REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 27706/2021

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: YES

22 February 2022 .....

DATE SIGNATURE

In the matter between:

V[….], V[….] J[….] First Applicant

T[….], R[….] Second Applicant

and

MINISTER OF SOCIAL DEVELOPMENT First Respondent

MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

JUDGMENT

VAN VEENENDAAL, AJ

[1] The Centre for Child Law, Pretoria ("the Centre") brought an application to be admitted as an *amicus curiae* in the main application seeking the following relief:

"1. That the centre is admitted as amicus curiae in the above proceedings as in terms of Rule 16A of the Uniform Rules of Court.

2. The Centre is granted leave to –

2.1 file written submissions in the matter and

2.2 present oral argument during the hearing.

3. The Centre, to the extent necessary, is granted condonation insofar as this application is filled late and out of time.

[2] The relief sought is granted and the Centre is added as a party to the proceedings. Neither applicants nor respondents opposed this application.

[3] In the main application the applicants approached this court asking for the following relief as set out in the notice of motion dated 27 May 2021:

"1. That section 40 of the Children's Act, 38 of 2005 (the "Children's Act") be declared to be inconsistent with the Constitution of the Republic of South Africa to the extent that the section does not include the words:

1.1 "or permanent life partner' after the word "spouse" and "husband" wherever such words appear in section 40;

1.2 "or permanent life partners" after the word "spouses" wherever such word appears in section 40.

2. That, in section 40 of the Children's Act, the words:

2.1 "or permanent life partners"' are read in after the word "spouse" and "husband" wherever such words appear in section 40;

2.2 "or permanent life partners" are read in after the word "spouses" wherever such word appears in section 40.

3. That it be declared that section 40 of the Children's Act is to read as follows:

1(a) Whenever the gamete or gametes of any person other than a married person or his or her spouse or permanent life partners have been used with the consent of both such spouses or both such permanent life partners for the artificial fertilisation of one spouse or one permanent life partner, any child born of that spouse or permanent life partner as a result of such artificial fertilisation must for al/ purposes be regarded to be the child of those spouses or permanent life partners.

(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses or permanent life partners have granted the relevant consent.

2 Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

3 Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial ferti/isation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when —

(a) that person is the woman who gave birth to that child; or

(b) that person was the husband or permanent life partner of such woman at the time of such artificial fertilisation."

4. The definition of "parent" as it appears in the Children's Act be declared to be inconsistent with the Constitution of the Republic of South Africa to the extent that the definition excludes any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.

5. That it be declared that the definition of "parent" as it appears in the Children's Act is to read as follows:

'"parent', in relation to a child, includes the adoptive parent of a child, but excludes-

(a) the biological father of a child conceived through rape of or incest with the child's mother and

(b) parent whose parental responsibilities and rights in respect of a child have been terminated".

6. That the first and second respondents be ordered to pay the costs of this application in the event of opposition thereof.

[4] The first respondent was not represented during the proceedings having duly filed a notice to abide dated 26 July 2021.The Centre opposes the main application.

[5] In the course of the argument the applicants abandoned the relief sought in prayers 4 and 5 of the notice of motion.

[6] The background to the matter is the following: the first applicant and the second applicant met during July 2016 through their workplace and have been involved in a lesbian same-sex permanent life partnership since January 2019. They share the same fundamental outlook on life by seeing the world in the similar way, they value the same things and possess the same moral compass. They are both regarded by their close relatives from both sides as part of the family and seen as a permanent couple by their families, friends and the broader community in which they live.

[7] Both applicants dream of having their own children and their own family. The second applicant already has a son from a previous marriage. They believe they have much to offer a family. They are financially stable and have the necessary flexibility in terms of their schedules to be fully committed to the caring and rearing of children. In the rest of this judgement, “the children” will reflect “a child or children to be born in this way”

[8] The legal hurdle for Applicant 1: the word “spouse” is not defined in the Children’s Act, in terms of which the process of surrogacy is regulated.

