THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable
Case no: 462/23

In the matter between:

KB **FIRST APPELLANT**

HBB **SECOND APPELLANT**

and

MINISTER OF SOCIAL DEVELOPMENT **RESPONDENT**

Neutral citation: *KB & Another v Minister of Social Development* (Case no 462/23) [2024] ZASCA 54 (19 April 2024)

Coram: MOKGOHLOA, MOTHLE, MABINDLA-BOQWANA and KGOELE JJA and BLOEM AJA

Heard: 15 February 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by e-mail, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 19 April 2024.

Summary: Constitutional law – Children's rights – Surrogacy – s 294 of the Children's Act 38 of 2005 – declarator sought that the requirement of use of a gamete of at least one of the commissioning parents to the exclusion of the genetic link between siblings is inconsistent with the Constitution — provision found to be constitutionally valid.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Sibuyi AJ sitting as court of first instance):

The appeal is dismissed with each party to pay its own costs.

JUDGMENT

Mokgohloa JA (Mothle, Mabindla-Boqwana and Kgoele JJA and Bloem AJA concurring):

Introduction

[1] The appellants brought an application in the Mpumalanga Division of the High Court, Mbombela (the high court) seeking an order declaring s 294 of the Children's Act (the Act)[1] inconsistent with the Constitution, on the basis that, as it currently reads, it denies a child already born, the right to have a genetically linked sibling through surrogacy. The appellants suggested words to be read into the section to cure the invalidity. The high court dismissed the application and granted the appellants leave to appeal to this Court.

The facts

[2] The facts in this matter are common cause. The appellants KB, the wife and HBB, the husband, were married to each other in December 2011. HBB has two adult children from his previous marriage. The appellants, together, have a

[1] Childrens' Act 38 of 2005.

son (minor child) who was born on 21 February 2018, after a fertilised embryo, created from two gametes not genetically linked to the appellants, was transferred to KB's uterus.

[3] KB had struggled with uterine growths which made it difficult to fall pregnant naturally. She had her first myomectomy in 2009 followed by further three myomectomies. HBB on the other hand, also had a previous vasectomy which was reversed. In 2000 he was diagnosed with testicular cancer which was medically treated.

[4] The appellants tried for five years to have children. They had numerous attempts through in vitro fertilisation (IVF) and intrauterine insemination (IUI) but were unable to fall pregnant. Their doctor advised them to make use of donor gametes to have children. They took the doctor's advice and found donors that suited their requirements and had seven embryos fertilised. KB underwent her first transfer which resulted in the birth of the minor child at thirty-three weeks. This was because her uterus was ruptured during the gestation period. Once she was medically treated and cleared, KB underwent the second transfer. This resulted in a positive pregnancy. However, at six months, she had to undergo emergency surgery because her life was in danger. She lost the baby during the process and her uterus was removed to the extent that she is unable to carry any of the remaining three embryos.

[5] The appellants are of the view that the only way for the embryos to be born would be by way of the surrogate motherhood process. They have found a willing surrogate who is prepared to assist them. A surrogate motherhood agreement has been drafted and awaits the granting of their application by the court, before they can sign.

In the high court

[6] The appellants contended that the provisions of s 294 of the Act that require that there must be a genetic link between the child to be born out of surrogate motherhood agreement and the commissioning parents violate the best interests of the minor child and his rights to dignity and equality. The respondent, the Minister of Social Development (the Minister), opposed the application and raised several points *in limine*, some of which were dismissed by the high court. There is no cross appeal.

[7] As to the merits, the Minister argued that the appellants had not made out a case for the relief sought. First, they failed to identify the minor child's rights and to establish the violation of such rights. Second, the constitutional invalidity of s 294 has already been decided by the Constitutional Court in the matter of *AB and Another v Minister of Social Development*[2] (*AB*). Third, the proposed 'reading in' to the provisions of s 294 violates the doctrine of separation of powers, as the provision is polycentric, and a legislative measure which must be left for the executive and the legislature to determine.

