IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 32200/2020

In the case between:

Q… G…	First Applicant
…	Second Applicant
and	
C… S…	First Respondent
…	Second Respondent
and	
DONRICH WILLEM THALDAR	*Amicus curiae*

AMICUS CURIAE'S HEADS OF ARGUMENT

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INTRODUCTION

Background and notes on terminology

1 In South Africa, a woman who intends to become pregnant through artificial fertilisation – the 'recipient' – can access donor gametes from anonymous gamete donors at local or international gamete banks or donation agencies. Some South African fertility clinics also offer their own inhouse databases of anonymous gamete donors that their patients can access. In the alternative to using the gametes of an anonymous gamete donor, a recipient can also use the gametes of a person who is known to her. Such a gamete donor is generally referred to as a 'known gamete donor'.

2 In practice, a known gamete donor would very often be the recipient's husband: In the event that a husband and wife cannot conceive children naturally, but the husband is able to produce sperm that can be used for artificial fertilisation, the husband can donate sperm for the artificial fertilisation of his wife (the recipient). A known gamete donor can also be another family member, a friend or an acquaintance of the recipient. For instance, if a recipient requires donor eggs, she may prefer to ask her sister or a good friend to be her donor, rather than using an anonymous egg donor. However, gamete donation by a known gamete donor is subject to more stringent regulation than gamete donation by an anonymous gamete donor. I make more detailed submissions in this regard in paragraphs 29 – 35 below.

3 When a recipient makes use of a known gamete donor, the parties may conclude an agreement that sets out their respective rights and duties. In the case of a male gamete donor, such an agreement is generally referred to as a 'sperm donor agreement'.

The issues before the court; summary of my submissions

4 The court is seized with two related questions: (*i*) Whether persons are entitled to have parental rights and responsibilities relating to a child based on, *inter alia*, their genetic link with the child, where the cause of such genetic link was a gamete donation; and (*ii*) whether a sperm donor agreement that excludes a known sperm donor from ever seeking parental rights and responsibilities relating to the donor-conceived child is enforceable.

5 My submission, in brief, is that (*i*) any person, including a known sperm donor and his family members, who can demonstrate that he or she has an interest in the wellbeing of the donor-conceived child, as contemplated in sections 23 and 24 of the Children's Act 38 of 2005, can approach the court for parental rights and responsibilities; however, the fact that persons have a genetic link with the child – where the cause of such genetic link was a gamete donation – should be allocated no weight when considering whether such persons are entitled to have parental rights and responsibilities towards said child; and that (*ii*) provisions in a sperm donor agreement that exclude a known sperm donor from ever seeking parental rights and responsibilities relating to the donor-conceived child are only enforceable if the court is satisfied that such provisions are in the best interests of the child.

6 In support of my submission, these heads of argument present analyses in two main parts: First, the statutory scheme governing artificial reproduction, and secondly a comparative legal analysis. I conclude by applying the relevant law to the facts of the case.

THE STATUTORY SCHEME GOVERNING ARTIFICIAL REPRODUCTION

The crux: The Rule relating to gamete donation and parental rights and responsibilities

7 The statutory scheme that governs artificial reproduction consists of Chapter 8 of the National Health Act (NHA) 61 of 2003, the Regulations Relating to the Artificial Fertilisation of Persons (the Regulations) made in terms of the NHA,[1] and certain provisions in the Children's Act.[2]

8 Two of these provisions in the Children's Act are relevant to the present inquiry: Both section 40 and section 26(2)(b) of the Children's Act make it clear that *a gamete donor (except a spouse) is not legally regarded as the parent of any child born from using said donor's gametes, and therefore does not acquire any parental rights and responsibilities relating to the donor-conceived child because of their genetic link*. (The 'Rule')

9 In both these provisions, the legislature clearly and deliberately excludes gamete donors from having any claim to parenthood of the donor-conceived child. The unequivocal purpose of the Rule is to make it so that in the eyes of the law a donor-conceived child is the child of the person(s) who intended to act as the child's parent(s); and that gamete donors relinquish any claim to parenthood, and the attendant rights and responsibilities that come with it, by virtue of becoming gamete donors.

