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Performing IVF for surrogacy before confirmation of the surrogacy agreement by the court: a critical analysis of recent case law in South Africa

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The regulation of surrogacy in South Africa centres on a scheme of judicial confirmation of surrogacy agreements before the start of the surrogate pregnancy. If such confirmation is granted by the court, actions taken in the execution of the surrogacy agreement are lawful, and the agreement itself is enforceable. Against this background, the question has arisen: is it lawful to perform in vitro fertilisation (IVF) before confirmation of the surrogacy agreement? This is a salient question: In circumstances where egg retrieval needs to take place in anticipation of surrogacy, and where sperm is available but where the surrogacy agreement has not (yet) been confirmed, there are significant clinical advantages to first creating embryos through IVF before cryopreservation—rather than cryopreserving the eggs. However, in the recent case of *Ex Parte MCM*, the court held that it is unlawful to perform IVF in anticipation of surrogacy where the surrogacy agreement has not (yet) been confirmed. The correctness of this decision is comprehensively analysed with reference to the two main statutory instruments that are relevant to the topic: the Children's Act and the Regulations relating to the Artificial Fertilisation of Persons. This article concludes that *Ex Parte MCM* interpreted the Regulations incorrectly, and that on a proper construction of both the relevant statutory instruments, the law does not prohibit IVF in anticipation of surrogacy where the surrogacy agreement has not (yet) been confirmed.

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Introduction

The primary legislation that regulates surrogacy in South Africa is Chapter 19 of the Children's Act (2005). It provides for a system of judicial confirmation of surrogacy agreements before the commencement of the surrogate pregnancy. If such confirmation is granted, actions taken in the execution of the surrogacy agreement are lawful, and the agreement itself is enforceable. In particular, in a case of 'full' surrogacy, i.e., where the surrogate mother does not have a genetic link with the surrogacy child, the child is legally deemed the child of the commissioning parents from the moment of birth.

Since Chapter 19 entered into force in 2010, the courts have interpreted and created clarity regarding various of its aspects. While significant strides have been made, it has not always been a smooth journey. In other non-surrogacy matters, the court typically has the benefit of submissions by at least two opposing parties. South Africa's adversarial legal system serves as a quality control mechanism. Through the exchange of successive rounds of pleadings and heads of argument between parties prior to the hearing, and often intense legal argument in court, gaps and errors are quickly identified and weaknesses in arguments are highlighted. However, applications for confirmation of a surrogacy agreement are exceptions to the adversarial rule—they are so-called *ex parte* applications: applications with no party cited in potential opposition. Accordingly, the normal mechanism to ensure the robustness of the legal process—having an adversary—is missing. Consequently, courts hearing surrogacy confirmation applications are deprived of their usual support structure. It is therefore not a surprise that there are sometimes less-than-correct, anomalous elements in surrogacy judgments. However, as I show in this article, if the law is considered broadly, anomalies can be identified for what they are and then rejected with confidence.

To introduce the topic of this article, consider the following two scenarios:

Scenario 1: Woman A is single and approaching menopause. Earlier in her life she had to undergo a hysterectomy. She intends to become a mother through surrogacy, using her own eggs. However, given her age, she is concerned that her eggs will soon start rapidly deteriorating in quality. Accordingly, she approaches her local fertility clinic to arrange for her eggs to be retrieved and cryopreserved for future use. Although she has not yet found a potential surrogate, she has identified a sperm donor at a local sperm bank.

Scenario 2: Woman B and Man C are married. Woman B had a hysterectomy, and because she is well post-menopause, her fertility specialist advised her that her eggs will not be of sufficient quality to use for in vitro fertilisation. However, her husband's sperm can be used. They also opt for surrogacy using Woman B's niece as an egg donor. However, the niece is about to emigrate, and will only be in South Africa for a few more weeks before departing. A surrogate has not yet been identified.

