisions of Chapter 19 as a whole and the relation between the genetic link and the best interests of the child.

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[390] *Ibid*.
[391] *Ibid*.
[392] Boniface 2017 *SALJ* 190.
[393] *Ibid*.
[394] Boniface 2017 *SALJ* p206.
[395] See in this regard *AB* CC par 115-119 and *AB* HC pars 43-46.
[396] *AB* CC par 273.

4.3.2 Rationale for the inclusion of genetic link in surrogacy

4.3.2.1 *AB* HC

In his judgment, Basson J seems to interpret section 294 against the purpose of Chapter 19 alone, rather than the broader purpose of the Act as whole. According Basson J the objective of chapter 19 is to enable infertile persons to have children of their own by making use of surrogacy.[397] As such chapter 19 should be considered and compared with other legislation, like the National Health Act,[398] that regulates artificial reproductive procedures. Basson J proceeds to compare IVF in the context of surrogacy with a situation where a woman who wants to have a child is artificially fertilised.[399] This comparison is not necessarily problematic but for the fact that Basson J thereafter finds that the distinction between the two procedures, which he accepts are fundamentally different, amounts to unfair discrimination[400] and then incorrectly refers to the purpose of Chapter 19 as being the purpose of the entire Children's Act.[401]

Basson J also considered the position in other jurisdictions in an effort to find reasons for the inclusion of a genetic link in the regulation of surrogacy in general. In this regard, however, he appears to be selective in his consideration. He seems to reject the comparative value of jurisdictions where the genetic link requirement exists based on the fact that the legal systems in those jurisdictions are different from that of South Africa.[402] However, when attempting to find support for the existence of a trend moving away from requiring a genetic link in other jurisdictions,[403] the differences in the legal systems as a whole are completely ignored. This, despite the fact that the South African Constitution makes the best interests of the child the paramount, and not merely the primary, consideration as in most other jurisdictions.

4.3.2.2 *AB* CC minority

The minority's findings regarding the reason for the inclusion of genetic link in surrogacy are very similar to those found in *AB* HC. Despite accepting that surrogacy

[397] Par 41.
[398] *AB* HC par 79.
[399] Par 7.
[400] Par 71-76.
[401] Pars 41- 42.
[402] *AB* HC par 47.
[403] *Ibid*.

in South Africa is regulated with the best interests of children in mind,[404] the minority makes the same error as the high court by considering other legislation regulating IVF that does not specifically aim to protect the best interests of the child. As such the factors to consider when confirming an agreement in terms of which the woman who gives birth to the child (surrogate mother) will not raise the child is compared to a scenario where the birth-mother intends to raise the child herself.[405] After considering various possible rationales for the inclusion of the genetic link requirement, the minority ultimately concluded that the most convincing reason is to prevent people from circumventing the adoption laws.[406] As already indicated before, this was also a reason advanced by the *ad hoc* committee.[407] The minority dismissed this reason as unnecessary given that there is an entire chapter in the Children's Act which provides for adoption and deter any circumvention of such laws.[408]

4.3.2.3 *AB* CC Majority

The majority of the Constitutional Court interpreted section 294 against the broader purpose of the Children's Act, which is to promote and protect children's rights and concluded that the purpose of section 294 is to create a bond between the child and the commissioning parents which is in the best interests of the child.[409] Although this finding of the majority appears to be rationally connected to a legitimate government purpose (ensuring the best interests of the child), it still does not answer the question of whether the absence of a genetic link will necessarily prevent or exclude such bonding. The majority found that the inclusion of genetic link requirement safeguards the genetic origin of the child which is considered in the best interests of the child. This statement is debatable since the genetic link only partially ensures the child's right to his or her origin, insofar as the requirement only ensures a link with one of the commissioning parents.

[404] *AB* CC par 141.
[405] Par 152.
[406] Par 165.
[407] *Ibid*.
[408] Par 167.
[409] *AB* CC par 287.

4.3.3 The effect and importance of the genetic link in Chapter 19

4.3.3.1 *AB* HC

The high court held that the genetic link requirement has the effect of excluding both pregnancy and conception infertile persons from accessing surrogate motherhood as a reproductive avenue.[410] This exclusion, in the court's view, reinforces the profound negative psychological effects that infertility often has on a person.[411]

4.3.3.2. *AB* CC minority

The minority rejected the submission that the genetic link requirement is important as it prevents the circumvention of adoption procedures.[412] The minority held that although the use of double donor gametes may result in a child that has no genetic link to his or her parents, which is the case in adoption, the two procedures are fundamentally different.[413] Despite acknowledging the differences between adoption and surrogacy, the court only referred to the differences in relation to the commissioning parents and said nothing about the child. An adopted child, for instance, is permitted to access information regarding his or her genetic parents[414] and in some cases can even be allowed to have contact with his or her biological/genetic parents.[415] Where double-donor gametes are used, the child is not allowed access to identifying particulars and the identity of the donor may not be revealed.[416] This means, the child will never have access to full information relating to his or her genetic parents, let alone meet them.