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[1] GN R175, *Government Gazette* 35099, 2 March 2012. Available online: https://www.greengazette.co.za/documents/regulation-gazette-35099-of-02-march-2012-vol-561-no-9699_20120302-GGR-35099.pdf

[2] Sections 26(2)(b), 40 and 41 (gamete donation); sections 292 to 303 (surrogacy).

10 The Rule is a cornerstone of the statutory scheme that governs artificial reproduction, as it protects the rights of all the parties involved:

10.1 Donors can altruistically donate gametes to (medically or socially) infertile persons (recipients) without the risk of incurring parental duties.

10.2 Recipients can accept altruistic gamete donations without the risk of the donor in future making claims to parenthood, and to attendant parental rights (based solely on the genetic link with the donor-conceived child) in conflict with the parental rights of the recipients.

10.3 Donor-conceived children can enjoy stable family lives without the risk of a donor intruding in their family lives demanding parental rights.

11 The legal certainty provided by the Rule is essential for sustaining the artificial reproduction system in South Africa. If the Rule is compromised, donors would not be willing to donate, recipients would not be willing to accept donations, and infertility would become an unsolvable burden. This would undermine access to reproductive healthcare services – a right which is guaranteed by the Constitution.[3] It would also violate the equality rights of medically infertile persons (which is a disability and hence falls within the ambit of protected grounds in the Constitution), and of socially infertile persons, such as lesbian couples (which is again a protected ground in the

[3] Section 27(1)(a) of the Constitution.

Constitution).[4] Additionally, it would obstruct infertile persons' freedom to form a family, which would violate their right to human dignity.[5]

12 Moreover, if the Rule is compromised, so will the stability of families formed through gamete donation, hence undermining not only the rights of recipients, but also the right of donor-conceived children to *grow up in a stable family environment* (as per section 7(1)(k) of the Children's Act).

13 Accordingly, the Rule serves at least four constitutional rights, namely (*i*) access to healthcare services, (*ii*) equality, (*iii*) dignity, and (*iv*) the principle of the best interests of the child.

14 Importantly, the Rule does *not* entail that a gamete donor can *never* acquire any parental rights and responsibilities relating to a donor-conceived child. The Rule simply entails that a gamete donor does not acquire parental rights and responsibilities relating to a donor-conceived child *by virtue of their genetic link*.

15 It follows that a gamete donor can, similar to any other person, potentially acquire parental rights and responsibilities towards a donor-conceived child in terms of sections 23 and 24 of the Children's Act. However, the following caveats apply:

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4 Sections 1(a) and 7(1) of the Constitution. Infertility is widely accepted as a disability, and hence qualifies as a listed ground in section 7(1) – see: Bonginkosi Shozi 'Something old, something new: applying reproductive rights to new reproductive technologies in South Africa' (2020) 36(1) *SAJHR* 20, p 20,

5 Section 10 of the Constitution. *Certification of the Constitution of the Republic of South Africa, 1996*. 1996 (4) SA 744 (CC) para 100. (The right to raise a family is protected by the right to dignity.)

15.1 A person does not qualify as a 'person having an interest in the care, well-being or development of a child' as contemplated in sections 23(1) and 24(1) of the Children's Act because of a genetic link *caused by gamete donation*. An interest in the care, well-being or development of a child therefore needs to be based on facts other than genetic relatedness caused by gamete donation.

15.2 Furthermore, when considering an application for parental rights and responsibilities as contemplated in sections 23(2)(e) and 24(2)(c) of the Children's Act, the court should refrain from taking into account a genetic link *caused by gamete donation*. In other words, the court should refrain from treating a gamete donor as though he or she were a biological parent, given the Children's Act's explicit exclusion of gamete donors from the classification of legal parents.