[8] In dismissing the application, the high court held that the appellants failed to identify the right that is alleged to have been violated and to provide the basis for that violation. The court agreed with the Minister that the Constitutional Court had already determined the constitutional validity of s 294 in *AB* and found it consistent with the Constitution. Significantly, it also held that the impugned section had nothing to do with the right of the minor child to have a sibling with the same genetic link.

[2] *AB and Another v Minister of Social Development* [2016] ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC).

[9] The high court further held that the removal of the genetic link requirement from s 294 or the creation of an exception thereto, will in essence be a fundamental departure from a lawfully chosen policy position. It found that it 'cannot interfere with the lawfully chosen measure on the ground that the Legislature should have taken other considerations into account or that it should have considered a different decision that is preferable (the right to have a genetically linked sibling).' The high court concluded that to grant the relief sought by the appellants would violate the principle of separation of powers and interfere with the lawfully chosen measure by the legislature.

In this Court

[10] The appellants rely on s 28 of the Constitution dealing with Children's rights as well as the equality provision in s 9 and the right to human dignity provided for in s 10. The rights they allege to have been violated by s 294 are those of their minor child (already born) and not those of the child to be born. They contend that the genetic link requirement between the child to be born out of a surrogate motherhood agreement and the commissioning parent/s impacts on the minor child's asserted constitutional rights. They argue that it is in the best interest of the minor child to have a sibling who is genetically linked to him, if possible. According to them, this fits together with the right to family life found in various international human rights agreements, including Article 16 of the Universal Declaration of Human Rights. The appellants further contend that the limitation placed by s 294 is not reasonable and justifiable as it limits the minor child's rights to dignity and equality.

[11] Accepting that s 28(2) of the Constitution gives paramountcy to the best interest of the minor child in matters concerning children, the Minister submits that it is, however, not violated in this case. She further contends that s 28(2), like

other rights in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36 of the Constitution.

[12] Professor Donrich Thaldar was admitted as the *amicus curiae* in this matter. He filed submissions in support of the appellants' application. In his submissions, he argues that the genetic link requirement in s 294 is 'a scourge in our legal system that causes much pain and suffering for infertile persons'. He is further critical of the *AB* decision and contends that it was wrongly decided. He then suggests that the appropriate remedy will be to strike out the genetic link requirements with immediate effect.

Is s 294 unconstitutional?

[13] The key question to determine is whether there is a right to have a genetically linked sibling, the source of that right, if any, and how it relates to surrogacy as provided in chapter 19 of the Act. If there be any such right, whether to declare s 294 invalid to the extent of its inconsistency with the Constitution. This requires an understanding of what s 294 means, within the legislative scheme of the Act.

[14] The principles applicable in statutory interpretation are trite. Regard must be had to the text, context and purpose of the provision. And the provision must be within the lens of the Constitution.[3] Further, the historical context within which the provision was enacted may be a relevant to the process of interpretation. I find it apposite to outline the relevant sections in the Children's Act that provide for surrogate motherhood, the background and the purpose of those sections.

[3] *Cool Ideas 1186 CC v Hubbard* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC).

[15] Surrogate motherhood in South Africa is regulated by chapter 19 of the Children's Act. Prior to the promulgation of chapter 19, no legislation existed which expressly regulated the issue of surrogacy in South Africa. Though not regulated, the reality is infertile couples and surrogate mothers entered into altruistic and commercial surrogacy agreements on a regular basis mainly due to the advantages that surrogacy was seen to hold over the adoption procedure. The legal relationship between the parties to the surrogacy arrangement remained uncertain.[4]

[16] This uncertainty gave rise to an investigation by the South African Law Commission (SALC) into the surrogate motherhood. The SALC prepared a report. Parliament referred that report to the relevant ad hoc select committee for deliberations. The deliberations led to the promulgation of chapter 19 of the Act[5] and s 294 was enacted and it reads thus:

'**Genetic origin of child**

No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gametes of at least one of the commissioning parents or where the commissioning parents is a single person, the gamete of that person.'