[9] As a consequence of the definition of “parent” in section 1 of the Act, even though applicant 1 may be a gamete donor herself, she will be excluded from being a parent to any children to be carried by the second respondent, although she will be a parent in the sense of caring for the children and carrying responsibilities for the children’s upbringing.

[10] The Applicant submits that in a female same-sex relationship, it is biologically impossible for the gametes from both spouses to be used, as there must also be male sperm involved for fertilisation to occur. The applicant submits that the legislature did not intend to extend parental rights to the non-genetic partner of the biological mother, in spite of the word “spouse” being used.

[11] The applicant submits that legislation is lacking in terms of which the genetic father of a child is only a gamete donor without parental rights while both mothers obtain parental rights upon the registration of the child, in the case of lesbian relationship. She further submits that as a consequence there is discrimination against same-sex female couples because parental responsibilities and rights are not automatically assigned to same-sex female couples in terms of the legislation and provisions and therefore there is no legal certainty.

[12] In terms of the legislation as it stands, only the second applicant will establish rights, responsibilities, duties or obligations with in regard to the children. The first applicant, in spite of being in a permanent relationship with the second applicant and donor of any gamete, will not be legally obliged to maintain the children; if she were to die intestate, no children will be able to receive a portion of her estate, she will have to show best interest of any such children in order to have access to the children; merely being made a custodian or guardian for any such children will not suffice as it does not recognise her role as parent of the children. Her consent will not be required for the contracting of a marriage by any child, for the removal of the children by the second applicant from the Republic of South Africa; for the application for a passport by any such children whilst under 18 years of age, or alienation or encumbrance of immovable property or any right to immovable property in the event that any such children acquire such property.

[13] The first applicant also maintains that her status of parent not to be recognised legally is unfair to her as her status as parent is not legally secure and she may be deprived of the children, should anything happen to the second applicant; she will not receive the full social recognition to which she will be entitled as a parent; the automatic allocation of parental responsibilities and rights to the second applicant affords the second applicant a degree of autonomy in respect of decision-making regarding the children.

[14] The amicus curiae in principle agrees with the unconstitutionality of section 40 of the Children's Act. However, the amicus disagrees that it is unconstitutional

on the basis that it discriminates unfairly against the applicants; the amicus also disagrees that section 1 is unconstitutional as it will lead to uncertainty regarding the status of donors while there currently is certainty; and does not agree that the proposed remedy will adequately or at all remedy the position of unmarried lesbian couples.

[15] The Amicus points out the following aspects of a proper interpretation of section 40 of the Children's Act:

1. Section 40(1)(a) introduces a legal fiction that a child born using the gamete of gametes of any person other than those of a married person or his or her spouse for the purpose of artificial fertilisation is regarded as the child of those spouses. The child is deemed to be the child of the respective spouses. This is analogous to the situation of both adoption and surrogacy.

2. No matter which spouse's gametes are used, does not matter.

3. Section 40(1)(a) applied to married persons only, which includes a civil union in terms of the Civil Unions Act 17 of 2006, and thus "marriage", husband", "wife" or "spouse" in any law other than the Marriages Act 25 of 1961 or the Recognition of Customary Marriages Act 120 of 1998 includes "civil union" and "civil union partner".

4. The exclusion of unmarried people from the ambit of section 40(1)(a) of the Children's Act applies in respect of both heterosexual and same-sex relationships. Their position is unregulated and therefore their position falls under section 40(2) of the Children's Act. This is woefully unsatisfactory. The partner then who did not give birth, regardless of having contributed a gamete or gametes, has to apply for parental rights and responsibilities in terms of sections 23 and 24 of the Children's Act. This is the situation applying to the applicants and the reason for the application.