4.3.3.3 *AB* CC majority

The majority said that the effect of section 294 is that if both commissioning parents are unable to contribute gametes for procreation, they are disqualified from using surrogacy.[417] The majority further held that the aim is to protect the best interests of the child and the genetic link requirement is important for that reason.[418] Although

[410] *AB* HC par 76.
[411] *Ibid*.
[412] *AB* CC par 174 – 185.
[413] *Ibid*.
[414] S 248.
[415] In terms of a post adoption agreement as regulated in s 234.
[416] Section 41 of the Children's Act.
[417] *AB* CC par 277 – 278.
[418] *Ibid*.

the majority's finding appears to be correct, the court failed to elaborate further on the effect and importance of section 294 in the context of chapter 19 as a whole.

4.3.3.4 Conclusion

As far as the effect and importance of the genetic link in relation to chapter 19 as a whole is concerned, the absence of such a link, first of all, will result in the agreement being invalid,[419] which means the commissioned child will be considered the child of the surrogate mother.[420] It is evident that this outcome would be contrary to the intentions of the parties to a surrogate motherhood agreement who would want the commissioning parents to become the legal parents of the child in question. Furthermore, a surrogate mother who is genetically related to the commissioned child (a partial surrogate) can legally terminate a valid surrogate motherhood agreement through notice to the court.[421] Notably, only a surrogate mother who is genetically related to the commissioned child enjoys the right to terminate the agreement, which seems to suggest that the genetic link is more important than the intention of the parties to the agreement. Upon termination the surrogate mother, her husband o partner, if any, or if none, the commissioning father will be vested with parental responsibilities and rights.[422] This means that if the surrogate mother does not have a spouse or partner, the surrogate mother and the commissioning father will become the legal parents of the commissioned child. The purpose of this effect is presumably to ensure that the child is raised by his or her genetic parents. However, this intention is ignored if the surrogate mother is married or in a partnership because then the spouse or partner will share parenthood with the surrogate mother to the exclusion of the genetically related commissioning father.[423] In conclusion it is evident that the genetic link requirement forms an integral part of a number of provisions and is woven into the fabric of the surrogacy regulatory framework as a whole. Striking down this requirement would thus in the wrd of the minority of the "upset the scheme in Chapter 19".[424]

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[419] See Ch 3.
[420] See s 297(2).
[421] See s 298(1) of the Children's Act. Also see Ch 3 above in this regard.
[422] S 299.
[423] However, these effects may presumably be altered in the best interests of the child in terms of s 298(3) which gives the court a discretion in relation to the order that can be made upon termination of the agreement.
[424] *AB* CC par 223.

4.3.4 Best interests of the child and the genetic link

4.3.4.1 *AB* HC

With regards to section 28(2) of the Constitution and section 7 of the Children's Act, Basson J was of the view that there is no evidence that knowledge of genetic origin is in the best interests of the child.[425] Notably, he did not elaborate on whether or not there is sufficient evidence before him suggesting that the absence of genetic link between the child and the commissioning parents is in the best interests of the child. He argued that there is no rationality in requiring a genetic link to promote the best interests of the child born through surrogacy and not to make it a requirement for the best interests of the artificially conceived child born to a woman who intends to raise the child herself.[426] Again the court compared fundamentally different procedures provided for under different statutes in order to determine the best interests of the child in relation to section 294. The approach adopted by the court in this instance appears to be questionable as it is generally agreed that the constitutionality of a statute should be tested with reference to the Constitution alone.

The court further implied that the best interests of the child should only be considered by courts in accordance with 295(e), that is "in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born".[427] Section 9 of the Children's Act echoes section 28(2) of the Constitution insofar as it requires the best interests of the child to be given paramount importance and section 7 provides a closed list of factors to be considered for this determination. Child, for purposes of the Children's Act is defined as a person under the age of 18 years and therefore presupposes an existing child.[428] The difficulty that confronted the court in *AB* HC in relation to determining whether genetic link requirement is in the best interests of the child is therefore understandable since the genetic link requirement relates to a child that is not yet conceived.[429] The question is therefore whether section 7 is at all relevant for

[425] *AB* HC pars 84 – 87.
[426] *Ibid*.
[427] Par 84.
[428] The court in *Christian Lawyers Association of SA v Minister of Health* 1998 4 SA 1113 (T) 1121 held that a foetus does not qualify as a child for purposes of interpreting section 28 of the Constitution.
[429] For a general discussion of the problems in this regard, see Louw "Surrogacy in South Africa: Should we reconsider the current approach?" 2013 *THRHR* 3.

purposes of determining the best interests of the commissioned child in the context of a surrogacy agreement.

