REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 50683 / 2020

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

Date: 2022 WJ du Plessis

In the matter between:

SURROGACY ADVISORY GROUP Applicant

and

MINISTER OF HEALTH Respondent

JUDGMENT

[1] Du Plessis AJ

Introduction

[1] This application concerns the constitutionality of certain regulations made in terms of the National Health Act[1] regulating certain aspects of artificial fertilisation. The applicant asks the court to declare certain provisions of the *Regulations Relating to the Artificial*

[1] 61 of 2003.

Fertilisation of Persons[2] and the *Regulations Relating to the Use of Human Biological Material*[3] unconstitutional.[4] These provisions relate to the requirement for certain people to undergo a psychological evaluation before undergoing treatment,[5] the prohibition against sex selection preimplantation[6] and the prohibition on disclosing certain information.[7]

[2] The respondent opposes the relief sought on various grounds and raises two points *in limine* that will be expanded on below. I will deal with the applicant's arguments as to why these regulations must be declared unconstitutional and invalid once I have addressed the respondent's points *in limine*.

The parties

[3] The applicant is a voluntary association of medical-legal lawyers and individuals with experience in infertility and surrogacy. The respondent is the Minister of Health, the cabinet member responsible for administering the National Health Act.

[4] The applicant brings this application in the public interest under s 38(d) of the Constitution. In its founding affidavit, it expresses the concern that in the context of artificial fertilisation technologies, health care users are not always treated with trust, are stigmatised, and that their personal and moral decisions regarding how they want to build their families are not always accepted and valued, and are subjected "to moralistic censure by the state".[8]

[5] The applicant relied on the expert opinions of Dr Rodrigues,[9] a reproductive medicine specialist, and Ms Samouri,[10] a clinical psychologist, specialising in counselling persons undergoing fertility treatments, to support their argument.

---

[2] GN R175, GG 35099, 2 March 2012.

[3] GN R177, GG 35099, 2 March 2012.

[4] Promulgated by the Minister of Health in terms of s 68 of the National Health Act 61 of 2003.

[5] The “psychological evaluation requirement".

[6] The "sex selection prohibition".

[7] The "prohibition of disclosure of certain facts".

[8] CaseLines 0003-7.

[9] CaseLines 0002-37.

[10] CaseLines 0002-46.

Preliminary issues

[6] I deem it necessary to first deal with the points *in limine* because if they are upheld, then I need not go into the merits of the case.

[7] The respondent raises two points: firstly, that the applicant should have brought the application under the Promotion of Administrative Justice Act[11] (PAJA), and secondly, that the attack on the regulations is premature.

(i) Justiciability of the issue

[8] The respondent avers that the Minister made the regulations in terms of s 68 of the National Health Act, that the making of regulations constitutes an administrative action which means that the attack on the regulations ought to be done under the provisions of PAJA. It is thus not legally permissible for the applicant to seek declaratory relief (as to their constitutionality), as opposed to reviewing the regulations in terms of PAJA.

[9] The National Health Act sets out the structure of the health care system and creates a framework for delivering healthcare services. S 2 sets out the objects of the Act.[12] S 3 requires the Minister to, within the limits and available resources, "determine the policies and measures necessary to protect, promote, improve and maintain the health and wellbeing of the population".[13] Therefore, the respondent maintains that to comply with its duties imposed in the Constitution and the National Health Act, they promulgated the regulations in question. The promulgation of the regulations, the respondent avers, is "nothing but an implementation of the national legislation by an executive functionary of the

---

[11] 3 of 2000.

[12] 2. Objects of Act. —The objects of this Act are to regulate national health and to provide uniformity in respect of health services across the nation by—
(a) establishing a national health system which—
(i) encompasses public and private providers of health services; and
(ii) provides in an equitable manner the population of the Republic with the best possible health services that available resources can afford;
(b) setting out the rights and duties of health care providers, health workers, health establishments and users; and
(c) protecting, respecting, promoting and fulfilling the rights of—
(i) the people of South Africa to the progressive realisation of the constitutional right of access to health care services, including reproductive health care;
(ii) the people of South Africa to an environment that is not harmful to their health or wellbeing;
(iii) children to basic nutrition and basic health care services contemplated in s 28 (1) (c) of the Constitution; and
(iv) vulnerable groups such as women, children, older persons and persons with disabilities.

[13] S 3(1)(c).

State", an administrative action by the executive authority. If this is so, then the application is defective because the applicants did not bring the review proceedings in terms of PAJA.

[10] If the making of regulations is an administrative act, the respondent's next contention is that this means that the attack on the constitutionality of the regulations must be made under PAJA in terms of the principle of subsidiarity. In *Esau v Minister of Cooperative Governance*,[14] the Supreme Court of Appeal stated that

> If, as I have accepted, the making of regulations is administrative action in terms of the PAJA, it follows that the validity of the impugned regulations must be determined with reference to the grounds of review listed in s 6(2) of the PAJA. The principal ground of review that arises on the basis of the appellants' attack on the regulations is s 6(2)(i) – that the regulations concerned are 'otherwise unconstitutional or unlawful'. If my assumption is incorrect, there will be no substantive difference: s 2 of the Constitution provides that 'law or conduct inconsistent with it is invalid' and in terms of s 172(1)(a), courts must declare law or conduct that is inconsistent with the Constitution to be invalid to the extent of the inconsistency.

[11] Based on this, the respondent contends that once it is accepted that PAJA applies, then the applicant does not have an election on whether to proceed in terms of PAJA or the Constitution because of s 6(2)(i), which states:

> Judicial review of administrative action […] (2) A court or tribunal has the power to judicially review an administrative action if—[…] (i) the action is otherwise unconstitutional or unlawful.

[12] For this, they cite *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs,*[15]*,* where O'Regan J found that since it is clear that PAJA is of application, the case cannot be decided without reference to it. They refer to the principle of subsidiarity,[16] explaining that in constitutional jurisprudence, the subsidiarity principle refers to the fact that the litigant

---

[14] *Esau v Minister of Co-Operative Governance and Traditional Affairs* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA) par 106.

[15] 2004 (4) SA 490 (CC) par 26.

[16] *Randgold and Exploration Company Limited v Gold fields Operations Limited* [2019] ZAGPJHC 436; [2020] 1 All SA 491 (GJ); 2020 (3) SA 251 (GJ).

may not rely directly on a constitutional provision to assert their rights if there is legislation that gives effect to that right.