How would these fertility patients be best served? Clearly, egg retrieval needs to proceed as soon as possible, but as there is no surrogate as yet, there are two clinical options: Option 1: freeze the eggs; or Option 2: as sperm is available, first perform IVF, incubate the newly created embryos for five days to reach blastocyst stage and then freeze the embryos. Option 2 offers several clinical advantages over Option 1, including that (a) embryo freezing is better established than egg freezing, (b) embryo freezing has a better survival rate than egg freezing, and (c) embryo freezing compromises the chance of successful pregnancy less than egg freezing. Furthermore, Option 2 allows for preimplantation genetic testing for aneuploidy (PGT-A), which also offers additional advantages. For example, by immediately performing IVF on Woman A's eggs, followed five days later by embryo biopsy and PGT-A, it can be established whether there are enough euploid embryos for eventual use, or whether Woman A would need to undergo a second (and perhaps further) round of egg retrieval. All these advantages considered, there are objectively good reasons from a clinical perspective to opt for Option 2.

However, is it lawful to perform IVF in anticipation of surrogacy prior to the surrogacy agreement being confirmed by the court? This question has plagued the South African fertility healthcare sector for years and was eventually answered in the negative by the recent case of *Ex Parte MCM* (2022). In this case, an infertile couple who intended to use surrogacy, but who had not yet found a surrogate mother, approached the court for a declaratory order that they could proceed with having embryos created in anticipation of the surrogacy pregnancy. While the court acknowledged that 'good reason exists' for the commissioning parents to 'cryopreserve embryos rather than individual male and female gametes', the court held that the 'current legislative framework does not provide that option'. The court based its reasoning in this regard on certain provisions in subsidiary legislation—the Regulations relating to the Artificial Fertilisation of Persons (2012, the Regulations, in short) made by the South African Minister of Health in terms of the National Health Act (2003).

But, was *Ex Parte MCM* decided correctly? In this article, I analyse this question with reference to the main statutory instruments on the topic, namely the Children's Act and the Regulations, and relevant case law. I conclude that the answer is 'no'—the court in *Ex Parte MCM* should have found that it is lawful to perform IVF in anticipation of surrogacy prior to the surrogacy agreement being confirmed by the court.

The Children's Act

The meaning of artificial fertilisation. The Children's Act provides the following definition of artificial fertilisation:

> "artificial fertilisation" means [Meaning 1:] 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) [Meaning 2:] the bringing 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) [Meaning 3:] 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.

Clearly, the term 'artificial fertilisation' can have three distinct meanings when used in the Children's Act, as shown in Table 1. Meaning 1 refers to what the International Committee for Monitoring Assisted Reproductive Technologies (ICMART) terms 'intra-cervical insemination' or 'intra-uterine insemination'; Meaning 2 to 'in vitro fertilisation (IVF)'; and Meaning 3 to 'embryo transfer' (Zegers-Hochschild et al., 2017).

It is important to note the conjunction 'or' between subparagraphs (a) and (b) of the definition of 'artificial fertilisation'. This indicates that all three the meanings are not always applicable, but that it can be the one or the other. The meaning of artificial fertilisation that is intended in a particular provision of the Children's Act is determined by its context. When considering which of the meanings apply, it is helpful to note, as indicated in Table 1, that the receiver of the action in Meaning 1 and 3 is a woman, while in Meaning 2 it is an egg.

For example, the Children's Act refers to 'artificial fertilisation of one spouse' (in section 40(1)), and 'artificial fertilisation of a woman' (in section 40(2)). This would include Meanings 1 and 3, but not Meaning 2. While one can artificially inseminate a woman

Table 1 Meanings of 'artificial fertilisation' in the Children's Act.

	Meaning 1	Meaning 2	Meaning 3
From the definition of 'artificial fertilisation' in the Children's Act	'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'	'the bringing 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'	'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'
Corresponding ICMART term(s)	Intra-cervical insemination, or intra-uterine insemination	In vitro fertilisation (IVF)	Embryo transfer
Receiver of the action	A woman	An egg	A woman
Intended outcome relevant to Chapter 19	A pregnant surrogate mother	In vitro embryos that can be used for the surrogacy	A pregnant surrogate mother

(Meaning 1) or transfer an embryo into a woman (Meaning 3), one cannot perform IVF on a woman. IVF is performed on an egg using a sperm (Meaning 3).