16 If a genetic link caused by gamete donation is allotted any weight by the court in the context of sections 23 and 24 of the Children's Act, the court would effectively be treating the gamete donor as a parent, when the statutory regime was clearly designed to disqualify the gamete donor from being treated as a parent. The Rule would be compromised, in turn upsetting the entire statutory scheme that governs artificial reproduction and violating the constitutional rights served by the Rule. This can be avoided only if the court treats the gamete donor as any other person applying for parental rights and responsibilities in terms of sections 23 and 24, and allots no special significance to the genetic link he or she has with the child.

Disclosure is at the parents' discretion

17 Importantly, while a donor-conceived child has the right to access all medical information of his or her donor,[6] which must be kept on file by the healthcare professional who effected the artificial fertilisation,[7] a donor-conceived child does *not* have a right to request disclosure of the identity of his or her donor.[8] This applies irrespective of whether the donor was anonymous or known (to the recipient).

18 Accordingly, the statutory scheme that governs artificial fertilisation places its trust in the legal parent(s) of a donor-conceived child to decide:

18.1 If, when, and how to disclose the fact of donor-conception to the child, and

18.2 in the event of a *known* gamete donor, if, when, and how to disclose the identity of the donor to the child.

19 Our country is home to diverse cultural traditions. Furthermore, within a given cultural community, the family dynamics of one family may be different from another family. Accordingly, different parents may reasonably be expected to make different decisions regarding disclosure.

20 The issue of disclosure would typically be one of the issues agreed between the parties to a gamete donor agreement, which is a lead into the next topic of analysis.

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6 Section 41(1) of the Children's Act.

7 Reg 8 of the Regulations.

8 Section 41(2) of the Children's Act.

The sperm donor agreement

21 The enforceability of the sperm donor agreement should be considered in light of the broader statutory scheme. Two types of provisions that purport to arrange parental rights and responsibilities in the sperm donor agreement should be differentiated: Provisions that restate the Rule, and provisions that go beyond the Rule:

21.1 *Provisions that restate the Rule*. Since the Rule is established through statute, and since the Rule serves a number of constitutional rights, *inter alia* the principle of the best interest of the child, provisions that restate the Rule are enforceable.

21.2 *Provisions that go beyond the Rule*. There are various provisions in the sperm donor agreement that purport to arrange parental rights and responsibilities beyond the scope of the Rule, for example that the gamete donor undertakes never to demand or request parental rights towards the donor-conceived child (irrespective of actual circumstances). As a general rule in our law, contractual provisions in an agreement, such as an antenuptial contract, that purport to arrange parental rights and responsibilities are only enforceable if the court deems such provisions in the best interest of the child.[9] Consistency demands that the same should apply to provisions in the sperm donor agreement that

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[9] *Girdwood v Girdwood* 1995 (4) SA 698 (C) at 708I/J to 709A. ('As upper guardian of all dependent and minor children this Court has an inalienable right and authority to establish what is in the best interests of children and to make corresponding orders to ensure that such interests are effectively served and safeguarded. No agreement between the parties can encroach on this authority.') This dictum was applied in, *inter alia*, *Du Toit v Minister of Welfare and Population Development* 2003 (2) SA 198 (CC) and *AD v DW* 2008 (3) SA 183 (CC).

purport to arrange parental rights and responsibilities beyond the scope of the Rule.

22 Accordingly, the sperm donor agreement should not be held to constitute a ban on the sperm donor from approaching the court in terms of sections 23 and 24 of the Children's Act. In fact, the inquiry in terms of sections 23 and 24 of the Children's Act will simultaneously serve to determine, in a particular case, whether the relevant provisions of a sperm donor agreement are enforceable or not.

23 However, it bears repetition that the genetic link between (a) the gamete donor, and, where relevant, members of the gamete donor's family, on the one hand, and (b) the donor-conceived child, on the other hand, is *not* a relevant fact in this enquiry. The court must regard the gamete donor and members of the gamete donor's family as the court would any other persons who approach the court in terms of sections 23 and 24 of the Children's Act.

24 The above does not mean that it is open season for known gamete donors to seek parental rights and responsibilities relating to donor-conceived children. In practice, I submit that it would only be in exceptional cases, such as the Australian case of *Mason v Parsons*[10] that I analyse below, that a known gamete donor would be able to demonstrate that he or she actually has an interest in the care, well-being or development of a child.