[13] The applicant disputes that non-administrative law challenges, such as a constitutional challenge to subordinate legislation, must be brought under PAJA. The applicant lists various cases from the Constitutional Court where subordinate legislation made by the executive was constitutionally challenged and declared invalid without reliance on PAJA.[17]

[14] The applicant further disagrees that the principle of subsidiarity and PAJA apply in this case. They give two reasons. Firstly, they state that PAJA was enacted to give effect to s 33 of the Constitution. PAJA thus deals with administrative law. Therefore, assuming that PAJA does apply to subordinate legislation, they agree that challenges to subordinate legislation should be channelled through PAJA when it deals with an administrative law challenge. However, they argue that this does not mean that non-administrative law challenges (such as human rights challenges) should be channelled through PAJA. Thus, the human rights dimension of subordinate legislation is not subsumed by PAJA.

[15] The second reason they offer is that in the *Esau*[18] case relied on, the Supreme Court of Appeal stated that there is no substantial difference between a direct constitutional challenge to regulations and a constitutional challenge to regulations channelled through PAJA. They also regard the position that a constitutional challenge must be channelled through PAJA as *obiter dicta* as it was not necessary for the decision (i.e. *ratio decidendi*).

[16] The applicant then lists three substantive differences for a challenge to subordinate legislation only challenged through PAJA:

a) For one, bringing a challenge in terms of PAJA has time limits, while there are no time limits for a direct constitutional challenge.

b) Secondly, the remedies for a direct constitutional challenge are governed by s 172 of the Constitution. PAJA's judicial review remedies are restricted.

---

[17] The applicant cites *Engelbrecht v Road Accident Fund* 2007 (6) SA 96 (CC); *South African National Defence Union v Minister of Defence* 2007 (5) SA 400 (CC), *Richter v Minister for Home Affairs* 2009 (3) SA 615 (CC) and *Nandutu v Minister of Home Affairs* 2019 (5) SA 325 (CC).

[18] *Esau v Minister of Co-Operative Governance and Traditional Affairs* [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA).

c) Original legislation can be challenged directly without the constraints of PAJA, whereas in the scenario proposed, delegated legislation would have to be challenged through PAJA. This means that a challenge to delegated legislation would be more difficult.

(ii) Is the application premature?

[17] The second point *in limine* is the respondent's contention that the attack on the regulations is premature. They point out that the Minister has embarked on amending the regulations, including the regulations in this application. The amendment process must thus first unfold before the court can pronounce on its constitutionality. They contend that failure to wait for the unfolding will infringe the separation of power principle.

[18] The Minister published draft regulations on 25 March 2021. After publication, the Department of Health received submissions from various stakeholders, including the applicants. It is considering these submissions. It is envisaged that "the entire process is likely to be completed before the end of this year", being 2021.[19] These regulations will address many of the issues raised by the applicant.

[19] For the contention that the amendment process must first unfold before a pronouncement can be made, the respondent relies on *Doctors for Life*[20] as authority. In this case, the applicant argued that Parliament failed in its duties to facilitate public participation in the passing of four Bills. The court stated that it could not pronounce on the constitutional validity of a bill until the legislative process is complete[21] (i.e. once the President signs it).

Discussion and findings

[20] To evaluate the respondent's argument, it is necessary to determine whether making regulations is indeed an administrative action; and whether the subsidiary principle is applicable.

---

[19] Respondent's answering affidavit, par 23, CaseLines 0002-66.

[20] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC).

[21] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) par 54.

[21] Delegated legislation always derives from original legislation such as an Act. These forms of legislation regulate in more detail the aspects outlined in original legislation and usually take the form of regulations. The power to make regulations is typically delegated to the executive.[22]

[22] The question of whether the making of regulations by the executive constitutes "administrative action" in terms of the Constitution[23] and PAJA[24] has been the subject of many debates over the years.

[23] Academic opinion seems to be in favour of the making of delegated legislation being an administrative action.[25] Burns and Beukes[26] argue that the promulgation of subordinate legislation potentially has far-reaching consequences for the individual and may often impact harshly on individual rights. As such, it must be included in the definition of "administrative action". Various other authors support this view.[27]

[24] As for case law, the Constitutional Court case of *Minister of Health v New Clicks South Africa (Pty) Ltd*[28] is often cited as authority that making regulations is indeed an administrative action. Yet, the court was divided on the issue.[29] The judgment referred to most often is that of Chaskalson CJ (with O'Regan J concurring), that held that

> "it had been regarded as administrative action for purpose of the interim Constitution, and […] nothing suggests that the final Constitution regarded it differently. […] [T]o hold that the making of delegated legislation is not part of the right to just administrative action would be

---

[22] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (10) BCLR 1289; 1995 (4) SA 877.

[23] S 33.

[24] S 1.

[25] Klaaren J and Penfold G "Just administrative action" 2006 (4) *Constitutional Law of South Africa* par 63.3 (b) (vi).

[26] Burns YBM *Administrative law under the 1996 constitution* (2006) 131

[27] See for example De Ville J *Judicial review of administrative action in South Africa* (2006) 39–40.

[28] 2006 (2) SA 311 CC par 113.

[29] Ngcobo J (with Langa DCJ and Van der Westhuizen J) did not decide on this general question but held that the making of the regulation, in that case, constituted administrative action. Sachs J held that PAJA is not applicable in the making of subordinate legislation, while Moseneke J (with Madala, Mokgoro, Skweyiya and Yacoob JJ concurring) assumed for the purposes of that judgment that PAJA applied to the making of that particular regulation, but refrained from deciding on the general question.

contrary to the Constitution's commitment to open a transparent government".[30]

[25] *New Clicks* therefore does not state unequivocally that the making of regulations is an administrative action as it was not a majority view.[31] However it has been followed as such subsequently.[32]

[26] Recently the Supreme Court of Appeal in *Esau v Minister of Cooperative Governance*,[33] decided, after an extensive discussion of the *New Clicks* decision, that the making of regulations is an administrative action. However, the court did not decide the case on that issue.

[27] For the purposes of this case, I accept that making regulations is an administrative action, especially in cases where they impact harshly on individual rights.

[28] If the making of regulations is an administrative action, the next question is whether the applicant is, in terms of the subsidiarity principle, limited to bringing a constitutional challenge of the regulations under PAJA.

[29] Subsidiarity is invoked in instances where several norms apply to the same situation but where a legal rule or a rule of interpretation excludes one of the competing legal norms from being applied in a particular case. Also knowns as *adjudicative subsidiarity,*[34] it guides the adjudication of substantive issues in law. If the legal question permits, it requires that a non-constitutional mode of adjudication should be preferred to a constitutional one.[35]

[30] This requires that a court, if the issue is related to a right contained in the Constitution, prefer an "aconstitutional" (or indirectly constitutional) mode of adjudication to a strictly constitutional mode. The reason for the rule is that the higher authority of the

---

[30] Par 109.