I now turn to Chapter 19 of the Children's Act—the chapter on surrogacy. Two sections in this chapter refer to 'artificial fertilisation': sections 296 and 303. Section 296(1)(a) provides as follows:

> No artificial fertilisation of the surrogate may take place—(a) before the surrogacy agreement is confirmed by the court;

Section 303(1) provides as follows:

> No person may artificially fertilise a woman in the execution of a surrogacy agreement or render assistance in such artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act.

Similar to section 40 mentioned above, and for the same reasons, 'artificial fertilisation' and 'artificially fertilise' in sections 296(1)(a) and 303(1) refer to Meanings 1 and 3, not Meaning 2. The reason is apparent from the context: in section 296(1)(a), 'artificial fertilisation' is qualified by 'of the surrogate', and in section 303(1), the words 'artificially fertilise' are qualified by 'a woman'. One cannot IVF a surrogate or a woman.

Accordingly, the prohibition in sections 296(1)(a) and 303(1) relates to performing embryo transfer or intra-cervical or intra-uterine insemination on a woman in the execution of an (unconfirmed) surrogacy agreement. The prohibition in sections 296(1)(a) and 303(1) does not relate to IVF. The phrase 'render assistance in such artificial fertilisation' in section 303(1) expands the scope of the prohibition to those who help the primary actor, but it does not expand the meaning of 'artificial fertilisation', as it refers to '*such* artificial fertilisation' (emphasis added).

A purposive interpretation of the prohibition. In the case of *Ex Parte MS* (2014), the Johannesburg High Court was confronted with an application for the confirmation of a surrogacy agreement at a stage when the surrogate was already 33 weeks pregnant. This was a clear contravention of sections 296 and 303 of the Children's Act. Yet, the court granted the confirmation order. The court identified (in paragraph 38) two distinct purposes of the prohibition in sections 296 and 303: (a) ensuring legal certainty, and (b) advancing the best interests of the prospective child. In light of these purposes, it makes sense to prohibit the artificial fertilisation of the surrogate (embryo transfer to, or intra-cervical or intra-uterine insemination of a woman) in the execution of a surrogacy agreement if such agreement has not (yet) been confirmed by the court. This is because this crosses a legal Rubicon: It places the woman irrevocably on a course to have a surrogacy child (subject to the normal physiological factors that will determine the success of a pregnancy) and negates the scheme of Chapter 19, and in particular the court's gatekeeper function.

To put it bluntly, once a surrogate falls pregnant, the court is rendered powerless to stop the birth of the surrogacy child. The horse has bolted.

By contrast, creating embryos through IVF has no impact on the scheme of Chapter 19, or on the purposes identified by the court in *Ex Parte MS*. The different intended outcomes of the respective meanings of artificial fertilisation are also shown in Table 1. Moreover, the existence of embryos at the stage of bringing an application for the confirmation of a surrogacy agreement is not uncommon, because many commissioning mothers first undergo fertility treatment to fall pregnant themselves, and therefore may have surplus embryos remaining from their own fertility treatment. An example of a reported case in which this was indeed the facts is *Ex Parte KAF* 2 (2019). It is clear from this case that the existence of embryos did not affect the court's discretion in deciding whether to confirm the surrogacy agreement.

Accordingly, while transfer in utero prior to confirmation of the surrogacy agreement would undermine the purposes of the prohibition found in sections 296 and 303 of the Children's Act, IVF would not. This fortifies my conclusion above that the meaning of 'artificial fertilisation' in sections 296 and 303 does not include IVF.

Section 295 and the best interests of the prospective child. The court in *Ex Parte MS* did not confine itself to the matter before it, but also remarked on the legal question that is the subject of this article. The court answered the question in the negative—namely that IVF in the absence of a court order confirming the relevant surrogacy agreement would be unlawful. This requires thorough analysis.

I suggest that the court's reasoning with relation to IVF and surrogacy is based on a dubious interpretation of two concepts in section 295 of the Children's Act: The court interpreted the concept 'the child that is to be conceived' as meaning the embryo that is to be conceived (created through IVF), and 'the child that is to be born' as meaning existing embryos or foetuses already created through IVF. Based on these interpretations, the court held that it should consider the best interests of the embryo (to be created, or already created), thus bringing IVF within the ambit of Chapter 19's regulatory scheme, and rendering unlawful IVF in the absence of a court order confirming a surrogacy agreement.