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[10] *Mason v Parsons* 2019 HCA 21 (Australia). Available online: https://www.jade.io/article/648489

Is BR v LS relevant?

25 The facts in *BR v LS*[11] (referred to by the applicants as '*R v S*') are clearly distinguishable from the facts *in casu* on various levels. Most importantly, the mother and father in *BR v LS* were romantically involved at one stage[12] and conceived a child *through natural means*.[13] The allegation by the mother that the father was a 'sperm donor' did not accord with the common cause facts and was therefore rejected by the court.[14] This places *BR v LS* beyond the realm of the statutory scheme that governs artificial fertilisation.

26 The above is amplified by the fact that the father in *BR v LS* was granted parental rights and responsibilities in terms of section 21 of the Children's Act,[15] which deals with parental responsibilities and rights of unmarried fathers – not in terms of sections 23 and 24.

27 The court in *BR v LS* held that the reliance on a 'sperm donor agreement' was somewhat of an afterthought only[16] and further observed that it did not have the benefit of detailed argument regarding the validity or not of such agreements.[17] The only importance which

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11 *BR v LS* 2018 (5) SA 308 (KZD).

12 Ibid para subpara 9(b).

13 Ibid para 1 of the judgment (as opposed to the order preceding that) and subpara 9(d).

14 Ibid para 30

15 Ibid paras 21 and 31.

16 Ibid para 30

17 Ibid paras 14 and 15.

BR v LS may have is the fact that the court held, albeit *obiter*, that the validity of sperm donor agreements deserves the court's attention as it is a novel issue.[18]

28 In the context of *BR v LS,* the applicants make reference to a *De Rebus* article by Robertson.[19] This article is a discussion of the *BR v LS* matter, but does not take the issue of a sperm donor agreement with an *actual* sperm donor any further. The applicants also make reference to an article by Anonymous in the *De Rebus*.[20] In my letter to the editor of *De Rebus* in response to the article by Anonymous, I point out that the article by Anonymous commits the legal error of referring to an unmarried father who conceived a child through natural means as a 'sperm donor'.[21] In any event, the court in *BR v LS* duly rejected this attempt at conflating two very distinct concepts in our law.

Excursus: The importance of compliance with the statutory scheme

29 The Regulations places a legal duty on the 'competent person' (the healthcare professional under whose care the gamete donation by a *known* donor takes place) to ensure that both the donor and the recipient are *psychologically evaluated*.

30 To explain the relevance and importance of these psychological evaluations, I requested Ms Voula Samouri, a clinical psychologist who practices in this field, to provide a brief

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18 Ibid para 15.

19 Applicants' heads of argument paras 10.2 – 10.2.2. (CaseLines 004-35 – 004-37)

20 Ibid para 10.2.3. (CaseLines 004-37)

21 Available online: http://www.derebus.org.za/letters-to-the-editor-april-2018/

expert opinion, which I append hereto. Ms Samouri states as follows in her expert opinion regarding the aim of the legally mandated psychological evaluations in the event of gamete donation by a *known* donor:[22]

> … it is essential to make sure that the donor has properly thought these scenarios through, and fully understands that the prospective child will be the legal child of the recipient (and her spouse or partner) and that the donor should have no expectations of being (or acting as) the parent of the prospective child. In particular, it is important to ensure that the expectations of the known donor are aligned with the way in which the recipient and her spouse or partner (the legal parents) foresee the involvement of the known donor with their prospective family.

31 Ms Samouri continues, with specific relevance to the facts *in casu*:[23]

> This would in particular be the case where a recipient is using a known donor who is a single, childless man who may (perhaps subconsciously) wish to enjoy some kind of father-child relationship with the donor-conceived child. A clinical psychologist would probe this possible hope during the interview and ensure that the known donor's expectations are aligned those of the recipient and her spouse or partner, or, if there are signs that expectations are not aligned, the clinical psychologist will recommend that the recipient reconsiders proceeding with the particular known donor.

