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Building a Progressive Reproductive Law in South Africa

DONRICH THALDAR

Abstract

This article delves into the expansion of procreative freedom in relation to assisted reproductive technologies (ARTs) in South African law, with reference to three seminal cases. In the case of *AB v. Minister of Social Development*, the minority of the South African Constitutional Court held that the constitutional right to procreative freedom is applicable to ARTs. Importantly, both the minority and the majority agreed on the principle of procreative non-maleficence—the principle that harm to the prospective child constitutes a legitimate reason to limit the procreative freedom of the prospective parents. Following this, *Ex Parte KF2* clarified the concept of the "prospective child" as relating to an idea, rather than an embryo. Finally, in *Surrogacy Advisory Group v. Minister of Health*, the controversial issue of preimplantation sex selection for non-medical reasons was examined. The court confirmed that the use of ARTs falls within the ambit of procreative freedom. While holding that preimplantation sex selection for non-medical reasons is inherently sexist, the court found that a woman's right to procreative freedom—including the sex identification of an in vitro embryo—outweighs other considerations. These landmark cases establish a robust groundwork for a progressive reproductive law in South Africa.

Donrich Thaldar is a professor at the School of Law, University of KwaZulu-Natal, Durban, South Africa.

Please address correspondence to the author. Email: thaldard@ukzn.ac.za.

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Introduction

Assisted reproductive technologies (ARTs) is a collective term for technologies that enable human reproduction in artificial ways—in contrast with natural reproduction. Common examples are in vitro fertilization (IVF) and intra-cytoplasmic sperm injection. However, as technology improves, the list is sure to grow. ARTs have already and will continue to disrupt many of the values that are deeply ingrained in our traditional way of thinking. While the idea of "test tube babies" was the object of scorn for many when IVF started off, it has become normalized in modern society. But what is next? As ARTs incorporate knowledge of the human genome, humanity will gradually gain control over its own genetic composition.[1] Children produced by ARTs will not only be *conceived* but will also be *made* and may ultimately be *designed*. Humanity may change from being a natural phenomenon—the product of evolution—to being a cultural artifact.

Unlike in the United States, the use of ARTs is heavily regulated in many other countries, including South Africa.[2] This new and burgeoning field of the law—often referred to as reproductive law—has been the subject of significant litigation in South Africa over the past decade. In this paper, I analyze the three seminal cases that have made the most significant contributions to the development of reproductive law in South Africa: *AB v. Minister of Social Development*, *Ex Parte KF2*, and *Surrogacy Advisory Group v. Minister of Health*.[3] I consider these cases through the lens of procreative freedom versus the limitation thereof by the state.

AB v. Minister of Social Development

The factual background of *AB* is a pursuit of motherhood by a woman cited under the pseudonym AB that spans over a decade.[4] The initial phase of her journey involved two unsuccessful IVF cycles using her and her husband's own genetic materials in 2001. Confronted with the diminishing viability of her own eggs due to age, AB resorted to utilizing donor eggs, proceeding with two additional IVF cycles in conjunction with her husband's sperm. These attempts, however, did not result in a successful pregnancy. The personal challenges compounded in 2002 when, after 20 years of marriage, AB's relationship dissolved, leaving her to face her fertility struggles as a single woman. Undeterred, AB underwent nine more IVF cycles, this time using both donor eggs and donor sperm, but none of these efforts culminated in the fulfillment of her dream to become a mother. In a twist of hope, a change of fertility clinics in 2009 led to two pregnancies for AB, but both ended in miscarriage. Following these heartbreaking outcomes and amidst her fertility specialist's grim prognosis of her chances, AB came to terms with her infertility. Toward the latter part of 2009, a new possibility emerged for AB with the option of surrogacy. She engaged with a surrogacy agency and found a woman prepared to act as a surrogate. However, AB's journey met a new obstacle in the form of a legal complication.