By contrast, I suggest that on a proper interpretation of the concepts 'the child that is to be conceived' and 'the child that is to be born' refer to a child that may exist in future—the prospective child. This is a mental construct, not to be confused with a physical thing, such as an egg, a sperm, or an embryo. My position has a solid basis in subsequent case law:

I first consider the judgment by the Johannesburg High Court in *Ex Parte KAF* 2. As I mentioned above, *Ex Parte KAF* 2 is an example of a case where the commissioning mother first underwent fertility treatment herself in an attempt to fall pregnant, but without success—and where, as a result of the preceding fertility treatment, the couple had four in vitro embryos remaining when they launched their application for the confirmation of their surrogacy agreement.

Consider the legal consequences if the reasoning by the court in *Ex Parte MS*—which equated 'the child that is to be born' with an embryo—was followed in *Ex Parte KAF* 2:

- How should the court protect the best interests of an embryo (the child that is to be born)?
- Do the best interests of an embryo (the child that is to be born) include the right to life?
- If the intended parents only want one child, which one of the four embryos is the child that is to be born?

These questions—and there are many more—illustrate the absurdity and indeed the legal folly of conflating 'the child that is to be born' (*qua* mental construct) with an embryo (*qua* physical entity). The court in *Ex Parte KAF* 2 adroitly avoided this conceptual quicksand and held (in paragraph 14) that no embryo can be legally equated with the prospective child, as the 'embryos are merely the human biological material that may… give rise to the child that is to be born'. This conceptual distinction made in *Ex Parte KAF* 2 provides coherence with the broader legal ecosystem. For example, the best interests of the prospective child (*qua* mental construct) should be protected (see section 295 of the Children's Act), while at the same time an in vitro embryo (*qua* physical entity) can be donated for research, spelling its doom (see the Regulations relating to the Use of Human Biological Material, 2012) and must be destroyed under certain circumstances (see regulation 10(2)(c) and (d) of the Regulations relating to the Artificial Fertilisation of Persons). Furthermore, a woman can terminate an embryo (*qua* physical entity) in her womb for any reason during the first trimester, with gradual protections afforded to the prenate (*qua* physical entity) in a woman's womb as it grows into a foetus and becomes more proximate to the birth of a child (see the Choice on Termination of Pregnancy Act, 1996). All these legal provisions can coexist because the prospective child (*qua* mental construct) and the embryo (*qua* physical entity) are distinct legal concepts.

A brief excursus: The gradual protections afforded to the prenate in the woman's womb point to the following understanding of the time *between* IVF and birth: As an embryo gradually develops into a foetus and becomes more proximate to the birth of a child, the two concepts of (a) the prenate *qua* physical entity, and (b) the prospective child *qua* mental construct, gradually move closer together until they finally coalesce into *the child* at birth.

The recent judgment by the Pretoria High Court in *Surrogacy Advisory Group v Minister of Health* 1 (2022) is also relevant. The court held that the prohibition on non-medical preimplantation sex selection (using PGT-A to determine the sex of in vitro embryos and then selecting embryos of a desired sex for transfer to the intended mother), as found in the Regulations, is unconstitutional. This finding was based on the constitutional rights to privacy and reproductive autonomy of the intended mother. It is clear from the judgment that while there may be moral objections by some in society, in our law in vitro embryos are merely objects that can be used as a means to the end of the intended parents' personal reproductive preferences, which are protected within the ambit of their relevant constitutional rights.

The most authoritative repudiation of the reasoning in *Ex Parte MS* is found in *AB v Minister of Social Development* (2017), which dealt with section 294 of the Children's Act—the genetic link requirement for surrogacy. Although the Constitutional Court was divided on the issue of the constitutionality of the genetic link requirement, both the majority judgment and the minority judgment accepted that the constitutional principle that the best interests of the child should be paramount in all matters affecting the child applies to the prospective child. It is clear from both judgments that the prospective child was conceptualised in the way contemplated in *Ex Parte KAF* 2—a mental construct of a child that may exist in future.