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22 Samouri expert opinion para 8.

23 Ibid para 9.

32 Accordingly, it is clear why the legally mandated psychological evaluation in the event of gamete donation by a known donor is an important element of the statutory scheme that governs artificial reproduction.

33 *In casu*, despite the fact that the parties made use of the professional healthcare services at Wilgers Hospital, *no psychological evaluation of the first applicant (the known donor) took place*.[24]

34 The position regarding the first respondent (the recipient) is less clear. The first respondent states that 'medical professionals' evaluated her and the second respondent's 'psychological well-being'.[25] First, not any medical professional would be competent to conduct a *psychological evaluation*. Secondly, from the analysis in paragraphs 30 – 31 above it should be clear that a *psychological evaluation* in the context of known gamete donation is about much more than mere 'psychological well-being'. Accordingly, there are insufficient facts before the court to make a finding on whether the first respondent actually underwent a psychological evaluation.

35 Had there been legal compliance with this requirement, as Wilgers Hospital was legally required to do before the sperm donation and subsequent artificial fertilisation, the present dispute could potentially have been entirely avoided.[26] I elaborate on the issue of non-compliance in paragraphs 55 – 57 below.

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[24] Founding affidavit para 4.5 (CaseLines 001-17), para 4.10 (CaseLines 001-24). This is not denied by the respondents: Answering affidavit para 6.24 (CaseLines 002-37).

[25] Answering affidavit para 6.28.2 (CaseLines 002-38).

[26] The first applicant also makes averments to this effect: Founding affidavit paras 4.2, 4.5 and 7.7. (CaseLines 001-16, 001-17 and 001-45)

COMPARATIVE LEGAL ANALYSIS

36 In their heads of argument, the applicants refer to two foreign cases, one in Australia, and one in England.[27] The respondents do not refer to any foreign cases. In this part of my heads of argument, I provide the court with a broader perspective regarding the two foreign cases cited by the applicants.

Australia

37 The applicants discuss the 2002 judgment in *Re Patrick*[28] in their heads of argument.[29] As such, I need not repeat the facts and the finding here. However, I submit that the way in which the Family Court in *Re Patrick* applied the best interests of the child criterion is open for critique:

37.1 The Family Court considered the sperm donor's contribution to the baby's conception as relevant. As submitted above, at least in the South African context, this would militate against the Rule, and therefore against several constitutional rights.

37.2 The Family Court gave too much weight to the sperm donor's desire to be the baby's father, while downplaying the fact that he is an outsider to the lesbian family unit. In South African law, preserving the stability of the family unit is recognised as being in the best interest of the child. By contrast, in Australia in

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27 Applicants' heads of argument paras 10.2.3.1 and 10.2.3.2. (CaseLines 004-37 – 004-44)

28 *Re Patrick* 2002 28 Fam LR 579 (Australia). Available online: https://www.jade.io/article/156924

29 Applicants' heads of argument para 10.2.3.1. (CaseLines 004-37 – 004-42)

2002, same-sex marriage has not yet been legally recognised – same-sex marriage has only been legally recognised in Australia in 2017.

38 The story of *Re Patrick* did not end well: Four months after the judgment, the mother killed the baby and herself.[30] I mention this tragic turn of events not in an attempt to discredit the judgment – the judgment should be considered on its own merits and demerits. Yet, this extra-curial event highlights the psychological trauma involved in these kind of matters, and underscores the necessity of compliance with our country's statutory scheme's requirement of psychological evaluation prior to proceeding with known gamete donation.

39 While *Re Patrick* was the first case of this nature in Australia, it was not the last. In 2019, *Mason v Parsons*[31] was decided by Australia's apex court, the High Court. In *Mason*, the applicant, a known sperm donor, was entered on her birth certificate as the child's father; he was actively involved in the child's life; and he had an ongoing role in the child's financial support, education, health and general welfare since birth. Based on the applicant's ongoing involvement and relationship with the child – *not* the genetic link – the High Court held that the applicant was indeed the child's parent for legal purposes. The High Court further held *obiter* that it was unnecessary to decide whether being a sperm donor *per se* is relevant to being a parent for legal purposes.