First, some legal background: In South Africa, surrogacy is governed mainly by chapter 19 of the Children's Act.[5] Under this law, a commissioning parent(s) and the surrogate mother must enter into a surrogacy agreement and have this agreement confirmed by the High Court prior to the planned surrogate pregnancy.[6] Provided that the child is not genetically related to the surrogate mother, a surrogacy agreement that has been confirmed is enforceable and the child must be registered as the child of the commissioning parent(s) at birth.[7] Any surrogacy arrangement not in compliance with this scheme is unenforceable and unlawful.[8]

However, one element of this statutory scheme posed an obstacle to AB: Section 294 of the Children's Act requires that commissioning parents use their *own* gametes for the conception of the child.[9] This excluded AB, as it had long since been established that her own eggs were unsuitable for use in IVF.[10] AB received this legal advice with a mixture

of shock, sadness, and bafflement—especially given that she had been legally allowed to use both male and female donor gametes for several years while attempting to achieve pregnancy herself through IVF.[11]

Accordingly, AB decided to challenge the constitutionality of section 294 of the Children's Act in court. In this quest, she was joined by a nonprofit organization, the Surrogacy Advisory Group, as second applicant.[12] This is noteworthy, as some years later the Surrogacy Advisory Group would launch an audacious legal challenge of its own—but I will return to this later.

The gist of AB's legal argument was that the impugned provision (section 294 of the Children's Act) was arbitrary and that it discriminated against her based on her status as being infertile.[13] This argument can be summarized as follows: If a woman is purportedly fertile in the sense that she can carry a pregnancy herself, she is legally entitled to select to use male and female donor gametes.[14] However, if she is infertile in the sense that she *cannot* carry a pregnancy herself and must use a surrogate mother, the legal position becomes the inverse: Now she is legally prohibited from using donor gametes.[15] AB submitted that this constituted discrimination based on her infertility. She further argued that the impugned provision infringed her procreative freedom (expressed in the rights to dignity, privacy, and bodily and psychological integrity) and her right to access reproductive health care services.[16]

However, the minister of social development, the member of the national executive responsible for the administration of the Children's Act, opposed AB's application.[17] The minister was supported by the University of Pretoria's Centre for Child Law.[18] Their argument was that the best interests of the prospective child demand that the prospective child have a genetic link with at least one commissioning parent—and if there is only one parent, then the child must have a link with that parent.[19] This argument rests on two presuppositions. First, a presupposition of a legal principle: that the constitutional protection of the best interests of the child extends to the prospective child.[20] Second, an empirical presupposition: that children are harmed by not knowing their genetic origins, or at least that not knowing one's genetic origins is not in one's best interests.[21]

The first presupposition proposed a significant development in South African law: that the court must in constitutional matters concerning prospective children consider their best interests and that the interests of prospective children—persons who are not yet in existence—can limit the rights of existing persons.[22] Interestingly, all the parties involved in the litigation accepted this presupposition, as did the court—both in its minority and its majority judgment.[23] This was a remarkable event and, I suggest, may still be highly consequential in the future. But what exactly is a "prospective child"? Is it an embryo? A fetus? Perhaps a sperm cell? This crucial question was not considered in *AB*, and I return to this question when I discuss the next case.

How was *AB* decided? Since the parties all agreed on the first presupposition, the legal battle focused on the second one, which made an empirical claim that children are harmed by not knowing their genetic origins, or at least that not knowing one's genetic origins is not in one's best interests. Here, the applicants, AB and the Surrogacy Advisory Group, filed expert opinions by world-leading psychologists to prove that the second presupposition is false.[24] The minister filed an opposing expert opinion by a bioethicist, but this expert opinion was thoroughly discredited in the applicants' papers—so much so that the minister eventually abandoned any reliance on her own expert.[25] The Centre for Child Law referred the court to two academic articles on children and genetic relatedness, but the content of these articles was a precarious basis for the empirical claim that children are harmed by not knowing their genetic origins, or at least that not knowing one's genetic origins is not in one's

best interests.[26] However, in a stunning display of post-truth jurisprudence, the majority of the Constitutional Court ignored the evidence before it and sided with the minister and the Centre for Child Law.[27] In the end, AB lost her case. But today, a decade later, the new case of *KB*, which was launched in Mpumalanga based on different facts, offers a glimmer of hope to rectify this injustice over time.[28]

While I am critical of the majority judgment in *AB*, the minority judgment penned by Justice Khampepe and concurred to by Justices Cameron, Froneman, and Madlanga is an 84-page-long tour de force infused with both reason and compassion. At the basis of the minority judgment is the recognition that the right to procreative freedom is not limited to natural procreation but also includes the use of ARTs.[29] Importantly, on this basic point, the majority judgment was quiet. Accordingly, the minority judgment's interpretation of the ambit of the right to procreative freedom as including the use of ARTs stands uncontradicted and constitutes persuasive authority.[30] This, I suggest, is a milestone in South African reproductive law. It is worth quoting the following passage from the minority judgment:

> *We are fortunate … to live in an era where the effects of infertility can be ameliorated to a large extent through assistive reproductive technologies. The technological advances seen over the last half century have greatly expanded the reproductive avenues available to the infertile. These reproductive avenues should be celebrated as they allow our society to flourish in ways previously impossible.*[31]

Ex Parte KF2

I now return to the crucial question that was left unanswered in *AB*—namely, what exactly is the "prospective child"? This question was answered in the subsequent case of *Ex Parte KF2*.[32] This case unfolded an array of legal questions that went beyond the scope of a seemingly typical surrogacy confirmation application. At the helm of the case were the commissioning parents—a couple whose journey to parenthood had been hindered by medical hurdles since their union in 2006.[33] Following the futile pursuit of parenthood through five IVF cycles, the couple was introduced to a potential surrogate, a young woman of 20, who was already a mother of two. The commissioning couple had four unused in vitro embryos remaining after the fifth failed IVF attempt and planned to use these embryos for the surrogacy pregnancy, as they had been created from the couples' own gametes. Despite the seeming simplicity of the case, where the clinical psychologist's reports appeared to favor the suitability of the parties involved, the application faced an unexpected setback in court. The suitability of the intended surrogate mother was questioned by the court. The fact that she became a mother at the age of 17 and never returned to finish school was under scrutiny.[34] The court, despite the psychologist's report, found it difficult to believe that the intended surrogate mother had the emotional maturity to comprehend the magnitude of her decision and dismissed the surrogacy confirmation application.[35]

The problem was that there were no objective criteria for assessing the suitability of an intended surrogate mother.[36] As a consequence, lawyers, psychologists, and judges all applied their own idiosyncratic criteria.[37] Accordingly, the commissioning couples' legal counsel devised the following approach: First, a panel of three psychologists was convened to draft a set of objective criteria for surrogate-mother suitability assessment. Next, a fourth psychologist was asked to interview the same intended surrogate mother in light of the set of objective criteria.[38] This psychologist provided a positive report of the intended surrogate mother and commented that penalizing her for her past decisions was unfair, suggesting instead that the focus should be on her evolved emotional maturity.[39] Thus, the couple relaunched their application in the Johannesburg High Court with supplemented papers.

The Johannesburg High Court accepted the objective criteria developed by the panel of psychologists and incorporated them into its judgment.[40] In this way, the set of objective criteria for surrogate-mother suitability became part of the law and has provided guidance to psychologists, lawyers, and judges ever since.[41] Next, the court also accepted the new psychological report on the intended surrogate mother.[42] However, the court raised a new issue during oral argument. Since the commissioning couple already had four cryopreserved embryos, and the Children's Act provided that the court should consider the best interests of the "child that is to be born," was it not incumbent upon the court to consider the best interests of each one of these embryos, and, if so, what would this entail in practical terms?[43] It was a broad and open question, but highly consequential for reproductive law.

Counsel for the commissioning couple argued that the prospective child is not something tangible but rather an idea in one's mind and that this idea of a prospective child can exist in one's mind irrespective of whether one already has embryos.[44] In other words, the idea of a prospective child is not linked with a specific in vitro embryo. Accordingly, none of the in vitro embryos can be equated with the prospective child.[45] There is of course a potential link between the in vitro embryos and the prospective child—namely, that the in vitro embryos are the biological material that may, if the pregnancy is successful, give rise to the prospective child.[46] The essence of counsel's submissions was incorporated into the judgment in *Ex Parte KF2*.[47] This is highly consequential for reproductive law, as it provides a clear theoretical basis for understanding the legal relevance of acts directed toward the in vitro embryo: it confirms the well-established position in South African law that the embryo itself does not have any interests or rights.[48] But this does not mean that there is legal *carte blanche* to do anything with the embryo—if an act directed toward an embryo is likely to have an effect on the prospective child, the interests of the prospective child are indeed legally relevant.