[31] *Mostert v Registrar of Pension Funds* 2018 (2) SA 54 (SCA) par 41 – 42 stated that "*New Clicks* is no authority for the proposition that the making of regulations by a minister, in general, is administrative action for purposes of PAJA".

[32] *City of Tshwane Metropolitan Municipality v Cable City (Pty) Ltd* 2010 (3) SA 589 SCA par 10; *Security Industry Alliance v Private Security Industry Regulatory Authority* 2015 (1) SA 169 (SCA) par 15; *South African Dental Association NPC v Minister of Health* 2016 1 All SA 73 (SCA) par 41 – 42.

[33] [2021] ZASCA 9; [2021] 2 All SA 357 (SCA); 2021 (3) SA 593 (SCA).

[34] Du Plessis L ""Subsidiarity": what's in the name for constitutional interpretation and adjudication?" 2006 (17) *Stellenbosch Law Review* 215.

[35] Du Plessis LM *Re-interpretation of Statutes* (2002) 30.

Constitution is not overused to decide issues that can otherwise be disposed of with reliance on particular, subordinate and non-constitutional rules of law.[36] It allows the norms and values of the Constitution to be fused into all areas of the law.

[31] However, unthoughtful reliance on the principle can undermine the Constitution as our supreme law. The Constitution remains the supreme law, and any law and conduct inconsistent with it can be declared constitutionally invalid. Subsidiarity merely indicates that the existence of the Constitution does not supplant ordinary legal principles.[37]

[32] When a litigant is faced with a situation where two legal norms are applicable, there are two principles of subsidiarity to guide them. The first principle of subsidiarity states that if legislation has been enacted to give effect to a constitutional right, then conflicts about *that right* should be adjudicated using that legislation, rather than relying directly on the Constitution or the common law.[38] In *Mazibuko v City of Johannesburg*[39] O'Regan J explained that

> "where legislation has been enacted to give effect to a right, a litigant should rely on that legislation in order to give effect to the right or alternatively challenge the legislation as being inconsistent with the Constitution."

[33] The second principle addresses the choice between common law and legislation as sources of law when dealing with a possible infringement of a constitutional right.[40] In the current matter, we are only concerned with the first principle.

[34] As stated, I accept that making regulations can be an administrative action and thus subject to PAJA. That, however, does not necessarily mean that a constitutional challenge to the regulations should be brought under PAJA. This is because PAJA has been enacted

---

[36] Du Plessis L ""Subsidiarity": what's in the name for constitutional interpretation and adjudication?" 2006 (17) *Stellenbosch Law Review* 215.

[37] Du Plessis L ""Subsidiarity": what's in the name for constitutional interpretation and adjudication?" 2006 (17) *Stellenbosch Law Review* 226.

[38] Van der Walt A "Normative pluralism and anarchy: reflections on the 2007 term: lead essay/response" 2008 (1) *Constitutional Court Review* 78 – 80.

[39] [2009] ZACC 28; 2010 (3) BCLR 239 (CC) ; 2010 (4) SA 1 (CC).

[40] Murcott M and Van der Westhuizen W "The ebb and flow of the application of the principle of subsidiarity–critical reflections on Motau and My Vote Counts" 2015 (7) *Constitutional Court Review* 47. In that case, the legislation must be relied on to the extent that it is provided for in legislation.

to give effect to s 33 of the Constitution, and any dispute about a *right to just administrative action* should be bought under PAJA (or the common law) and not directly rely on s 33 of the Constitution.

[35] It is so that s 6(2)(i) of PAJA offers a ground of review for regulations that are "otherwise unconstitutional or unlawful". However, s 6(2)(i) does not require that when regulations are tested against other rights in the Bill of Rights, it must be done in terms of PAJA. Authors Hoexter[41] and De Ville[42] make it clear that s 6(2)(i) is a "catch-all" ground of review, where the ground of review does not fit in with any of the other listed grounds in s 6. In this regard, De Ville uses the example of vagueness and uncertainty, although not explicitly mentioned, as being a ground of review as it is contained in the rule of law. Kohn[43] adds to that buck-passing and no-fettering rule as not included in the Act itself, but finding direct application through this s. In other words, when the grounds of review of an administrative action are not listed in the Act itself but can be found in the Constitution or the common law, then s 6(2)(i) is applicable. It does not apply to testing regulations against other Constitutional provisions contained in the Bill of Rights.

[36] The respondent's reference to *My Vote Counts NPC v the Speaker of the National assembly*[44] and *Mazibuko v City of Johannesburg*[45] does not support its argument. In *My Vote Counts* the issues of subsidiarity related to s 19 of the Constitution and the Promotion of Access to Information Act,[46] legislation promulgated to give effect to that right. Likewise, in *Mazibuko,* the question was whether litigants could rely directly on s 27(2) of the Constitution instead of relying on legislation promulgated to give effect to that right.

[37] PAJA was enacted to give effect to s 33 of the Constitution. As such, if the issue before the court pertains to a right to administrative justice - such as issues relating to the lawfulness, reasonableness and procedural fairness of an administrative act - subsidiarity

---

[41] Hoexter C *Administrative Law in South Africa* (2012) 325

[42] De Ville J *Judicial review of administrative action in South Africa* (2006) 186

[43] Kohn L "Our curious administrative law love triangle: the complex interplay between the PAJA, the Constitution and the common law" 2013 (28) *Southern African Public Law* 36.

[44] [2018] ZACC 17; 2018 (8) BCLR 893 (CC); 2018 (5) SA 380 (CC).

[45] [2009] ZACC 28; 2010 (3) BCLR 239 (CC); 2010 (4) SA 1 (CC).

[46] 2 of 2000.

will require the litigant to rely on PAJA and not directly on s 33 of the Constitution.[47] However, PAJA will not be applicable where the cause of action lies in an infringement of human rights (i.e. challenging the constitutionality of regulations).

[38] In this case, the applicants contend that the regulations infringe various constitutional rights, such as the right to equality, privacy and bodily integrity. PAJA was not promulgated to give effect to any of these rights specifically, and therefore subsidiarity is not invoked.

[39] It would also be untenable if an applicant is forced to bring an application within 180 days after the promulgation of the regulations. Unconstitutional regulations do not cease to be unconstitutional merely because they were not challenged within 180 days of promulgation. It would be against the constitutional order to allow unconstitutional regulations to remain in force simply because a challenge to their constitutionality was not launched in time.