The Constitutional Court used the terms 'prospective child', 'child that is to be born', and other variations of these terms interchangeably (see, for example, paragraph 192 of the minority judgment and paragraph 280 of the majority judgment). It is therefore clear that the interpretation by the court in *Ex Parte MS* of 'the child that is to be born' as meaning existing embryos or foetuses is erroneous. 'The child that is to be born'—or the prospective child—is a mental construct, and not a physical entity.

It follows that Chapter 19 and section 295 in particular, envisage the consideration of the best interests of the prospective child *qua* mental construct—for which the existence or non-existence of embryos is irrelevant, as an embryo cannot in law be equated with the prospective child. Accordingly, the rationale, as per *Ex Parte MS*, for requiring that a surrogacy agreement be confirmed prior to IVF collapses.

To state it differently, if, hypothetically, the meaning of section 295 was, as per *Ex Parte MS*, that the court should consider the 'best interests' of an in vitro embryo (not that an embryo can have legal interests, because it is not a legal subject), then it would follow that the confirmation application should precede IVF. However, on a proper interpretation of section 295, this is not what it means. Section 295 concerns itself with the best interests of the prospective child *qua* mental construct. And in this light, the existence or not of in vitro embryos at the stage when a confirmation application is brought is irrelevant, as held by the court in *Ex Parte KAF* 2. Accordingly, there is no reason to limit the freedom of intended parents to proceed to use IVF to create embryos in anticipation of a surrogacy arrangement. Moreover, as discussed above, from a clinical perspective there may, depending on the circumstances, be objectively good reasons to wish to create embryos in anticipation of a surrogacy arrangement.

There is also a further technical legal point that is relevant. It relates to the difference between those parts of a judgment that are essential for answering the legal question before the court (referred to as ratio decidendi), and those parts that are not (referred to as obiter dicta). While *ratio decidendi* constitute binding law, *obiter dicta* do not. Accordingly, the lawyerly exercise of differentiating between *ratio decidendi* and *obiter dicta* is often of great import. In the present context, it is relevant to note that while the judgment in *Ex Parte KAF* 2 regarding the conceptual difference between the child that is to be born and in vitro embryos is *ratio decidendi* (as there were actual in vitro embryos that were considered as part of the decision to confirm the surrogacy agreement), the judgment in *Ex Parte MS* that conceptually conflated the child that is to be born with in vitro embryos is *obiter dicta* (there were no in vitro embryos, *ergo* the court's discussion of in vitro embryos was hypothetical and not essential for answering the legal question before the court). Accordingly, while the relevant reasoning in *Ex Parte KAF* 2 constitutes binding law, that in *Ex Parte MS* does not.

Conclusion on the Children's Act. Nothing in Chapter 19—neither sections 296 and 303 that refer to 'artificial fertilisation', nor section 295 that refers to 'the child that is to be conceived' and 'the child that is to be born'—prohibits a person from performing IVF in pursuance of a possible surrogacy arrangement.

What is prohibited in sections 296 and 303 is embryo transfer or intra-cervical or intra-uterine insemination of a woman in the execution of a surrogacy agreement, if such agreement has not (yet) been confirmed by the court. While IVF per se has no bearing on the court's exercise of its discretion in deciding whether to confirm a surrogacy agreement (and hence opens the door for the child contemplated in the agreement to become a reality), embryo transfer or intra-cervical or intra-uterine insemination of a woman in the execution of an unconfirmed surrogacy agreement undermines the court's gatekeeper role as envisaged in Chapter 19, as the court would in such a scenario be powerless to stop the child contemplated in the agreement from becoming a reality.

The court in *Ex Parte MCM* did not place much reliance on Chapter 19, and only superficially referred to it (in paragraph 21 of its judgment). It is implicit from the court's reasoning that it did not interpret Chapter 19, viewed on its own, as prohibiting a person from performing IVF in pursuance of a possible surrogacy arrangement. Accordingly, this part of the court's judgment cannot be faulted.