Surrogacy Advisory Group v. Minister of Health

The third seminal case—*Surrogacy Advisory Group v. Minister of Health*—was surely the most controversial of the three and was a true test of the depth of South Africa's commitment to procreative freedom.[49] At the heart of this case was the issue of sex selection. To follow the argument in this case, one needs to understand two ARTs, preimplantation genetic testing for aneuploidy (PGT-A) and non-invasive prenatal testing (NIPT).

In normal human development, an embryo inherits 23 chromosomes from each parent to make up a total of 46. However, sometimes errors occur during cell division, and embryos may end up with a missing or an extra chromosome—a condition known as aneuploidy.[50] Aneuploidy is a leading cause of miscarriage and can result in conditions such as Down syndrome.[51] PGT-A is designed to detect aneuploidy in an embryo before the embryo is transferred to a women's uterus.[52] It entails taking a biopsy sample of a few cells from an in vitro embryo and then testing the sample for aneuploidy. This test helps identify which embryos have the correct number of chromosomes and therefore have the best chance of leading to a successful pregnancy if implanted.[53] Importantly, PGT-A also discloses whether an embryo has XX or XY chromosomes. As a result, using PGT-A technology, parents can select the sex of the embryo to be transferred to the mother's uterus.

I now turn to the second relevant technology, NIPT. Whereas PGT-A is performed before an embryo is transferred to a woman's body, NIPT is performed at about 10 weeks of pregnancy.[54] NIPT entails taking a blood sample from the mother's arm.[55] This testing detects small pieces of DNA from the placenta, known as cell-free DNA, which circulate in the mother's bloodstream.[56] Similar to PGT-A, NIPT also tests for aneuploidy and reveals

the sex of an embryo.[57] NIPT is typically used for detecting conditions such as Down syndrome, which can then be followed by an abortion.[58] However, it can also be used for sex selection: a pregnant woman can abort an embryo if it is not of the desired sex.[59] She can then attempt to become pregnant again and repeat the process until she is pregnant with an embryo of the desired sex.[60]

In 2012, the minister of health promulgated the Regulations relating to the Artificial Fertilization of Persons, which prohibit the use of any preimplantation or prenatal test to select the sex of child, except if the selection is for medical reasons—in other words, to avoid a sex-linked genetic disorder.[61] This means that is unlawful to use either PGT-A or NIPT for non-medical sex selection. However, is this prohibition not a limitation on the procreative freedom of intended parents? And, if so, can it be justified? These were the core issues in *Surrogacy Advisory Group v. Minister of Health*.

The Surrogacy Advisory Group, suing in the public interest, challenged the constitutionality of the prohibition of non-medical sex selection. The main thrust of the Surrogacy Advisory Group's litigation strategy was to rely on the Choice on Termination of Pregnancy Act (Choice Act) and to contrast the procreative *freedom* that women enjoy under the Choice Act with the impugned provision in the regulations that *restricts* such freedom.[62] Let me explain: Generally speaking, the Choice Act strikes a *balance* between the procreative freedom of the pregnant woman and the interest of the state in protecting prenatal life.[63] During the first trimester, the procreative freedom of the pregnant woman supersedes the state's interest.[64] Then, from the second trimester, and increasingly so in the third trimester, the state's interest supersedes the woman's procreative freedom.[65] For example, in the third trimester, only a select number of factors, such as the life of the pregnant woman, can supersede the state's interest in protecting prenatal life.[66] However, the focus of the lawsuit was on the first trimester. During this period, the Choice Act provides that a woman can have an abortion without having to provide a reason.[67] In other words, any reason—including sex selection—is a good enough reason to have an abortion.[68] Remember that NIPT can be used as early as the 10th week of pregnancy. As a result, the Surrogacy Advisory Group argued that the Choice Act makes it lawful for a pregnant woman who is intent on selecting the sex of her child to practice first-trimester *prenatal* sex selection.[69] Given that the Choice Act (which is primary legislation) supersedes the regulations (which is subsidiary legislation), the regulations' ban on non-medical *prenatal* sex selection is rendered invalid.[70] But where does this leave *preimplantation* sex selection—that is, sex selection at the in vitro stage?