[40] I therefore find that the applicant is not compelled to rely on PAJA. The regulations are tested against other the provisions of the Constitution, and not administrative law grounds.

[41] Should I be wrong on this aspect, the Constitutional Court in *Bato Star*[48] stated held that the applicant's failure to identify with precision the provisions relied upon is not fatal to its cause of action. What is important is that the facts relied upon, and the legal basis for the cause of action, must be clearly stated. I am satisfied that both the facts and the legal basis for the applicant's cause of action were set out in their founding affidavit, enabling the respondent to know what case must be met.[49]

[42] As for the second point *in limine*: (in this case - delete) the applicant is challenging existing regulations that went through the legislative process. As such, the applicant is within its rights to challenge the regulations, and the court, accordingly**,** can consider it.

---

[47] For an explanation of how this will work, see Kohn L and Corder H "Administrative justice in South Africa: An overview of our curious hybrid" 2019 *Pursuing Good Governance: Administrative Justice in Common Law Africa* 138.

[48] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) par 27.

[49] *Goosen-Joubert v Women4women NPC* [2022] JOL 53203 (WCC).

[43] The argument that regulations will be promulgated to replace the current ones is based on uncertainty. There is no guarantee that the final regulations will include the amendments as stated in the replying affidavit, as a legislative process (even the making of regulations) is unpredictable. I am mindful that it is not for the Court to make the regulations or to dictate to the executive what must be in the regulations. This judgment is, therefore, only concerned with the law as it stands at the date of the hearing, and not the proposed amendments.

[44] Against this background, I now turn to consider the constitutionality of the regulations.

The constitutionality of the regulations

[45] The applicant raises the issue of constitutionality regarding three regulations:

a) Regulation 7(j)(ii) of *Regulations Relating to the Artificial Fertilisation of Persons*,[50] seeks a declaration of constitutional invalidity with the remedy of reading-in;

b) Regulation 13 of *Regulations Relating to the Artificial Fertilisation of Persons*[51] seeks a declaration of constitutional invalidity and to strike it out;

c) The read down Regulation 19 of *Regulations Relating to the Artificial Fertilisation of Persons*[52] to exclude the people donating or receiving to artificial fertilisation themselves.

[46] The respondent replies response to these three provisions as follows:

a) The new regulations will remove this requirement of a psychological evaluation by the donor, where the known donor is the recipient's husband or partner.

b) Most countries prohibit sex selection in the absence of genetic disease.[53] There are mainly three policy reasons for this, namely:

   i) It is wrong for the state to endorse sex selection by permitting preimplantation sex selection because sex selection is intrinsically unethical;

---

[50] The “Psychological Evaluation Requirement”.

[51] The “Sex Selection Prohibition”.

[52] The “Prohibition of Disclosure of Certain Facts”.

[53] Paragraph 18 of the replying affidavit, CaseLines 0002-65.

ii) Permitting preimplantation sex selection is unethical as the practice reinforces sexual discrimination, and this causes harm; and

iii) It is contrary to public interest to permit preimplantation sex selection as it may disrupt the ratio between the sexes due to the aforementioned discrimination.

Furthermore, the proposed new regulations will allow for preimplantation sex selection subject certain conditions.

c) The draft regulations will repeal this, and the prohibition on information sharing will only apply to fertility clinic and staff, not to the donor or recipient of a gamete.

[47] The respondent thus claims that the applicant has not made out a case for declaration of invalidity because the regulations conflict with the Constitution. Their reliance on irrationality and/or violation of the right to equality and/or privacy and/or access to health care is misplaced.

[48] I will deal with each of the regulations separately in detail, setting out what the current regulations state, the respondent's reply, the applicable law, and my evaluation of the constitutionality. I will discuss the remedies separately at the end.

(i) "Psychological Evaluation Requirement"

[49] This regulation refers to the requirement that certain people must go for a phycological evaluation before they can commence with artificial fertilisation. It is necessary to clarify certain definitions before discussing the requirement:

a) "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[54] or embryo[55] is to be placed for the purpose of human reproduction;

b) "gamete donor" means a living person from whose body a gamete or gametes are removed or withdrawn, for the purpose of artificial fertilisation".

[54] A fertilised egg cell.

[55] An embryo is deemed a foetus beginning the 11th week of pregnancy (the 9th week after fertilisation).

[50] A recipient is always a female person, while a gamete donor can be either a male (sperm donor) or a female (egg donor). A "gamete donor" can also be a husband who donates his sperm for the artificial fertilisation of his wife.[56]

[51] In terms of regulations 7(c) and 7(j), a recipient can use donor gametes from either an unknown or a known gamete donor. A recipient can get access to unknown gamete donors from local or international gamete banks or donation agencies.[57] Some fertility clinics offer their own in-house databases of unknown gamete donors that patients can access.[58]

[52] A recipient can also use gametes from a person known to her. This is often the recipient's husband, but it can also be another family member, friend, or person known to the recipient.

[53] Regulation 7(j)(i) states:

> 7. Prerequisites for removal or withdrawal of gametes.
>
> A competent person who intends to remove or withdraw a gamete, or cause a gamete to be removed or withdrawn from the body of a gamete donor, shall, before such removal or withdrawal-
>
> (j) shall, in the event of a request in respect of which the donor and recipient are known to each other, ensure that there is-
>
> […]
>
> (ii) psychological evaluation of both parties.

[54] There is no general requirement that all *recipients* who intend to use donor gametes undergo a psychological evaluation.[59] There is also not a general requirement that all gamete *donors* must undergo an evaluation.[60] However, Regulation 7(j)(i) and (ii) requires

---

[56] Regulation 18(1)(b), for instance, provides that “in the case of a male gamete donor for the artificial fertilisation of *his spouse*,” (own emphasis).

[57] Expert opinion of Dr Rodrigues, par 9.

[58] Expert opinion of Dr Rodrigues, par 9.

[59] If there is such an evaluation, it must be filed in the recipient’s file, regulation 14.

[60] If there is such an evaluation, it must be filed in the donor’s file, regulation 8.

that a recipient that knows the donor, and the gamete donor that knows the recipient, undergo a psychological evaluation.

[55] Ms *Samouri*, for the applicant,[61] argues that from a psychological perspective, there are good reasons to evaluate unknown donors and known donors who are not the recipients' husbands or parents. This is because while these people will be *genetic* parents, they will not be *legal* parents. However, where the donor is the recipient's husband (or partner), he will both be the legal and the genetic parent. Based on this, the applicant advances the argument that there is no rationale for the psychological evaluation in this case where a husband (or partner) is involved.