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30 'Lesbian mum kills son'. *The Sydney Morning Herald*. 4 August 2002. Available online: https://www.smh.com.au/national/lesbian-mum-kills-son-20020804-gdfigf.html

31 *Mason v Parsons* 2019 HCA 21 (Australia). Available online: https://www.jade.io/article/648489

40 The *Mason* judgment is therefore broadly aligned with my submissions above regarding South African law. Important to note is that the *nature* of the applicant's relationship with the child was that of *de facto* parent. This is distinct from someone who may sincerely care for a child, but who merely aspires *to be* a parent and cannot demonstrate that he or she is, as a matter of fact, fulfilling the role of *de facto* parent.

England

41 The second foreign case that the applicants discuss in their heads of argument[32] is the 2007 English case of *TJ v CV*.[33] However, an important fact that should be added to the applicants' discussion is that there was a factual dispute regarding whether the child's conception was through natural means or through artificial fertilisation.[34] The court declined to make a finding on this dispute, holding that it is irrelevant to the future of the child.[35] As such, it is uncertain whether *TJ v CV* actually deals with a known sperm donor in the sense that it is understood in South African law. Given this factual uncertainty and consequent conflation of two concepts that are distinct in our law – the known sperm donor and the unmarried father – the *TJ v CV* case should be read with circumspection.

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32 Applicants' heads of argument para 10.2.3.2. (CaseLines 004-43 – 004-44)

33 *TJ v CV* [2007] EWHC 1952 (Fam) (England). Available online: https://www.familylawweek.co.uk/site.aspx?i=ed999

34 Ibid paras 19 and 20.

35 Ibid para 22.

42 Furthermore, the English court's argument, namely that the dispute regarding the nature of the child's conception need not be decided because it is irrelevant to the future of the child, deserves analysis.

42.1 In one sense, the premise is *true*: Whether the child was donor-conceived or naturally conceived, there is no dispute about the identity of the biological father. Also, whether one is donor-conceived or naturally conceived, does not affect one's health or physical development, and in today's society is also unlikely to lead to stigma.

42.2 In another sense – which matters in the law – the premise is *false*: Parents and children all benefit from having certainty about their legal relationships. This is the precise reason the Rule exists: to make unequivocally clear the legal parentage of donor-conceived children. There are very different legal consequences in terms of parental rights and responsibilities between natural conception and artificial conception. (The reasons for these differences, and how they promote constitutional rights, have been analysed in paragraphs 7 – 16 above.) Therefore, failing to decide the dispute regarding the nature of the child's conception undermines the legal certainty that parents are entitled to when they decided to use either natural or artificial means of conception, and undermines the legal certainty of all parties – including the child – going into the future, as this unresolved factual dispute at the centre of the case can lead to further litigation.

43 Accordingly, the argument that the nature of a child's conception is irrelevant to the future of the child, should be rejected as legally untenable. It is highly relevant to all parties involved, including the child.

44 It should also be noted that *TJ v CV* was decided under the Human Fertilisation and Embryology Act of 1990, before being amended by the Human Fertilisation and Embryology Act of 2008.[36] The original 1990 version of the Act contained a presumption that a child needed a father.[37] This presumption was only removed after the judgment in *TJ v CV*.[38] Accordingly, *TJ v CV* was decided under a statutory regime that is contrary to South African law. This court held as follows in *Wilsnach NO v TM*:[39]

> A father can be as a good a 'mother' as the biological mother of the child, whilst a mother can be as a good a 'father' of as the biological father of the child.

45 Although the court in *TJ v CV* did not explicitly rely on the presumption that a child needs a father, it is implicit in the court's reasoning about the child's perceived interests. Accordingly, I submit that the English case of *TJ v CV* has little, if any, relevance to the present matter.

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36 Both the original and the revised text of the Human Fertilisation and Embryology Act of 1990 (United Kingdom) can be accessed online: https://www.legislation.gov.uk/ukpga/1990/37/contents/enacted

37 Section 13(5) provided as follows: 'A woman shall not be provided with treatment services unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth.' [Underlining added.]