If South African law allows prenatal sex selection via the Choice Act, but prohibits preimplantation sex selection via the regulations, the law effectively forces a woman who is intent on selecting the sex of her prospective child to use NIPT at 10 weeks of pregnancy, together with elective abortion and repeated pregnancies, rather than allowing her the option of preimplantation sex selection.[71] This of course has a negative effect on such woman's bodily integrity and psychological integrity.[72] Consider her bodily integrity: while preimplantation sex selection entails no medical risks, the abortion does entail physical discomfort and medical risk. Thus, bodily integrity is compromised.[73] Now consider her psychological integrity: while preimplantation sex selection does not require the destruction of the woman's in vitro embryos, abortion by definition destroys an embryo in the woman's body. Many women value embryonic life. Thus, psychological integrity is infringed.[74]

The minister of health answered the Surrogacy Advisory Group's argument by denying that there is any infringement of the right to bodily and psychological integrity of a woman, as the in vitro embryo that can be tested through PGT-A is outside the woman's body.[75] However, this argument is

blind to the *effect* that the ban on sex selection has on a woman's body, and therefore this argument did not pose a significant obstacle. The minister further argued that, in the event that the court found an infringement of the right to bodily and psychological integrity, the state has a legitimate purpose in prohibiting non-medical sex selection, as it is inherently sexist and unethical.[76] This, I suggest, was the minister's strongest position.

In reply, the Surrogacy Advisory Group argued that the South African Constitution embraces the idea of value pluralism and that the state cannot enforce the moral convictions of one section of the population on everyone.[77] Counsel for the Surrogacy Advisory Group elaborated on this argument as follows:

> *In our country, we have,* inter alia*, traditional nuclear families (husband, wife, and children), polygamous marriage families, inter-racial families, same-sex families, adoption families, and single-parent-by-choice families … There is clearly significant diversity. But all these families deserve equal concern by the state. And the* family life *of each family is protected under the auspices of the right to privacy … There can be a multitude of reasons for wanting a child of a certain sex, which would depend on each family's circumstances: It can be a parent wanting a companion of a certain sex, feeling more able to rear a child of a certain sex, or wanting to build a family with the desired composition of boys and girls … These are all* personal *reasons within the context of the* family life *of different families … Importantly, one may not agree with the way in which other families live their lives or raise their children. For example, one may believe that polygamy is immoral, or same-sex marriage is immoral, or inter-racial marriage is immoral, but this is one's private moral opinion. It would be antithetical to our constitutional dispensation to try to enforce such private morality through the law. However, that is exactly what the impugned provision does.*[78]

The court's judgment on the issue of sex selection is over 5,000 words. Contrary to the Surrogacy Advisory Group's position, the court held that sex selection is inherently sexist because it relies on stereotypes of what it means to be a girl or boy child.[79] However, the court held that this issue is overshadowed by a woman's right to procreative freedom.[80] The court agreed with the Surrogacy Advisory Group's argument that contrasted the Choice Act and the impugned provision in the regulations.[81] The court observed that a woman need not give reasons for an abortion in the first trimester and that this means that should a woman choose to abort because of the sex of the child, she is free to do so.[82] The court held that this creates an untenable situation where *prenatal* non-medical sex selection is lawful in terms of the Choice Act, but *preimplantation* non-medical sex selection is prohibited.[83] As a result, the court held that the impugned provision in the regulations is unconstitutional.

What is most remarkable about the judgment is that it explicitly held that sex selection falls within the ambit of procreative freedom: "Sex selection can be understood as part of reproductive autonomy … The available technology just increased the number of options, thereby increasing reproductive liberty."[84] I suggest that this is the correct legal view of how the ambit of rights should evolve in synchronization with the advent of new technology—even if the new technology is controversial. As Justice Sachs remarked in the momentous case of *Minister of Home Affairs v. Fourie* (the 2005 Constitutional Court judgment that ordered Parliament to enact legislation to legalize same-sex marriage in South Africa), "Indeed, rights by their nature will atrophy if they are frozen."[85]

This interpretation of the ambit of procreative freedom—both by the *AB* minority and by the court in *Surrogacy Advisory Group*—lays a solid foundation for building a progressive reproductive law in South Africa.