The Regulations

Whereas Chapter 19 of the Children's Act deals with surrogacy, the Regulations deal with the clinical aspects of medically assisted reproduction. Therefore, to ascertain whether it is lawful to perform IVF in anticipation of surrogacy, prior to confirmation of a surrogacy agreement by the court, the Regulations must be considered. The court in *Ex Parte MCM* relied primarily on the Regulations in arriving at its answer to this question.

A good place to start an analysis of the Regulations is the definition provided for 'recipient':

> "recipient" means a female person in whose reproductive organs a male gamete or gametes are to be introduced by other than natural means; or in whose uterus/womb or fallopian tubes a zygote or embryo is to be placed for the purpose of human reproduction;

The provision of the Regulations that was core to the judgment in *Ex Parte MCM* was regulation 10(2)(a), which reads as follows:

> A competent person shall not effect in vitro fertilisation except for embryo transfer to a specific recipient…

In other words, a 'competent person' (a fertility specialist or an embryologist) may only use IVF to create an embryo if it is for embryo transfer to a 'specific' recipient. What is the meaning of 'specific'? The leading dictionaries provide the following relevant definitions of 'specific':

- Oxford English Dictionary (2022): 'Exactly named or indicated, or capable of being so'
- Cambridge Dictionary (2022): 'relating to one thing and not others'
- Merriam-Webster Dictionary (2022): 'constituting or falling into a specifiable category'.

It is possible to postulate a narrow interpretation of regulation 10(2)(a) that would require that the recipient must be *exactly named* as a precondition for IVF. However, this interpretation fixates on only one part of the Oxford definition ('Exactly named …') and ignores the other part of the same definition ('… or capable of being so').

The following broader interpretation of regulation 10(2)(a) is better aligned with the common meaning of the word 'specific' as found in all three of the leading dictionaries quoted above: As a precondition for IVF, the embryos created through IVF must be intended for *one* recipient, not recipients generally, and the recipient must either be named or *capable of being named*—i.e., the recipient must be *specifiable*. In the context of surrogacy, this means that it would suffice if there were commissioning parents involved who could, at an appropriate stage in future, name their surrogate.

A purposive interpretation. A purposive interpretation of regulation 10(2)(a) would entail the question: What is the mischief that this regulation aims to suppress? I suggest that the mischief that regulation 10(2)(a) is designed to suppress is the following: Not all gametes are necessarily used up in IVF. Moreover, when excess gametes are no longer needed by their owners, they often simply abandon such gametes by failing to continue to pay for their continued cryopreservation and storage at a clinic. In such a scenario, fertility clinics can, after reasonable efforts to find the owners have been unsuccessful, acquire ownership of these gametes. The relevant legal principle is that abandoned things (*res derelicta*) belong to no one (*res nullius*) and the first person who takes control of such things with the intention of being the owner becomes the owner. The legal jargon for this mode of acquiring ownership is *occupatio*. Given that fertility clinics are already in physical control of cryopreserved gametes, for them to acquire ownership in abandoned cryopreserved gametes is therefore remarkably easy. In theory, fertility clinics can then create stockpiles of 'shelf embryos' that they can use to attract more patients or use them for their gain in some other way. This would be the creation through IVF of embryos for recipients in general. This, I suggest, is the mischief that regulation 10(2)(a) seeks to suppress by providing that embryos may only be created through IVF for embryo transfer to a *specific* recipient (rather than creating embryos for embryo transfer to recipients in general).

If this argument is accepted, the broad interpretation of regulation 10(2)(a) suffices and the narrow interpretation is overly restrictive. Following the broad interpretation, a fertility clinic can only create embryos if there is a recipient who is named, or, in the alternative, intended parents who can, at an appropriate stage in future, name the recipient—i.e., the recipient is specifiable. The clinic cannot just create its own stockpiles for general use.