4.3.4.2 *AB* CC minority

The minority rejected the submission that the purpose of section 294 is to ensure that any child born through surrogacy arrangement knows their genetic origin and that this is in the best interests of the child.[430] The minority held that the provisions of section 294 are not in sync with those of section 41(2). In the court's view, it is contradictory to claim that section 41(2) deliberately *prevents* a category of children from knowing their genetic origin, while simultaneously claiming that the purpose of section 294 is to ensure that a portion of this category *do* know their genetic origin.[431] In contradistinction to the court's views, the two sections seem to be compatible. The fact that section 294 ensures that the commissioned will at least have access to the origins of one parent would counteract the blanket prohibition on access to any identifying information in terms of section 41(2).

The minority further held that section 7 of the Children's Act requires that all factors relating to the child must be considered to determine the best interests of the child.[432] The minority found that arguing that the purpose of section 294 is to protect the child's best interests by ensuring the child knowledge of his or her origins, privileges one factor (genetic origin) to the exclusion of others (factors listed in section 7 of the Children's Act).[433] The difficulty relating to the determining of the best interests of the child born through surrogacy was pointed out in the Centre for Child Law's written submissions in *AB* CC.[434] The Centre questioned the veracity of the studies referred to by the applicants indicating that the absence of a genetic link between the commissioning parents and the child does not appear to affect the child negatively.[435] The Centre argued that these studies are not conclusive as they only involved children under the age of 10 years, focussed on the commissioning parent's views and feelings towards a child not genetically linked to them and does not

[430] *AB* CC par 155.
[431] Par 159.
[432] *AB* CC par 195.
[433] Par 196.
[434] See Centre for Child Law written submissions par 14.
[435] *Ibid.*

indicate whether the children were informed of the absence of genetic link**.** In short, the absence of genetic link cannot be predicted with certainty.

4.3.4.3 *AB* CC Majority

The majority emphasised the importance of the genetic link requirement in relation to the child.[436] It found that the requirement is important for the self-identity and self-respect of the child.[437] The emphasis on the child's rights and protection thereof seems to be a recurring theme in the majority judgment. The majority found that the fact that a child's right to dignity and best interests of the child are put at risk in other legislation is no reason to find their protection in the present context irrelevant. The majority correctly cautioned against comparing the provisions of two different statutes in an attempt to establish their constitutionality.[438] The majority held that there is no need to determine whether or not the absence of a genetic link will be harmful to the child and that the only determination that needs to be made is whether the provision is connected to a legitimate government purpose.[439] Although the majority was correct about the issues to be decided, it appears that the court missed an opportunity to deal with the impact of the genetic link requirement on other sections under chapter 19.

[436] *AB* CC par 294.
[437] *Ibid*.
[438] Pars 289 – 290.
[439] *AB* CC par 291.

CHAPTER 5: CONCLUSION

As shown in this dissertation, there were two contradictory approaches by the judiciary in interpreting section 294.[440] The high court and the minority adopted an approach that focussed on the rights of the commissioning parents while the Constitutional Court focused exclusively on the best interests of the child. Despite their apparent divergence, the approaches could nevertheless conceivably be reconciled. Since the best interests of the child to be born can only be given paramountcy by ensuring that the most suitable candidates enter into the surrogacy agreement, it is reasonable to restrict the possible candidates that may become commissioning parents. By including the genetic requirement the legislator is giving the resultant child the best chance of growing up with at least one genetic parent. Even if the presence of a genetic link is not an absolute guarantee that the interests of the child will be promoted, it may at least contribute to the possibility. In the context of surrogacy it is vital to create certainty regarding the legal parentage of the commissioned child. The chances of a commissioned child to become parentless reduce significantly with the retention of the genetic link requirement. Legal parentage determined purely on the basis of the intention to parent, without any genetic link, would surely place the commissioned child at more risk than otherwise.