It is interesting to note that the judgment in *Surrogacy Advisory Group* was handed down less than a month after the US Supreme Court's decision

in *Dobbs v. Jackson Women's Health Organization*.[86] However, while *Dobbs* walked back procreative freedom in the US, *Surrogacy Advisory Group* was a bold move forward in South Africa. In fact, it relied on the South Africa's national abortion legislation, the Choice Act, to reach its conclusion related to the use of ARTs. This highlights the foundational nature of abortion legislation in reproductive law.[87]

Conclusion

I suggest that two core principles have crystallized in the three seminal cases analyzed in this paper. First, procreative freedom includes within its ambit the use of new ARTs—irrespective of whether the use of such new technologies is socially controversial. Although the use of new ARTs does not directly affect any existing person, it does potentially affect the prospective child. From this flows the second principle—namely, that the scope of possible procreative decisions that prospective parents may take (at least in the context of using ARTs) should be legally limited to exclude decisions that will cause harm to the prospective child. My colleague Bonginkosi Shozi and I call this the principle of "procreative non-maleficence."[88] Although for legal analytical purposes it is based on the *AB* judgment, it aligns with classic liberal theory and essentially applies John Stuart Mill's dictum that freedom can be limited only if it harms someone else in the context of the use of ARTs.[89]

Guided by the twin principles—the progressive, pluralist interpretation of procreative freedom, and the principle of procreative non-maleficence—South Africa stands poised and ready to embrace the challenges emerging in the landscape of reproductive law, as science marches forward.

Note

This paper is based on a lecture that I delivered at the University of KwaZulu-Natal on August 23, 2023. The lecture can be accessed at https://www.youtube.com/watch?v=apfykqtMvok&t=46s.

References

1. See D. Thaldar, B. Shozi, M. Steytler, et al., "A Deliberative Public Engagement Study on Heritable Human Genome Editing among South Africans: Study Results," *PLOS One* 12/11 (2022); A. Gooden and D. Thaldar, "Toward an Open Access Genomics Database of South Africans: Ethical Considerations," *Frontiers in Genetics* 14 (2023); B. Shozi and D. Thaldar, "Promoting Equality in the Governance of Heritable Human Genome Editing through Ubuntu: Reflecting on a South African Public Engagement Study," *American Journal of Bioethics* 23/7 (2023); B. Townsend and B. Shozi, "Altering the Human Genome: Mapping the Genome Editing Regulatory System in South Africa," *Potchefstroom Electronic Law Journal* 24/1 (2021).

2. South Africa, Regulations Relating to the Artificial Fertilisation of Persons (2012). See also United Kingdom, Human Fertilisation and Embryology Act (2008); Canada, Assisted Human Reproduction Act (2004); New Zealand, The Human Assisted Reproductive Technology Act (2004); Switzerland, Federal Act on Medically Assisted Reproduction (1997); India, Assisted Reproductive Technology (Regulation) Act (2021); France, Law on the Donation and Use of Elements and Products of the Human Body, Medically Assisted Procreation, and Prenatal Diagnosis (1994); Italy, Medically Assisted Procreation Law (2004).

3. *AB v. Minister of Social Development* 2017 (3) SA 570 (CC); *Ex Parte KAF* 2019 (2) SA 510 (GJ) ("*Ex Parte KF 2*"); *Surrogacy Advisory Group v. Minister of Health* 2022 (4) SA 187 (GP).

4. *AB v. Minister of Social Development* (see note 3), para. 8(a).

5. South Africa, Children's Act (2005).

6. Ibid., sec. 292.

7. Ibid., sec. 297.

8. Ibid., secs. 292, 303(1).

9. Ibid., sec. 294.

10. *AB v. Minister of Social Development* (see note 3), para. 10.

11. Ibid., AB's founding affidavit, paras. 9.2, 14 (record 9).

12. Ibid., para. 5.

13. Ibid., paras. 12, 20.

14. South Africa, Regulations Relating to the Artificial Fertilization of Persons (see note 2), reg. 10(2)(a)(ii).

15. Children's Act (see note 5), sec. 294.

16. *AB v. Minister of Social Development* (see note 3),

paras. 12, 20.

17. Ibid., para. 12.

18. Ibid., para. 29.

19. Children's Act (see note 5), sec. 294.

20. *AB v. Minister of Social Development* (see note 3), para. 26.

21. Ibid., paras. 29, 30.

22. Ibid., para. 26.

23. Ibid. (minority judgment), paras. 191, 192 and (majority judgment), paras. 287, 294. For further discussions of *AB*, see D. Thaldar, "Post-Truth Jurisprudence: The Case of *AB v Minister of Social Development*," *South African Journal on Human Rights* 34/2 (2018); D. Thaldar, "The Constitution as an Instrument of Prejudice: A Critique of *AB v Minister of Social Development*," *Constitutional Court Review* 9/1 (2019); B. Shozi, R. Hazarilall, and D. Thaldar, "Blood Is Thicker Than Water, But Is It Thicker Than Ink? An Analysis of Parenthood and Sperm Donor Agreements in the Wake of *QG v CS* (32200/2020) 2021 ZAGPPHC 366 (17 June 2021)," *Stellenbosch Law Review* 33/3 (2022).