38 The revised section 13(5) now provides as follows: 'A woman shall not be provided with treatment services ... unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for supportive parenting), and of any other child who may be affected by the birth.' [Underlining added.]

39 *Wilsnach NO v TM* [2020] ZAGPPHC 756 para 82.

CONCLUSION

The concept of the 'family' in our law

46 Our Constitution espouses a socially dynamic, inclusive conception of the family. In *Du Toit v Minister for Welfare and Population Development* the Constitutional Court held that:[40]

> 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.

47 In *Minister of Home Affairs v Fourie* the Constitutional Court held as follows:[41]

> South Africa has a multitude of family formations that are evolving rapidly as our society develops, so that it is inappropriate to entrench any particular form as the only socially and legally acceptable one.

48 Although the presence of a parent-child genetic link is important to many families, this should not be generalised to everyone – nor should the law give an elevated status to genetically-constituted families. What is clear from both of these cases quoted above is that families that entail parent-child genetic links are neither more nor less valuable

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40 *Du Toit v Minister for Welfare and Population Development* 2003 (2) SA 198 (CC) para 19.

41 *Minister of Home Affairs v Fourie* 2006 (3) BCLR 355 (CC) para 59.

from a constitutional perspective than families without any such links. For instance, in *Fourie* the Constitutional Court held:[42]

> It is demeaning to adoptive parents to suggest that their family is any less a family and any less entitled to respect and concern than a family with procreated children.

49 The recent case of *Wilsnach* encapsulates the current position in our law:[43]

> Thus, there are the biological parents of the child (also referred to as the natural parents), there may be adoptive parents, surrogate parents, persons who acquire responsibilities and rights as a result of a Court order and possibly *de facto* parents of a child. In all of this, the role and place of biology and blood is limited, the primary focus being the relationship that exists between the child and the parent (or the person who discharges that role).

50 All this speaks to the heart of the Rule, and my submission in favour of its preservation. If the court were to treat the sperm donor as a parent, and give weight to his genetic link to [child's name], the court would implicitly be suggesting that genetic links are more important that other forms of bonds families can share.

Applying the law to the facts before the court

51 The respondents' family – consisting of the lesbian couple and their child, [child's name] – should be legally recognised and respected as a *family*. It follows, following

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42 Ibid para 86.

43 *Wilsnach NO v TM* [2020] ZAGPPHC 756 para 42.

section 7(1)(k) of the Children's Act, that it is in [child's name]'s best interests to *protect the stability of this family*.

52 The applicants are requesting parental rights and responsibilities in terms of sections 23 and 24 of the Children's Act. The first step is therefore to determine whether the applicants qualify as persons who have an interest in the care, well-being or development of a child as contemplated in sections 23(1) and 24(1). The following legal principles apply:

52.1 The Rule (that a gamete donor, except a spouse, is not legally regarded as a parent and therefore does not acquire any parental rights and responsibilities towards a donor-conceived child by virtue of their genetic link) is important in our law, as it serves various constitutional rights, *inter alia* the best interests of the child.

52.2 Accordingly, the question of whether the applicants qualify as persons having an interest in the care, well-being or development of [child's name] must be answered without having regard to the genetic relatedness between the applicants and [child's name], since such genetic relatedness was brought about through gamete donation.

52.3 In our case law, the only factors other than genetic relatedness that appears to have been sufficient to satisfy sections 23(1) and 24(1) were when a person has been the *de facto* parent of a child.[44]

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[44] See for example: *CM v NG* 2012 (4) SA 452 (WCC) (Person suing for parental rights and responsibilities of genetically unrelated child was the co-caregiver for 2 years.) *Du Plessis v Venter* [2021] ZAFSHC 25 (Person suing for parental rights and responsibilities of genetically unrelated child was the co-caregiver for 3 years.)

52.4 This approach is also broadly aligned with the approach of the Australian High Court in its recent judgment in *Mason*, as discussed in paragraphs 39 – 40 above.