It appears from this dissertation that the best interests of the child principle tipped the scale to lean towards protection of the children's rights, not because the absence of the genetic link is or would be harmful to the child, but because it is currently unknown what the impact would be. Thus, it is suggested that a further inquiry into the impact of genetics on surrogate motherhood in South Africa be conducted, precisely because the absence of completed expert scientific research makes it impossible to assess the aforementioned impact.[441] It is however evident from the sources discussed and analysed in this dissertation, that the intention of the law makers in enacting the Children's Act with a chapter on surrogate motherhood was to ensure that the best interests of the commissioned child are protected.[442] Notably, *AB* CC majority flagged the fact that legislation is not declared unconstitutional based on expert research studies, and that it is declared unconstitutional if found to

[440] See chapter 3 of this dissertation.
[441] See Ch 4.
[442] *Ibid*.

be inconsistent with the Constitution. It thus appears that even after expert research on the impact of genetics in surrogacy had been completed, the legislature would be better positioned to provide clarity or guidance on the implementation of chapter 19. Until then, the best interests of the child principle remain persuasive in relation to the retention of the genetic link requirement.

BIBLIOGRAPHY

Legislation and International Instruments

Child Care Act 74 of 1983

Children's Act 38 of 2005

Children's Act Amendment Bill (Vol 640 No 42005)

Children's Status Act 82 of 1987

Constitution of the Republic of South Africa, 1996

Guardianship Act 192 of 1993

Human Tissue Act 65 of 1983

National Health Act 61 of 2003

South African Law Reform Commission Act 19 of 1973

Case Law

AB and Another v Minister of Social Development 2016 2 SA 27 (GP)

AB and Another v Minister of Social Development 2017 3 SA 570 (CC)

Albutt v Centre for the Study of Violence and Reconciliation, and Others 2010 3 SA 293 (CC)

Barkhuizen v Napier 2007 5 SA 323 (CC)

Constitutional Assembly, Chairperson of the, Ex Parte: In re Certification of the Constitution of the Republic of South Africa, 1996 1996 4 SA 744 (CC)

Du Toit and Another v Minister of Welfare and Population and Others 2003 2 SA 198 (CC)

Ex Parte WH 2011 6 SA 514 (GNP)

Ex Parte KAF 2019 2 SA 510 (GJ)

Ex parte MS and others: In re: Confirmation of Surrogate Motherhood Agreements 2014 2 All SA 312 (GNP)

Ex Parte HP and Others 2017 4 SA 528 (GP)

Law Society of South Africa and Others v Minister for Transport and Another 2011 1 SA 400 (CC)

Ferreira v Levin No and Others 1996 1 SA 984 (CC)

Harksen v Lane NO 1998 1 SA 300 (CC)

Jordaan and others v the State 2002 6 SA 642 (CC).

Law Society of South Africa v Minister of Transport 2011 1 SA 400 (CC)

MEC for Education: Kwazulu-Natal v Pillay 2008 1 SA 474 (CC)

Minister of Health v Treatment Action Campaign (No 2) 2002 5 SA 721 (CC)

NM v Smith 2007 5 SA 250 (CC)

Prinsloo v Van der Linde 1997 3 SA 1012 (CC)

S v M (Centre for Child Law as Amicus Curiae*)* 2008 3 SA 232 (CC)

S v Makwenyane 1995 3 SA 391 (CC)

S v Jordan 2002 6 SA 642 (CC*)*

Soobramoney v Minister of Health 1998 1 SA 765 (CC)

Weare v Ndebele NO 2009 1 SA 600 (CC)

Books and Articles

Allen AL "Surrogacy, Slavery, and the Ownership of Life" 1990 *Harvard Journal of Law and Public Policy* 144

Bekker JC *Seymour's Customary Law in South Africa* (5th Edition) Cape Town, Juta (1989)

Boniface A E "The genetic link requirement for surrogacy: a family cannot be defined by genetic lineage" 2017 *SALJ* 190

Bonthuys E and Broeders N "Guidelines for the approval of surrogate motherhood agreements: *Ex Parte WH*" 2013 *SALJ* 485

Burns CE, Martin L & Moyal D "Future child's right in new reproductive technology; thinking outside the tube and maintaining connections" 2010 *Family Court Review* 3

Carnelley M "*Ex Parte WH* 2011 6 SA 514 (GNP): Recent case law" 2012 *De Jure* 179

Currie I and de Waal J (eds) *The Bill of Rights Handbook* 5ed (2005)

Eaton TA "The British Response to Surrogate Motherhood: An American Critique" 1985 *The Law Teacher* 163

Eaton TA 1986 *Neb LR* 708

Hanahan "Fertilisation, Embryo Transfer Procedures Raise Many Questions" 1984 *American Bar Association Journal* 50
Huxley AL *Brave New World* (1932)

Jadva V, Freeman T, Kramer W, and Golombok S "The experiences of adolescents and adults conceived by sperm donation: comparisons by age of disclosure and family type" 2009 *Human Reproduction* 1909