5. The donor of a gamete or gametes for use in artificial fertilisation does not acquire parental responsibilities and rights and is not considered a parent of the child except when the donor is also the spouse of the woman who gave birth to the child. The need to have clarity on who is and who is not the donor, in the strict sense, is absolutely necessary to ensure that there is legal clarity on who the parents of the child are.

[16] After listing the possible scenarios regarding section 40(1)(a) and 40(3), the amicus states that the mischief in this matter is not whether the provisions unfairly discriminate against people on the basis of sexual orientation, but rather whether the exclusion of unmarried people in a committed relationship is constitutionally justifiable.

[17] I find myself in agreement with the amicus on this point. Great strides have been made in the past with the acknowledgement of gay and lesbian rights in terms of recognition and formalisation of union, civil union and marriage and facilitation of recognition of relationships in terms of succession, estate planning and provision for what would normally have been viewed as spouses in a very sense. However, the Children's Act remains conservatively lagging in terms of artificial fertilisation and the subsequent recognition of partners as parents. The physical, scientific side of fertilisation presents cut and dried facts, which is regulated in terms of the Health Care Act. However, the more murky side of recognising contributing partners, whether as a nurturing parent or as a contributing donor of gametes, while in a committed relationship, albeit without a ceremony that constitutes some form of union or a registered contract, still presents a problem. It is a fact that sometimes parties, for various reasons prefer not to get married or to have some form of formal process. This does not take away from parties in a relationship, which they view as a permanent, lifelong committed relationship also wanting to procreate and establish a family with children and eventually wanting to be grandparents and eventually great-grandparents, if they are granted long and healthy lives. Parties are then sharing parental responsibilities and want to pool their financial resources in order to create an estate which will establish a secure future. Like all other couples, they also realise that they need to

provide for the future even if the committed relationship does not stand the test of time and there is a split between the parents.

[18] The concern regarding a lifelong permanent partnership is the lack of a formal indication of the intention to remain together. This is a concern that should be regarding all other more formalised unions, civil unions and marriages or customary marriages as well. What should happen to the children and their best interests when a lifelong permanent partnership breaks down? The interests of the parties involved in such a partnership, including the children, seemingly is not considered. However, it needs to be pointed out that unions, civil unions, marriages and customary marriages also break down. The only difference is that through litigation and extension of the law, the parties and the children involved in these types of relationships are protected.

[19] The family is one of the core foundational institutions in all societies on international, regional and domestic level. This recognition is found in the Universal Declaration of Human Rights (Arts 12 and 16(1), the International Covenant of Civil and Political Rights (Preamble and art 23), the Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children ((arts 1, 2 and 17), the African Charter on Human and Peoples' Rights (art 18), the African Charter on the Rights and Welfare of the Child (art 18), the Constitution (sec 28(1)(b) and the Children's Act (Preamble).

[20] The family is complete when children are born into the family or brought into the family. "Children occupy a special place in the social, cultural and legal arrangement of most societies. That this is so is understandable in recognition of both the vulnerability of children and the almost instinctive need to advance their well-being and ensure their protection as well as the compelling human and social imperative to pursue and further their best interests as they are set on the path of developing their full potential and taking their rightful place as full and responsible citizens of society." (Ex parte WH and Others 2011 (6) SA 514 (GNP) cited in EJ and Others v Haupt 2022 (1) SA 514 (GP)

[21] Through the family life the values, cultures and traditions of a people are held in safe-keeping and passed on to the next generation and future generations. See Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae) 2003 (2) SA 198 (CC) at [19]: “The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and that legal conceptions of the family and what constitutes family life should change as social practices and traditions change.”

[22] The family, as legal concept, remains a difficult concept to define. The Amicus refers to the Revised White Pater on Families in South Africa, in which the Department of Social Development defines the family as: “a societal group that is related by blood (kinship), adoption, foster care or the ties of marries (civil, customary, or religious), civil union of cohabitation, and go beyond a particular physical residence.”