The words that the appellants sought to be read in, at the end of the provision, after the words '. . . *where the commissioning parent is a single person, the gamete of that person*' are '*or where the genetic origin of the child is the same with that of any of her siblings.*'

[4] *AB* fn 2 paras 246 and 248.
[5] *AB* fn 2 para 248.

[17] It is plain from the language of the section that it seeks to create a bond between a child to be born, with at least one of the commissioning parents. This is confirmed by the heading of the section: 'Genetic origin of the child'. The context as borne out by the Act was to assist fertile parents who could not conceive a child due to biological, medical or other reasons, to use their gametes or of one of them to conceive a child or if the commissioning parent is single, his or her gamete. This, as the legislative scheme, was confirmed by the majority in *AB*.[6] Nkabinde J, writing for the majority observed that, the regulatory scheme must be considered with the Act as a whole. The main objective of the Act is to give effect to constitutional rights of children. 'The legislative scheme under [chapter 19], especially the impugned provision, also protects the child by ensuring that a genetic link exists when that child is conceived.'[7]

[18] Counsel for the appellants argued that the real purpose of s 294 is a genetic link. The bond requirement or purpose in s 294 will be met by using the embryos, due to the genetic link the minor child and the child to be born will have. According to her, s 294 as it reads, limits the minor child's constitutional rights by prohibiting surrogacy in spite of the fact that the embryo to be used is genetically linked to the child. She contended that there is no justification for that limitation.

[19] The difficulty with this proposition is that s 294 serves a purpose of a bond between a child to be born and a parent. Therefore, what is contended for by the appellants is in conflict with the purpose of the provision. Moreover, the interests sought to be protected in that provision are of the child to be born and not the one already born as already stated.

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[6] *AB* fn 2 paras 276 – 278.
[7] Ibid para 279.

[20] As already mentioned, the text, and context reveal the purpose. It is to protect the child to be born by creating and establishing the genetic origin of a child to at least one of the parents which is important for the self-identity of the child. The appellants' contention that the child to be born out of surrogacy can obtain a genetic origin from its siblings is not supported by the text, context and purpose of s 294. What is evident is that it is a parent whose gamete is used, that establishes the child's origin, in terms of that section, not the sibling's genetic origin. The interests of the child spoken of in s 294 read in context, are not those of a child already born.

[21] Furthermore, as stated by the high court, it is incumbent upon a party raising a constitutional challenge to identify the right that is alleged to be violated and the basis upon which it is contended that the right is violated. There is no right that can be constitutionally sourced for a minor child to have a sibling that is genetically related to them. The basis advanced by the appellants, for this right, is that a full biological sibling may be crucial in case of possible illness that the minor child may face later in life. He may need a potential match for a tissue or organs, for instance. While this argument may be compelling, its importance does not give rise to a constitutional right.

[22] As to the assertion that the right to equality of the child has been infringed, the appellants have not established how the minor child is treated differently from other children similarly placed and hence s 9(1) of the Constitution is violated. Equally, no evidence has been placed as to how the minor child's right to dignity has been breached. I, therefore, cannot find that the appellants succeeded in identifying the constitutional right violated and the basis for the alleged violation. The finding of the high court in this regard cannot be faulted.

[23] Counsel for the appellants submitted that the rationality of s 294 was not the question before us, but the issue was whether the provision is justifiable. We do not get to the limitation analysis because no violation of a right has been identified. In any event, the purpose of s 294 was clearly articulated by the Constitutional Court in *AB* as indicated above.

[24] What the Constitutional Court stated when dealing with the rationality of s 294 is relevant to this case. The Court said, in a case where legislative measures were challenged on the basis that they were irrational, a court must 'examine the means chosen in order to decide whether they are rationally related to the public good sought to be achieved.'[8]

The court went further and held that:

'It needs to be stressed that the legislative measure chosen by the Legislature in section 294 is rationally related to the public good sought to be achieved by government. Therefore we cannot interfere with the lawfully chosen measure on the ground that the Legislature should have taken other considerations into account or that it should have considered a different decision that is preferable.