The presumption that statute law is not unjust and unreasonable. It is well established in South African law that where a statutory provision is reasonably capable of two meanings, and the one meaning leads to harshness and injustice, while the other does not, the milder meaning must be preferred (see, for example, *Principal Immigration Officer v Bhula* (1931)) As highlighted above, there are objectively good reasons from a clinical perspective for creating embryos to be cryopreserved, rather than freezing eggs. If persons such as Woman A and Woman B and her husband in the scenarios sketched above are excluded from having embryos created for their reproductive purposes, it is likely to negatively affect their chances of successfully building their families. This revolts against one's sense of justice. These are people who are already confronted with the personal struggle of infertility. To take further legal measures to undermine their chances of building their families would be a shocking offence to justice. Yet, this is exactly what the narrow interpretation of regulation 10(2)(a) accomplishes. Clearly, based on the presumption that statute law is not unjust and unreasonable, the broad interpretation of regulation 10(2)(a) must be followed.

The court's interpretation. The court in *Ex Parte MCM* followed a contextual approach, entailing that the court (in paragraph 29 of its judgment): (a) considered other provisions of the Regulations that referred to the recipient, (b) observed that some of these provisions

contemplate that there is an identifiable recipient from the moment that the embryo comes into being, and (c) concluded that the broad interpretation of regulation 10(2)(a) is not supported by the language of the Regulations, and hence rejected it. The other provisions that the court relied on can be summarised as follows:

- Regulation 10(2)(c) deals with the fate of cryopreserved embryos when a recipient falls pregnant or when it is decided—not specified by whom—not to go ahead with embryo transfer to the recipient. Regulation 10(2)(c)(i) provides that the recipient must consent to the further storage of the embryos, and regulation 10(2)(c)(ii) provides that the recipient may consent to donating the embryos.
- Regulation 18 deals with ownership of gametes and embryos, and provides in regulation 18(2) that after IVF, the ownership of an embryo is vested in the recipient.

These provisions assume that there is an identifiable recipient from the moment that the embryo comes into being. However, they also assume more—they assume that as long as there are cryopreserved embryos, there will always be a recipient. This assumption is manifestly unrealistic, as can easily be demonstrated by considering the following hypothetical scenarios:

- First, consider a scenario where the court confirms a surrogate motherhood agreement, followed by IVF. However, after the first embryo transfer is unsuccessful, the surrogate mother withdraws from the agreement. She makes it clear that she does not wish to continue as the recipient. Who must now consent to the further storage of the embryos? This is not a situation that the Regulations contemplated.
- Second, consider a South African gay couple that intends to use surrogacy in South Africa and acquires and imports an already created batch of embryos from a foreign country. As long as the gay couple's fertility clinic has an import permit from the Department of Health, the embryos can be imported and stored until a surrogate mother is found and a surrogate motherhood agreement is confirmed by the court. However, from the time of arrival in South Africa, to the time when the surrogate motherhood agreement is confirmed, there is simply no recipient. Again, this is not a situation that the Regulations contemplated.
- Thirdly, and lastly, one thing that is certain in life is death—we all die. Consider a scenario of a husband and wife who struggle to have children and visit a fertility clinic. Their fertility specialist recommends IVF. Accordingly, a batch of embryos is created and ready for transfer to the wife's uterus. Unfortunately, the wife dies an untimely death in an accident. Again, this is not a situation that the Regulations contemplated.

These three examples—and there are more!—illustrate that the Regulations are confined in their scope of application and that it is unrealistic to force every situation into such a scope. Accordingly, the reasoning that *if these provisions contemplate X, X should always be the case*, is not tenable, as it cannot consistently be sustained in reality. It follows that the court's reasoning in *Ex Parte MCM* fails on its own merits.

Furthermore, an interpretative exercise that considers context only and fails to consider the *purpose* served by the relevant provision, is inadequate from a legal doctrinal standpoint. As held by South Africa's Constitutional Court in *Moyo v Minister of Police* (2019) (at paragraph 54):

> Instead, what is sought is the purpose for which the statute was enacted. The relevant context in which the provision rests is to be understood by identifying the mischief that the statute seeks to address.