[23] If this definition cannot be reflected in section 40 of the Children’s Act, can it be said that the definition in the Act is constitutionally justifiable? The Act still requires a marriage in order to establish a family and does not provide for families that does not fit this mould.

[24] The partners who have not yet had children by way of artificial fertilisation consider that their right to dignity and equality (in terms of sec 9 and 10 of the Constitution) is violated, as set out by the applicants.

[25] In Centre for Child Law v Director-General: Department of Home Affairs 2021 JDR 2222 (CC), the court held regarding “illegitimate children” that “human dignity is not just a founding value that informs the society sought to be created under the new constitutional order but also a justiciable and enforceable right […) It follows therefore, that everyone, irrespective of his or her marital status or status at birth, is a bearer of this right by virtue of being a

human being." (at par [59]). At par 64, the Constitutional Court further states that "Despite the fluidity of the concept of dignity, there is a core content which embraces the humanity and intrinsic worth of every human being. In this case, it is the unmarried father and his child who are constitutionally entitled to this, and this entitlement must be protected by the State. The retention of section 10 of the Act would also undermine the unmarried father's right to dignity. It would imply that he is not entitled to be treated as worthy of registering the birth of his child with his surname in the mother's absence merely because he and the child's mother are not married."

[26] That marital status is the touchstone, and then further discriminates against other relationships of long-term nature, is clear. See Centre for Child Law (supra) at par {70]: "The differentiation and supremacy of a married couple in comparison to unmarried couples continues to be problematic. South African society is not homogeneous, and it must be accepted that the concept of "marriage" no longer retains its stereotypical meanings. O'Regan J stated in Dawood that: "[F]amilies come in many shapes and sizes. The definition of family also changes as social practices and traditions change. In recognising the importance of the family, we must take care not to entrench particular forms of family at the expense of other forms."

[27] Section 40 of the Children's Act unfairly discriminates on the basis of marital status in terms of its treatment of children born in or out of wedlock – see Centre for Child Law (supra) at par 71 and runs contrary to the Revised White Paper, which clearly states as strategic priority to : "Ensure that policies and legislation do not discriminate unfairly against families on the basis of amongst other things, their age, gender, sexual orientation, race, etnic or social origin, marital status, disability, beliefs, culture, language, physical and mental conditions, family composition and financial conditions" at page 28.

[28] In respect of partners who have had children by way of artificial fertilisation, but relationship not recognised, their right to equality and dignity are violated in regard to the inroads to their right to family life.

[29] When children are born by artificial fertilisation and of unmarried parents, their right to family and/or parental care is violated, as set out by the first applicant. When a child is hurt at school, the school will only be obliged to call on the biological parent, while the second parent has no say over the treatment of the child.

[30] A child's right to have his best interests considered of paramount importance, is violated. As pointed out by the first applicant, the child will have no rights regarding inheritance if something were to happen to her and she were to leave no will.

[31] The remedy: the applicants wish the words "permanent life partner" to be read into section 40. However, the Amicus submits that there is no definition for the term of "permanent life partner" and that it will create a breeding ground for disputes as to when a person can be deemed a permanent life partner. The Amicus also submits that will probably not cure all the deficiencies identified by the applicants as it is still a term open to interpretation. The Amicus also submits that deletion of par (b) of the definition will likely not be effective, as it will create confusion regarding the regulation of artificial fertilisation.

[32] It is clear that section 40 of the Children's Act is no longer worded to provide for

1. the reality of unmarried couples who want to undergo artificial fertilisation;

2. the terminology as to when it would apply to unmarried couples;

3. a formulation to avoid denial of acquisition of parental responsibilities and rights;

4. what would be required for a valid process of artificial fertilisation to be embarked upon by an unmarried couple – particularly as to when both

partners have agreed that they have established a permanent life partnership.

[33] It is also clear that the right to dignity and equality of the children born of such artificial fertilisation is violated, as are the rights to dignity and equality of the parties to a lifelong permanent partnership.