24. *AB v. Minister of Social Development* (see note 3), paras. 178, 182. See Ms Rodrigues expert opinion II, para. 9 (*AB* record at 2561); Golombok expert opinion, para. 5 (*AB* record at 738–739); Jadva expert opinion, para. 4 (*AB* record at 1796).

25. *AB v. Minister of Social Development* (see note 3), para. 202.

26. L. Frith, "Gamete Donation and Anonymity: The Ethical Legal Debate," *Human Reproduction* 16 (2001); M. Cowden, "No Harm, No Foul: A Child's Right to Know their Genetic Parents," *International Journal of Law, Policy and the Family* 26/1 (2012). See *AB v. Minister of Social Development* (see note 3), minority judgment comments on these articles in paragraphs 203 and 204.

27. *AB v. Minister of Social Development* (see note 3), para. 294.

28. *KB v. Minister of Social Development* [2023] ZAMPMBHC 12. See D. Thaldar, "The Right to Family Life: Why the Genetic Link Requirement for Surrogacy Should Be Struck Out," *South African Journal of Bioethics and Law* 15/3 (2023).

29. *AB v. Minister of Social Development* (see note 3), paras. 70, 74.

30. See B. Shozi, "Something Old, Something New: Applying Reproductive Rights to New Reproductive Technologies in South Africa," *South African Journal on Human Rights* 36/1 (2020).

31. *AB v. Minister of Social Development* (see note 3), para. 3.

32. *Ex Parte KAF* 2017 ZAGPJHC 227 ("*KF 1*").

33. Ibid., para. 4.

34. Ibid., paras. 11, 12.

35. Ibid., para. 21, 30.

36. See D. Thaldar, "The Need to Develop Objective Criteria for Suitability as a Surrogate Mother: Reflections on *Ex Parte KAF*," *South African Journal of Bioethics and Law* 11/1 (2018).

37. Ibid.

38. *Ex Parte KF 2* (see note 3), para. 12.

39. Ibid., para. 32.

40. Ibid., para. 23.

41. See D. Thaldar, "Criteria for Assessing the Suitability of Intended Surrogate Mothers in South Africa: Reflections on *Ex Parte KAF II*," *South African Journal of Bioethics and Law* 12/2 (2019).

42. *Ex Parte KF 2* (see note 3), paras. 31, 32.

43. Ibid., para. 14.

44. *Ex Parte KF 2* (see note 3), applicants' supplementary heads of argument, paras. 4–7.

45. Ibid.

46. Ibid.

47. *Ex Parte KF 2* (see note 3), para. 14.

48. See D. Thaldar, "Performing IVF for Surrogacy before Confirmation of the Surrogacy Agreement by the Court: A Critical Analysis of Recent Case Law in South Africa," *Humanities and Social Sciences Communications* 10/15 (2023); D. Thaldar, "The In Vitro Embryo and the Law: The Ownership Issue and a Response to Robinson," *Potchefstroom Electronic Law Journal* 23/1 (2020); D. Thaldar and B. Shozi, "Procreative Non-maleficence: A South African Human Rights Perspective on Heritable Human Genome Editing," *CRISPR Journal* 3/1 (2020); D. W. Jordaan, "Science versus Anti-science: The Law on Pre-embryo Experimentation," *S. Afr. Law J.* 124/3 (2007); D. W. Jordaan, "Legal Status of the Human Pre-embryo in the Context of the Genetic Revolution," *South African Law Journal* 122/1 (2005).

49. *Surrogacy Advisory Group v. Minister of Health* (see note 3).

50. F. Zegers-Hochschild, G. D. Adamson, S. Dyer, et al., "The International Glossary on Infertility and Fertility Care, 2017," *Fertility and Sterility* 108/3 (2017), p. 404.