[56] For this reason, the applicant avers that the Psychological Evaluation Requirement infringes certain rights in the Bill of Rights, namely s 9(1) (the right to equality), s 14 (the right to privacy), and s 27(1)(a) (the right of access to healthcare services).

[57] The respondent states that the draft regulations published seek to address the issue by changing the definitions that will make the psychological evaluation on the donor and will only apply to unknown recipients. Should the regulations be adopted in their current form, the issues raised by the applicant will be "academic".[62] For this reason, the respondent does not engage with the rationality of these regulations, as there is a process underway by the Minister to amend the regulations.

The right to equality

[58] In explaining how the regulations infringe on the right to equality, the applicant divides the recipient/donor possibilities into four categories, namely:

a) Group 1: women and their husbands/partners who plan to have children through sexual intercourse.

b) Group 2: women and their husbands/partners who plan to have children through artificial fertilisation using their own gametes.

c) Group 3: Women (and husbands/partners, if any) who plans to have children through artificial fertilisation, using the gametes of unknown (anonymous) donors.

---

[61] Expert opinion Ms Samouri.

[62] Respondent's answering affidavit CaseLines 0002-73.

d) Group 4: Women and husbands/partners, if any) who plan to have children through artificial fertilisation, using the gametes of known donors who are not the women's husbands/partners.

[59] Persons in groups 1 and 3 are not legally required to undergo a psychological evaluation. However, persons in groups 2 and 4 must undergo a phycological assessment.

[60] The applicant states that there is no legitimate government purpose to differentiate between group 2 (women and their husbands/partners who plan to have children through artificial fertilisation using their own gametes) and group 1 (women and their husbands/partners who plan to have children through sexual intercourse). There is thus a differentiation.

[61] Furthermore, they aver that there is no legitimate purpose to differentiate between group 2 (women and their husbands/partners who plan to have children through artificial fertilisation, using their own gametes) and group 3 (women and their husbands/partners, if any, who plan to have children through artificial fertilisation, using the gametes of unknown donors).

[62] The respondent did not answer these claims in its answering affidavit but addressed them in its heads of argument. The respondent, in its heads of argument, argues that there *is* a rational government purpose for this regulation, namely the public good chosen by the lawgiver to ensure that parents who intend to have children through artificial fertilisation are psychologically evaluated to ensure that they are psychologically prepared to have their children through artificial insemination. It also serves the child's best interest since it ensures that the parents are psychologically ready for the child to be born out of artificial insemination.

[63] Based on the procedural rule that affidavits constitute not only the evidence but also the pleadings,[63] the applicant argues that the failure of the respondent to identify any legitimate government purpose in its answering affidavit prohibits the respondent from advancing it in argument.

[64] However, should the court not agree with this, the applicant states that the discrimination is based on a prohibited list in s 9(3) of the Constitution, namely disability.

---

[63] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) par 28.

For this, it cites documents from the Department of Health that state that "[i]nfertility is a disease, which generates disability as an impairment of function". This accords with the World Health Organisation's classification. If this is the case, then unfairness of the discrimination is assumed, which means that the onus rests on the respondent to counter this presumption of fairness, which it did not do.

The right to privacy

[65] The applicant states that the fact that a psychological evaluation of a recipient must take place, entails an interview by a clinical psychologist about personal issues relating to decisions to build a family using artificial fertilisation, and that this is an infringement of their right to privacy. They argue that there is no justification for such an intrusion where the known donor is the husband or partner of the recipient.

[66] The applicant refers the court to *Bernstein v Bester*[64] where the Constitutional Court held that privacy is acknowledged in the truly personal realm. The personal issues relating to the decision to build a family using artificial fertilisation fall within the truly personal realm.

[67] The respondent denies this. They refer the court to *S v Jordan*[65] and *AB v Minister of Health*[66] where the Constitutional Court did not posit an independent right to autonomy. They then aver that this is because the right not to be subjected to psychological evaluation is not expressly included in the right to privacy.

The right of access to healthcare

[68] The applicant lastly asserts that the psychological evaluation requirement creates a financial and emotional obstacle to the person's access to artificial fertilisation healthcare services. This is in contravention with s 27(1)(a) of the Constitution, which places a negative duty on the state to refrain from limiting access to health care.[67]

[69] The respondent did not reply to this in their answering affidavit other than stating that the regulations are under review and that the court should allow the process to

---

[64] 1996 (2) SA 751 (CC).

[65] 2002 (6) SA 4 CC par 53.

[66] [2016] ZACC 43; 2017 (3) BCLR 267 (CC); 2017 (3) SA 570 (CC)

[67] See also *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 78.

complete before making an order of constitutional invalidity. I have already addressed this issue.

[70] In their heads of argument, the respondents argue that s 27(1) of the Constitution does not give rise to a self-standing and independent positive right to healthcare that is immediately enforceable.

Discussion and findings

- **The right to equality**

[71] In the *NICRO*[68] case, the Constitutional Court faced a situation where the respondent Minister had the burden of justifying a constitutional limitation and the question of when the Minister cannot justify it, the application must succeed. The court relied on *Moise v Greater Germiston Transitional Local Council,*[69] where it was stated that

> If the government wishes to defend the particular enactment, it then has the opportunity - indeed an obligation - to do so. The obligation includes not only the submission of legal argument but the placing before Court of the requisite factual material and policy considerations. Therefore, although the burden of justification under s 36 is no ordinary onus, failure by government to submit such data and argument may in appropriate cases tip the scales against it and result in the invalidation of the challenged enactment.

[72] In a justification inquiry, facts and policy are often interwoven in a justification analysis. A legislative choice, the court held, is not always subject to courtroom fact-finding and may be based on reasonable inferences unsupported by empirical data.[70] However, if policies are directed at legitimate governmental concerns, the party relying on the justification should place sufficient information before the court as to the policy that is furthered, the reason for such a policy and why it is a reasonable to limit a constitutional right to advance the policy. From this, I distil three requirements:

---

[68] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC).

[69] 2001 (4) SA 491 (CC) par19.

[70] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) par 35.

a) Sufficient information must be placed before the court to ascertain what the policy is;

b) The reason for the policy must be clear;

c) It must be shown that limiting a constitutional right to further the policy is reasonable.