This the court in *Ex Parte MCM* failed to do. I have suggested above that the mischief that regulation 10(2)(a) seeks to address is the creation of 'shelf embryos' by fertility clinics, and that addressing this mischief is consistent with the broad interpretation and does not require a narrow interpretation. Moreover, although the court in *Ex Parte MCM* noted (in paragraphs 15 and 32) that there are objectively good reasons from a clinical perspective for creating embryos to be cryopreserved, rather than freezing eggs, it failed to consider (a) the impact of this fact on justice for the persons involved, and (b) the presumption that statute law is not unjust and unreasonable. Accordingly, from a perspective of legal doctrine, the court in *Ex Parte MCM* erred in rejecting the broad interpretation of regulation 10(2)(a).

Statutory interpretation and the Constitution. Although my critique above of the interpretative exercise in *Ex Parte MCM* suffices to show conclusively that the court erred, for the sake of comprehensiveness mention should also be made of the role of the South African Constitution in statutory interpretation. Section 39(2) of the Constitution (1996) provides that 'when interpreting any legislation… every court… must promote the spirit, purport and objects of the Bill of Rights'. The Constitutional Court elaborated on this provision as follows in *Daniels v Campbell* (2004) (Ngcobo J's concurrence at paragraph 43):

> Consistent with this interpretive injunction, where possible, legislation must be read in a manner that gives effect to the values of our constitutional democracy. These values include human dignity, equality and freedom.

In this light, let me pose a simple, but powerful, rhetorical question: Are the constitutional values of human dignity, equality and freedom served by a statutory interpretation—the narrow interpretation favoured by the court in *Ex Parte MCM*—that negatively affects infertile people's chances of successfully building families?

Conclusion

Ex Parte MCM was wrongly decided. A broad interpretation of regulation 10(2)(a)—that would have allowed fertility specialists and embryologists to perform IVF for commissioning parents who have not yet found a suitable surrogate—should have been followed. The court's first interpretative error was to place reliance on the scheme contemplated by the Regulations in the abstract, divorced from the reality in which such a scheme operates. The scheme contemplated by the Regulations is an over-simplified version of reality in fertility healthcare in South Africa, which evidently does not cater for all situations in practice. The court should have recognised this severe limitation, but it did not. The court's second interpretative error was doctrinal. Although context is important, it is not the be-all and end-all. Although it is well established that South Africa follows a purposive approach to statutory interpretation, the court in *Ex Parte MCM* did not attempt to consider the purpose of regulation 10(2)(a). Furthermore, although the South African Constitution enjoins the court to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation, the court in *Ex Parte MCM* did not make any such attempt.

Interestingly, the court in *Ex Parte MCM* strongly hinted that a constitutional challenge in which the Minister of Health is cited as respondent may offer a solution. About a month after the judgment in *Ex Parte MCM* such a constitutional challenge was indeed launched in *Surrogacy Advisory Group v Minister of Health* 2 (2022). At the time of writing, this case was still in the pleadings stage, and the Minister of Health has not yet indicated whether he intends to oppose this challenge.

Such a constitutional challenge to regulation 10(2)(a) as narrowly interpretated in *Ex Parte MCM* should have been unnecessary. The court in *Ex Parte MCM* should have engaged in a more in-depth interpretive analysis. Importantly, the court's constitutional duty to interpret legislation in a way that promotes the spirit, purport and objects of the Bill of Rights does *not* require a legal challenge to the constitutionality of the relevant provision; it also does *not* require that the cabinet minister responsible for the administration of the relevant provision be cited as a party to the proceedings. The court's constitutional duty to interpret legislation in a way that promotes the spirit, purport and objects of the Bill of Rights is applicable whenever the court is called upon to interpret any legislation—including in an *ex parte* application. It appears that the court in Ex Parte *MCM* lost sight of its constitutional duty.

Data availability

Data sharing is not applicable to this research as no data were generated or analysed.

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Declaration

The author served as legal counsel in *AB v Minister of Social Development*, *Surrogacy Advisory Group v Minister of Health* 1, and *Ex Parte KAF* 2; served as *amicus curiae* in *Ex Parte* MCM; and is briefed as legal counsel in *Surrogacy Advisory Group v Minister of Health* 2.

Competing interests

The author declares no competing interests.

Ethics approval and informed consent

This article does not contain any studies with human participants performed by the author.

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