Kindregan CP 2008 "Collaborative Reproduction and Rethinking Parentage" *J Am Acad Matrimonial Law* 2

Louw A "Surrogacy in South Africa: Should we reconsider the current approach?" 2013 *THRHR* 564

Louw A "*Ex Parte MS* 2014 DR 0102 Case No 48856/2010 (GNP) Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child: recent case law" 2014 *De Jure* 110

Louw A "Surrogate Motherhood" in Davel CJ & Skelton A (eds) *Commentary on the Children's Act* Cape Town, Juta (2007) (RS 2018)

Metz T "Questioning South Africa's 'genetic link' requirement for Surrogacy" 2014 *SAJBL* 34

Meyerson D "Surrogacy arrangements" 1994 *Acta Juridica* 121

Nicholson C and Bauling A "Surrogate motherhood agreement and their confirmation: A new challenge for practitioners?" 2013 *De Jure* 510

Nicholson C "When moral outrage determines a legal response: Surrogacy as labour" 2013 *SAJHR* par V

Pillay R and Zaal FN "Surrogate motherhood confirmation hearings: The advent of a fundamentally flawed process" 2013 *THRHR* 475

Pretorius R "Practical aspects of surrogate motherhood" 1991 *De Jure* 52

Pretorius R "Surrogate motherhood: a commentary on the draft Bill" 1996 *De Rebus* 115

Singer P and Wells D *The Reproduction Revolution: New Ways of Making Babies* 1984

Skosana T "A donor-conceived child's right to know its genetic origin: A South African perspective" 2017 *Obiter* 261

Slabbert MN "Legal issues relating to the use of surrogate mothers in the practice of assisted conception" 2012 *SAJBL* 27

Smit E1987 *Acta Aktueel* 24

Steptoe P and Edwards RG "Birth After the Implantation of a Human Embryo" 1978 *Lance*r 366.

Tager L "Surrogate Motherhood, Legal Dilemma" 1986 *SALJ* 382

Van Heerden B Chapter 15: "Legitimacy, Illegitimacy and the Proof of Parentage" in Van Heerden B Cockrell A Keightley R (eds) *Boberg's Law of Persons and the Family* (2nd ed) Juta, Cape Town (1999)

Van Niekerk C "Assisted Reproductive Technologies and the Right to Reproduce under South African Law" 2017 *PELJ* 4

Van Niekerk C "Section 294 of the Children's Act: Do roots really matter?" 2015 *PELJ* 397

Dissertations and Theses

Filander T *The Enforceability of International Surrogacy In South Africa: How Would a South African Court Proceed In Determining an International Surrogacy Case?* Unpublished LLM Thesis University of Western Cape (2016)

Lewis SV *The Constitutional and Contractual Implications of the Application of Chapter 19 of the Children's Act 38 of 2005* Unpublished LLM Dissertation University of Western Cape (2011)

Louw AS *Acquisition of Parental Responsibilities and Rights* Unpublished LLD Thesis University of Pretoria (2009)

Rispel SL *The Scope and Content of the Child's Right to Identity in the Context of Surrogacy* Unpublished LLM dissertation University of Western Cape (2017)

South African Law Reform Commission Publications

SALC *Working Paper 38 on Surrogate Motherhood* 1989.

Report of the *Ad Hoc Committee on the South African Law Commission Report on Surrogate Motherhood* (11 February 1999)

South African Law Commission Discussion Paper 103 on the *Review of the Child Care Act* Project 110 (23 December 2001)

South African Law Commission First Issue Paper 13 on the *Review of the Child Care Act* Project 110 (18 April 1998)

South African Law Commission Report and Draft Children's Bill on the *Review of the Child Care Act* Project 110 (December 2002)

South African Law Commission Report on *Surrogate Motherhood* Project 65 (1992) (on file with the author)

South African Law Reform Commission Issue Paper 32 on *The Right to Know One's Own Biological Origins* Project 140 (20 May 2017)

Internet sources

Report of the Committee of Inquiry into Human Fertilisation and Embryology (Cmnd 9314 (1984) available at https://www.bioeticacs.org/iceb/documentos/Warnock

Kassiem E "New surrogacy law spawns happy events" IOL 20 September 2010, available at http://www.lawlibrary.co.za/notice/updates/2010/issue22/recentjudgments_wcc.html

Mooki O "Triumph for gay couple" IOL 22 December 2010, available at http://www.iol.co.za/news/africa/triump-for-gay-couple-1.1004191

Oellermann I "High court seals surrogacy deal" *The Witness* 27 August 2011, available at http://www.witness.co.za/index.php?showcontent&global%5B_id%5D=67272