[73] In the absence of this, the court may not be able to ascertain what the policy is, and the party that makes the constitutional challenge will not have an opportunity to rebut the contention through countervailing factual material or expert opinion. The court ends this discussion by stating that "[t]here may […] be cases where despite the absence of such information on the record, the court is nonetheless able to uphold a claim of justification based on common sense and judicial knowledge".[71]

[74] I will have regard to the respondent's heads of argument and the supplementary heads of the applicant on this point in the context of the *NICRO* judgment.

[75] The starting point in an inquiry to equality in terms of s 9(1) is to determine whether a differentiation is permissible when it infringes the right to equality. Differentiation that amounts to discrimination can be either fair or unfair. Mere differentiation in itself is not necessarily unfair and unconstitutional. For it to be unfair if it is arbitrary and irrational.[72] *Harksen v Lane NO*[73] laid down the test:

a) Does the differentiation amount to discrimination?

b) If it does, does it amount to unfair discrimination? If it is on a ground listed in s 9(3), the unfairness is presumed.

[76] The query in this second test asks the court to evaluate the reasons given by the government to determine whether there is a legitimate purpose. This requires the government to show that the purpose is not arbitrary or irrational. The next step is to ask whether the chosen measure is rationally connected to this purpose. It does not require the court to analyse the impact of the action or the policy choices – the state must merely provide reasons. The courts are usually likely to defer decisions to the legislature.

---

[71] *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO)* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) par 36

[72] *Prinsloo v Van der Linde* 1997 (6) BCLR 759 (CC).

[73] [1997] ZACC 12; 1997 (11) BCLR 1489.

[77] As far as the first leg of the test is concerned, it is clear that there is a differentiation between people or categories of people, as set out above. The only question that this court needs to consider is whether there is a rational connection to a legitimate government purpose in differentiating.

[78] The respondent's heads of argument give some indication as to the purpose of the regulation by stating that it intends to ensure that parents who conceive children through artificial fertilisation are psychologically evaluated. This also serves the child's best interest.

[79] Rationality in the context of s 9(1) is a weak form of rationality. The purpose proffered by the respondent is not arbitrary or irrational. I accept that conceiving children through artificial insemination is an invasive and stressful procedure. It might involve risks and disappointment, which can impact the individuals and their relationships. Ensuring that parents who conceive children through artificial insemination is psychologically prepared is thus a legitimate government purpose and is not irrational or arbitrary.[74]

[80] That does not mean that the discrimination is fair. I accept the classification of the WHO that infertility is a disability, in which case the discrimination is presumed unfair. The respondent only stated the reason for the policy, but did not entrust the court with what the policy entails or why it is reasonable to limit the rights of people in the above categories. It, therefore, did not rebut this presumption as required by *NICRO*.

[81] I accordingly find that the regulation infringes the right to equality.

- **The right to privacy**

[82] The right to privacy is protected by s 14 of the Constitution. S 14 states that "[e]veryone has the right to privacy, which includes" and then lists certain rights. An infringement of s 14 is *prima facie* regarded as unlawful, and the onus is on the infringing party to establish that such a breach can be justified by s 36.[75]

[83] The Constitutional Court in *Bernstein v Bester NO*[76] ventured into a preliminary observation on the scope of the right (in the interim Constitution).[77] It stated that only the

---

[74] Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening) [1998] ZACC 18; 1999 (2) SA 1; 1999 (2) BCLR 139.

[75] *Bernstein v Bester NO* [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751 par 71.

[76] [1996] ZACC 2; 1996 (4) BCLR 449; 1996 (2) SA 751.

[77] Par 65.

inner sanctum of a person – such as family life, sexual preference and the home environment – is shielded from limitations from the conflicting rights of the community. In this context, privacy is "acknowledged in the truly personal realm".[78] The protection lessens as one moves on the continuum towards communal relations and activities such as social interaction.

[84] When considering this all together, the court firstly notes the respondent's remark that there is no independent right to autonomy, and that the right not to be subjected to psychological evaluation is not expressly included in the right to privacy. This is presumably based on the dicta in *Jordan*[79] where the court, referring to a possible independent right to autonomy, stated that they don't see it appropriate to base their constitutional analysis on the right (of autonomy) as it is not expressly included in the Constitution.

[85] This conflates the idea that personal autonomy rights typically protect individuals from intrusions into and interference with their private lives – also referred to as substantive privacy rights.[80] These personal autonomy privacy rights permit individuals to make decisions about their lives without the state's interference, thereby giving individuals control over matters such as marriage, procreation, family relationships, child-rearing and education. It is, therefore, not the same as an independent right to autonomy, but rather the right of privacy enabling personal autonomy, subject to Constitutional limitations.

[86] The decision of people in a relationship to conceive a child through artificial fertilisation is within the truly person realm. It is close to the core of privacy, the most protected end of the continuum. And while it might be good and advisable for people to ensure that they have phycological support through the process as it can be a roller coaster ride of unbounded hope and unmet expectations, a legal requirement to this effect is an infringement of their privacy. The respondent did not provide any justification for the limitation.

[87] I accordingly find that the regulation infringes the right to privacy.

---

[78] Par 67.

[79] *S v Jordan* 2002 (6) SA 4 CC par 53.

[80] Du Plessis L and De Ville J "Personal rights: Life, freedom and security of the person, privacy, and freedom of movement" 1994 *D van Wyk et al* 242.

- **The right of access to healthcare**

[88] The respondent, however, did not address the applicant's contention that s 27(1)(a) gives rise to a negative right on the state to refrain from limiting access to health care, nor argued that the enforcement of a negative right will place a positive duty on the state to provide something. It also did not justify the possible infringement.

[89] In the absence of such justifications, I find that this requirement is a limitation on health care.

[90] Regulation 7(j)(i) is thus unconstitutional and invalid for infringing ss 9(3), 14 and 27(1)(a) of the Constitution.

(ii) The Sex Selection Prohibition

[91] Dr Rodrigues for the Applicant states that science makes it possible to determine the sex[81] of an in vitro embryo before it is transferred into the recipient's uterus. It is important to distinguish between preimplantation sex selection, prenatal sex selection, and sex selection at childbirth.

[92] Preimplantation sex selection refers to the selection of a specific embryo to be transferred to the recipient's uterus based on the recipient's preference to have a baby of a certain sex. This can be done by using Preimplantation Genetic Diagnosis (PGD) or other technologies such as MicroSort. This was unregulated in South Africa before 2012 and was offered as a service by some fertility clinics. The current regulations prohibit it.