52.5 This benchmark – of being a *de facto* parent – is reasonable and sensible, and must be maintained even when dealing with gamete donors. The gamete donor, by virtue of being a gamete donor, eschewed any claim to being the donor-conceived child's legal parent, and is therefore not entitled to preferential treatment when it comes to determining whether he or she obtains parental rights and responsibilities. Lowering the benchmark because of the genetic link would cause unnecessary instability to *families*, which would be contrary to the best interests of the child.

52.6 In this context, it is important to differentiate a person who has an *interest* (in the sense of a legally recognised stake or involvement), and a person who is *interested* (in the sense of showing concern) in the care, well-being or development of a child. It cannot be the purpose of the Children's Act to permit any person who have had occasional contact with a child to pierce the sanctity of the child's family life and sue for parental rights and responsibilities. Such concern with the child may be sincere, or it might be self-serving, but it is ultimately insufficient to constitute *locus standi*.

53 I now turn to the facts *in casu*: In motion procedure, the case is decided on those facts in the founding affidavit that were admitted or not disputed in the answering affidavit.[45] The picture that emerges from the papers is that the applicants only occasionally had

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[45] *Plascon-Evans Paints (Tvl) Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

contact with [child's name], and that the nature of their relationships with [child's name] are far removed from ever having been *de facto* parents. Even on the applicants' own version, the applicants' relationships with [child's name] still cannot be described as being *de facto* parents.

54 Accordingly, based on the facts before the court, the applicants *in casu* do not qualify as persons who have an interest in [child's name]'s care, well-being or development, and therefore lack *locus standi*. This should be the end of the enquiry. The applicants' case should, in my respectful submission, be dismissed.

Costs

55 I have an acute awareness not only of the emotional toll of a case like the present one, but also of the financial toll. My submission regarding costs may be out of the ordinary, but, I submit, within the power of the court: I submit that the court should, with respect, make an order in the following terms:

55.1 Joining Wilgers Hospital as third respondent.

55.2 Issuing a rule *nisi* against Wilgers Hospital, ordering it to present reasons before a specified return date as to why it should not pay the costs of this suit, failing which, it will be liable to pay said costs. (For clarity, the costs of this suit includes the costs of the applicants and the first and second respondents.)

56 My reasons for proposing this extraordinary cost order are as follows:

56.1 At common law, a respondent may be joined on grounds of, *inter alia*, equity and the avoidance of multiplicity of actions; furthermore, the court can *mero*

motu raise the issue of non-joinder and has the inherent power to order the joinder of further parties in a case that has already begun.[46]

56.2 Wilgers Hospital had a statutory duty to ensure that both the first applicant and the first respondent undergo psychological evaluation prior to the artificial fertilisation. It is common cause between the parties currently before the court that Wilgers Hospital breached this statutory duty in the case of the first applicant.[47] (The position regarding the first respondent is unclear.[48])

56.3 The purpose of this statutory duty, as explained by Ms Samouri in her expert opinion, is for a clinical psychologist to ensure that the expectations of the recipient and the known gamete donor regarding the intended known gamete donor's role in the prospective child's life are aligned.[49] Clearly, this statutory duty is important.

56.4 The court should, with respect, show its displeasure with Wilgers Hospital's non-compliance with this important statutory duty by ordering it to pay the costs of the suit.

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46 See the general comments on Rule 10 in *Erasmus Superior Court Practice* and the authority cited therein.

47 See para 33 above.

48 See para 34 above.

49 See paras 30 – 31 above.

57 Note, for clarity, that the proposed cost order should not be misconceived as necessarily implying delictual liability of Wilgers Hospital, which is a separate issue. I submit that the proposed cost order would be (*i*) equitable in the circumstances, (*ii*) show the court's displeasure at non-compliance with an important statutory duty, and (*iii*) send a signal to all healthcare practitioners involved in artificial reproduction to take statutory compliance seriously.

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LIST OF APPENDICES

Expert opinion by clinical psychologist, Ms Voula Samouri.

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