[T]he purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved.'[9]

[25] The means chosen to achieve the purpose of enacting s 294 was the legislature's choice and courts cannot interfere with that choice on the ground that it would have considered a different purpose and means. To do this, would be for the judiciary to usurp the powers given to the other arms of the state and a violation of the doctrine of separation of powers.

[8] Ibid para 285.
[9] Ibid para 292.

[26] Most importantly, we are bound by the Constitutional Court's interpretation of s 294, even if we held a different view. Following precedent is not simply a matter of respect for courts of higher authority, but 'is a manifestation of the rule of law itself, which in turn is a founding value of our Constitution.'[10]

[27] In conclusion, the appellants are seeking an order that certain words be read into the provisions of s 294 of the Act, to make a provision that a surrogate motherhood agreement will be valid where the genetic origin of the child to be born is the same as any of her siblings. It follows that the reading in of words into the legislative provision has to be preceded by a finding of constitutional invalidity. Absent that finding, such reading in cannot be made.

Costs

[28] The appellants asked this Court to follow the position adopted in *AB* and grant them part of their costs (ie travelling expenses), in the event they were unsuccessful. They contend that they pursued this appeal not only in their own interest and that of the minor child, but also on behalf of other would-be parents and children who may find themselves in a position similar to theirs.

[29] Generally costs follow the result. However, where litigants unsuccessfully raise important constitutional issues against the state, costs will not be awarded against them. The reason for this is that litigants must not be discouraged from challenging the constitutionality of laws that limit their rights for fear of being mulcted with costs. There is, however, an exception to this rule: this is when the

[10] *Camps Bay Ratepayers and Residents v Harrison* [2010] ZACC 19; 2011 (4) SA 42 (CC); 2011 (2) BCLR 121 (CC) para 28.

litigation pursued by such litigant, was frivolous or vexatious or in any other way manifestly inappropriate.[11]

[30] It is unusual to expect the state, being the successful party, to pay the costs of the other party. If this were to be adopted as the general position, it would mean, in every case where the state opposes a constitutional matter and succeeds, it may be ordered to pay the losing party's costs or part thereof, which may run into a considerable amount of money. This is not what *Biowatch* envisioned. Also, this is not precedent set by the *AB* judgment, properly construed.

[31] Indeed, the Constitutional Court in *AB* awarded costs to the unsuccessful litigant. It appears, that in the high court the State had conducted its litigation in a dilatory manner. Furthermore, the issues raised by the appellants in this matter are not novel. The appellants launched their application during February 2022. This was almost six years after the judgment in *AB*, was delivered, which clearly found s 294 to be consistent with the Constitution. The law pertaining to the constitutionality of s 294 was clear. Regrettably, the appellants continued with their application all the way to this Court.

[32] Significantly, the appellants never pleaded to have the Minister pay for costs in their papers. They did not even submit that in their heads of argument. This request was only raised in oral argument, it is not substantiated by any facts. In fact, the Minister was caught by surprise on this issue and was never given an opportunity to prepare for argument. It would not be appropriate in this case to order the Minister to pay the costs of the appellants as there are no grounds to justify such an order. In any event, costs are a matter for the Court's discretion.

[11] *Biowatch Trust v Registrar Genetic Resources and Others (*CCT 80/08) [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

[33] Nonetheless, even if I found that the appellants' determination to seek a declaration of constitutional invalidity of the impugned section was not justified, I am mindful of the fact that the court should guard against deterring *bona fide* litigants from challenging the constitutionality of laws that they believe limit their rights, in fear of being mulcted with costs. The *Biowatch* principle will, accordingly, apply and each party shall be ordered to pay its own costs.

[34] For all these reasons, the following order shall issue:
The appeal is dismissed with each party to pay its own costs.

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F E MOKGOHLOA
JUDGE OF APPEAL

Appearances

For the appellant:	A De Vos SC and H Botma
Instructed by:	Adele van der Walt Inc, Pretoria
	Honey Attorneys, Bloemfontein
For the respondent:	HA Mpshe and P Loselo
Instructed by:	State Attorney, Mbombela
	State Attorney, Bloemfontein.