[93] Prenatal sex selection refers to the selective termination of a pregnancy if the prenate[82] is not the sex that the parent(s) desire. Termination of pregnancy is governed by the Choice of Termination of Pregnancy Act[83] (the Choice Act) which allows a woman (who conceived without artificial fertilisation) to terminate her pregnancy, without giving any reasons before 12 weeks.[84]

[94] Sex selection at birth includes infanticide or child neglect post-birth leading to the death of the child, if a child of the undesired sex is born. It is a crime (murder).

---

[81] The term “sex” here refers to biologically sex, as opposed to the term gender, that has a social connotation.

[82] Defined as an unborn offspring at any stage of gestation.

[83] 92 of 1996.

[84] Thereafter the termination of a pregnancy will happen if both the woman and her medical doctor agrees.

[95] The desire to have a child of a particular sex is not new. Aristotle is reported to have advised people who want to have a boy to have intercourse when the wind is in the north.[85] Often diets, positions and timing of sex are offered as ways to increase the chances of having a child of a particular sex.[86]

[96] The reasons for sex selection range from family balancing (a desire to have a child of each sex) to genetic conditions linked to a sex.[87] But sex selection is sometimes also informed by cultural expectations and religious obligations.

[97] Sex selection can be understood as part of reproductive autonomy – the decision if and how to have offspring. The available technology just increased the number of options, thereby increasing reproductive liberty. Reproductive rights further include the right to decide on the number and spacing of one's children, the right to private family life, the right to liberty and security of the person, the right to marry and found a family, and the right to maternity protection.[88] It is seldom to find, at least in international treaties, a right to sex selection,[89] and any such right will have to fall under the rights mentioned above.

[98] There are several arguments against sex selection that I divided into three groups: the interest of women, the interest of the unborn child and the interest of society.

The interest of women

[99] In some cultures and communities, there is a disparity in the treatment of males and females. A male child is often viewed as more desirable to ensure the family's economic security. In some countries where preimplantation sex selection is allowed, a premium is placed on having boys.[90] This not only impacts the so-called "sex ratio" in countries but also raises questions about women's rights.

---

[85] De Wert G and Dondorp W "Preconception sex selection for non-medical and intermediate reasons: ethical reflections" 2010 (2) *Facts, views & vision in ObGyn*.

[86] Rai P, Ganguli A, Balachandran S, Gupta R and Neogi SB "Global sex selection techniques for family planning: a narrative review" 2018 (36) *Journal of reproductive and infant psychology* 552.

[87] Such as cystic fibrosis, haemophilia, and sickle cell disease.

[88] Toebes B "Sex selection under international human rights law" 2008 (9) *Medical law international*

[89] Toebes B "Sex selection under international human rights law" 2008 (9) *Medical law international* 211.

[90] Rai P, Ganguli A, Balachandran S, Gupta R and Neogi SB "Global sex selection techniques for family planning: a narrative review" 2018 (36) *Journal of reproductive and infant psychology* 549.

[100] In some countries,[91] the widespread use of pregnancy ultrasounds has led to the selective abortion of female foetuses. This, and the practice of female infanticide, has led to what has been coined the "the missing women".[92] Studies so far indicate that there is no markable preference in South Africa, with most people suggesting that they would like a variety of sexes (i.e. family balancing).[93]

[101] "Family balancing" might be an ethically tolerable decision. Such a request would respect women's (or indeed parents') autonomy to make their own decisions[94] without necessarily causing societal harm in the form of "missing women".

[102] The preference in many countries to have a boy as a firstborn, or where there is a clear preference for boys, re-enforces the patriarchal family structures.[95] In such instances allowing to plan the sex of future children exemplifies sexism.[96]

[103] However, the blanket prohibition on non-medical sex selection poses other human rights issues. While non-medical sex selection can encourage or lead to sex discrimination against women, a prohibition on non-medical sex selection can violate a woman's right to reproductive autonomy. There are, therefore, two competing rights, both concerned with women's rights.

[104] While a few countries explicitly allow preimplantation sex selection, which is often restricted to facilitate family balancing, it is banned or unregulated in most countries.[97] Many jurisdictions that have adopted national laws and policies on sex selection generally prohibit sex selection without achieving a therapeutic benefit. For many of these

---

[91] From the literature most notably China and India.

[92] Bongaarts J and Guilmoto CZ "How many more missing women? Excess female mortality and prenatal sex selection, 1970–2050" 2015 (41) *Population and Development Review*.

[93] Rossi P and Rouanet L "Gender preferences in Africa: A comparative analysis of fertility choices" 2015 (72) *World Development* 4; see also Madyibi U and Ngqila KH "The 'normalisation'of sex selection within families of Xhugxwala in King Sabata Dalindyebo Local Municipality, Eastern Cape, South Africa" 2020 (34) *Agenda* that indicate that it is more desirable to have a boy as a first child in the communities that they studied.

[94] Dahl E, Beutel M, Brosig B and Hinsch KD "Preconception sex selection for non-medical reasons: a representative survey from Germany" 2003 (18) *Human reproduction*.

[95] Dickens BM *Can sex selection be ethically tolerated?* (2002) 335–336.

[96] Wolf SM "Feminism and Bioethics : Beyond Reproduction" 1996 336.

[97] Bayefsky MJ "Comparative preimplantation genetic diagnosis policy in Europe and the USA and its implications for reproductive tourism" 2016 (3) *Reproductive biomedicine & society online*.

jurisdictions, non-medical sex selection emphasises the relevance of the differences between the sexes.

The interest of society

[105] Indeed, many of these issues go to the core of what society deems to be the norm: a heterosexual family with two children – one male and one female. It re-enforces certain stereotypes on what "family" is[98] and reinforces preconceived gender roles and stereotypes linked to the sex of a child. The Constitutional Court stated so eloquently in *Minister of Home Affairs v Fourie*[99] that 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".[100]

[106] The other argument against sex selection is the "slippery slope" argument - the idea that sex selection is the start of so-called "designer babies",[101] where parents can choose their baby's sex, with future possibilities to include their hair colour and eye colour, and even intelligence.[102] This has the potential to reinitiate eugenic movements.[103] In many countries, sex selection is only available to those who can afford the high cost, which comes with other socio-economic ethical complications.

[107] Selecting the characteristics of a child can also be viewed as a form of consumerism: parents can "order" a child, choosing the child's genetic makeup instead of respecting the child's inherent worth, regardless of their specific characteristics.

The interest of the child

[108] This leads to the argument that the complexity of (future) children's traits are reduced to one: their sex. Certain methods of preimplantation sex selection are not 100% accurate, leading to the possibility that a child might be born the "wrong" sex. Alternatively, the

---

[98] Shahvisi A "Engendering harm: a critique of sex selection for “family balancing”" 2018 (15) *Journal of Bioethical Inquiry*.