51. Ibid.

52. Ibid.

53. Ibid.

54. Z. Salvador, "Cell Free DNA Testing: Benefits and Indications," *Invitra Medical Magazine* (2019). See also R. Horn, "NIPT and the Concerns regarding Routinisation," *European Journal of Human Genetics* 30/6 (2022), p. 637.

55. Salvador (see note 54).

56. Ibid.

57. H. Bowman-Smart, J. Savulescu, C. Gyngell, et al., "Sex Selection and Non-invasive Prenatal Testing: A Review of Current Practices, Evidence, and Ethical Issues," *Prenatal Diagnosis* 40/4 (2020), p. 398.

58. C. Lewis, C. Silcock, and L. S. Chitty, "Non-invasive Prenatal Testing for Down's Syndrome: Pregnant Women's Views and Likely Uptake," *Public Health Genomics* 16/5 (2013).

59. Bowman-Smart et al. (see note 57).

60. D. Thaldar, "Is It Time to Reconsider the Ban on Non-therapeutic Pre-implantation Sex Selection?," *South African Law Journal* 136/2 (2019), p. 232. For further discussion on preimplantation genetic screening and sex selection see D. W. Jordaan, "Preimplantation Genetic Screening and Selection: An Ethical Analysis," *Biotechnology Law Report* 22/6 (2003); D. Thaldar and B. Shozi, "South Africa's Latest Medically Assisted Reproduction Draft Regulations: Close, but No Cigar," *Journal of South African Law* 1 (2022).

61. Regulations Relating to the Artificial Fertilisation of Persons (see note 2), reg. 13.

62. *Surrogacy Advisory Group v. Minister of Health* (see note 3), Surrogacy Advisory Group's supplementary heads of argument, para. 84. See South Africa, Choice on Termination of Pregnancy Act (1996), sec. 2(1)(a).

63. *Christian Lawyers Association of South Africa v. Minister of* Health (1998) 4 SA 111 3 (T); *Christian Lawyers Association v. Minister of Health* 2005 (1) SA 509 (T).

64. Choice on Termination of Pregnancy Act (see note 62), sec. 2(1)(a).

65. Ibid., secs. 2(1)(b), sec. 2(1)(c).

66. Ibid., sec. 2(1)(c).

67. Ibid., sec. 2(1)(a)(i).

68. *Surrogacy Advisory Group v. Minister of Health* (see note 3), Surrogacy Advisory Group's supplementary heads of argument, para. 84.

69. Ibid. See also Thaldar, "Is It Time to Reconsider the Ban on Nontherapeutic Pre-implantation Sex Selection?" (see note 60), p. 232.

70. Ibid., supplementary heads of argument, para. 86.

71. Ibid., para. 78.1.

72. Ibid., para. 78.2.

73. Ibid.

74. Ibid.

75. *Surrogacy Advisory Group v Minister of Health* (see note 3), para. 135.

76. Ibid., para. 114.

77. Ibid., para. 150.

78. Ibid., Surrogacy Advisory Group's supplementary heads of argument, paras. 88, 89, 90.

79. Ibid., para. 157.

80. Ibid., paras. 158, 159.

81. Ibid., para. 161.

82. Ibid., para. 157.

83. Ibid., para. 167.

84. Ibid., para. 97.

85. *Minister of Home Affairs v. Fourie* (3) BCLR 355 (CC), para. 102.

86. *Dobbs v. Jackson Women's Health Organization*, 142 Supreme Court 2228, 2242-43 (2022).

87. C. Schaffer, "In Vitro Fertilization after Dobbs v. Jackson W. Jackson Women's Health Organization: The Best Interest of the Embryo," *Children's Legal Rights Journal* 43/1 (2022); K. L. Dobbs, "Abortion Laws, and In Vitro Fertilization," *Journal of Health Care Law and Policy* 26/1 (2023); A. Ulker, M. B. Evans, and L. B. Craig, "The Impact of the Dobbs Decision on In-Vitro Fertilization and Fertility Care," *Current Opinion in Obstetrics and Gynecology* 35/4 (2023); G. Letterie and D. Fox, "Legal Personhood and Frozen Embryos: Implications for Fertility Patients and Providers in Post-Roe America," *Journal of Law and the Biosciences* 10/1 (2023).

88. Thaldar and Shozi, "Procreative Non-maleficence" (see note 48).

89. John Stuart Mill, *On Liberty* (London: Longman, Roberts, and Green Co., 1859).