[34] In regard to the above section 40 of the Children's Act must be declared unconstitutional and must be referred to the parliament for reconsideration.

[35] It is recommended that the definition of "parent" must also be reconsidered in view of the changes in the society.

[36] In the circumstances, I make the following order:

(1) That section 40 of the Children's Act, 38 of 2005 (the "Children's Act") is declared to be inconsistent with the Constitution of the Republic of South Africa to the extent that the section does not include the words:

"or permanent life partner' after the word "spouse" and "husband" wherever such words appear in section 40;

"or permanent life partners" after the word "spouses" wherever such word appears in section 40.

(2) That, in section 40 of the Children's Act, the words:

2.1 "or permanent life partners"' are read in after the word "spouse" and "husband" wherever such words appear in section 40;

2.2 "or permanent life partners" are read in after the word "spouses" wherever such word appears in section 40.

2.3 that subsection (c) be inserted after section 1(b):

(3) That it be declared that section 40 of the Children's Act is to read as follows:

(1)(a) Whenever the gamete or gametes of any person other than a married person or his or her spouse or permanent life partners have been used with the consent of both such spouses or permanent life partners for the artificial fertilisation of one spouse or one permanent life partner, any child born of that spouse or permanent life partner as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses or permanent life partners as if the gamete or gametes of those spouses or permanent life partners had been used for such artificial fertilisation.

(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses or permanent life partners have granted the relevant consent.

(2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-

(a) that person is the woman who gave birth to that child; or

(b) that person was the husband or permanent life partner of such woman at the time of such artificial fertilisation.

(4) As a temporary solution to the plight of the applicants, the words are to be read into section 40 of the Act as follows and will remain in effect until the Act is amended:

(1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse **or permanent life partners** have been used with the consent of both such spouses **or permanent life partners** for the artificial fertilisation of one spouse **or one permanent life partner**, any child born of that spouse **or permanent life partner** as a result of such artificial fertilisation must for all purposes be regarded to be the child of those **spouses or permanent life partners** as if the gamete or gametes of those spouses **or permanent life partners** had been used for such artificial fertilisation.

(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses or life partners have granted the relevant consent.

(2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.

(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-

(a) that person is the woman who gave birth to that child; or

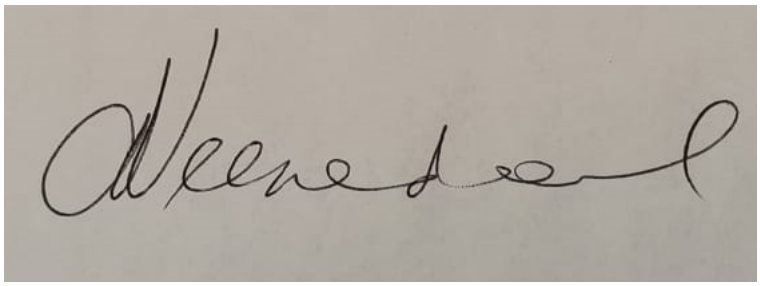
(b) that person was the husband or permanent life partner of such woman at the time of such artificial fertilisation

(5) This application is declared to be confidential and:

5.1 the Court file and application shall be retained in the Chief Registrar's office;

5.2 the identity of the parties to this application, or any facts which may cause them to be identified, shall not be published and/or made public.

(6) There is no order made pertaining to costs.



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C VAN VEENENDAAL

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the plaintiff's legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 22 February 2022.

APPEARANCES

For the Applicants:	Adv A de Vos SC & H Botma
Instructed by:	Adele van der Walt Attorneys Inc.
For the Respondents:	No Appearance
Instructed by:	The State Attorney, Pretoria

As Amicus Curiae:	Adv M Courtenay
Instructed by:	Centre for Child Law, Pretoria
Heard on:	03 November 2021
Delivered on:	24 February 2022