[99] [2005] ZACC 19; 2006 (3) BCLR 355 (CC); 2006 (1) SA 524 (CC).

[100] Par 59.

[101] *AB v Minister of Social Development* [2016] ZACC 43 par 149 – the Constitutional Court expressed that it is difficult to find a precise explanation of what is intended by the term.

[102] Stankovic B "" It's a Designer Baby!"-Opinions on Regulation of Preimplantation Genetic Diagnosis" 2005 (9) *UCLA JL & Tech.*

[103] Kudina O "Accounting for the moral significance of technology: Revisiting the case of non-medical sex selection" 2019 (16) *Journal of Bioethical Inquiry* 75.

knowledge of having been chosen can go either way: children might feel that they were "chosen" or be under pressure, wondering if they hold up to their parent's expectations. Or they might have guilt because of the discarded embryos.

[109] Discarding an embryo because it is not of the desired sex raises further moral issues about the moral status of an embryo relative to the potential of it developing into an autonomous child with independent moral standing – and then, with it, the question of what to do with the surplus of embryos.[104]

[110] These moral objections must be understood in the context of South African law, where both the common law and constitutional jurisprudence do not protect potential,[105] as a foetus only enjoys legal protection once it is born alive.[106] However, the progressive limitation on a woman's right to terminate her pregnancy as the pregnancy advance indicates that the more the embryo develops (into a foetus), the greater the protection it is afforded.[107] In that sense, an argument may be possible that the law does indeed protect potential.

Conclusion on the interests protected

[111] It is all these considerations that the executive must contend with when making regulations. Many of these questions are ethical or policy questions that the court can only review for their constitutionality, as the applicant requests the court to do. Mindful of the ethical implications, I will now deal with the constitutionality of the regulation.

Regulation 13

[112] The *Regulations Relating to the Artificial Fertilisation of Persons* outlaw preimplantation and prenatal testing for selecting the sex of a child if there is no therapeutic purpose. Regulation 13 states

---

[104] Kudina O "Accounting for the moral significance of technology: Revisiting the case of non-medical sex selection" 2019 (16) *Journal of Bioethical Inquiry* 78.

[105] Although it protects potential interests of a child through, for instance, the *nasciturus* fiction.

[106] *Christian Lawyers Association of South Africa v Minister of Health* 1998 4 SA 1113 (T).

[107] Up to twelve weeks a woman at her request (thus without the permission of anyone, and without having to give reasons). From 13 – 20 weeks, termination can only happen if a medical practitioner agrees that there is a physical or mental health risk; there is a possibility of foetal abnormality; the pregnancy is due to rape or incest or the pregnancy will significantly affect the social or economic circumstances of a woman. After 20 weeks, termination can only take place if the woman or the foetus life is at risk.

> "Preimplantation and prenatal testing for selecting the sex of a child is prohibited except in the case of a [sic] serious sex linked or sex limited genetic conditions."

[113] The applicant avers that this infringes on the right to bodily and psychological integrity (s 12(2)(a) and (b)), privacy (s 14) and equality (s 9(3)). It asks that the prohibition on sex selection be declared unconstitutional and invalid and that it is struck out in both sets of regulations where it is found.[108]

[114] Replying to this, the respondent states that there are three broad arguments against the state permitting preimplantation sex selection, namely:

a) It is wrong for the state to endorse sex selection because it is intrinsically unethical;

b) It is unethical as it reinforces sexual discrimination, and this cause harm;

c) It may disrupt the ratio between the sexes due to discrimination.

[115] Despite the respondent stating that it will be unethical, it clarifies that it proposes that the regulations be amended to allow for preimplantation testing for sex selection. This will then be subject to the fertility specialist recording the requests in a central data bank for each live birth that follows. If, after two years, the evidence of the central data bank shows a bias in favour of a particular sex, the Minister of Health may place a moratorium on preimplantation sex selection by notice in the government gazette for a period not more than five years.[109] Thus, should the regulations be promulgated in their current form, the issue raised by the applicant will become "academic".[110]

[116] As I explained before, until the respondent promulgates new regulations, the applicant has a right to question the constitutionality of the existing regulations. Since the legislative process is also uncertain, there is no guarantee that the proposed amendments will be affected. I, therefore, deal with this contentious issue below.

---

[108] Exactly the same wording is found in Regulation 6 of the *Regulations Relating to the use of Human Biological Material.*

[109] Respondent's answering affidavit, CaseLines 0002-74.

[110] Respondent's answering affidavit, CaseLines 0002-74.

[117] I will set out the legal position in international law and various foreign jurisdictions, as s 39(1)(b) & (c) of the Constitution requires, before considering the specific arguments advanced by the applicant, followed by my analysis and finding.

- **International law**

[118] Council of Europe's Convention on Human Rights and Biomedicine[111] provides in article 14 that:

> "The use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided."

[119] Instruments such as the Cairo[112] and the Beijing Declarations[113] contain a definition of reproductive health and recognise various rights connected to it. It does not mention a right to determine the sex of children. The documents do take a clear stance on the practice of (prenatal) sex selection and infanticide, specifically with son selection.

- **Foreign law**

[120] The *Human Fertilization and Embryology Act* of 2008 prohibits non-therapeutic sex selection in the United Kingdom. The Human Fertilisation and Embryology Authority, which licenses fertility clinics in the UK, has ruled several times over the past 20 years that sex selection should not be allowed for "social" reasons, arguing that it is not in the best interests of either society or the child. Sex selection is not a legal ground for an abortion in the UK.

[121] In India, the *Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act* of 1994 prohibits sex-selective termination of pregnancy. There is also a ban on the use of technology to determine the sex of the foetus.[114] This has, however, been criticised

---

[111] Council of Europe *Convention for the protection of human rights and dignity of the human being with regard to the application of biology and medicine* (1997).

[112] International Conference on Population and Development *Population and development : programme of action adopted at the International Conference on Population and Development, Cairo, 5-13 September 1994*.

[113] United Nations DoPICoW *The Beijing declaration and the platform for action : fourth World Conference on Women, Beijing, China, 4-15 September 1995* (1996).

[114] Bumgarner A "A Right to Choose: Sex Selection in the International Context" 2007 (14) *Duke J. Gender L. & Pol'y 1302*.

as ineffective and not adequately implemented as the testing and termination of pregnancies with female foetuses still occurs despite legislation.[115]

[122] Germany has the *Embryo Protection Act,*[116] which makes sex selection a criminal act. Abortion is technically illegal in Germany but allowed in certain circumstances for up to 12 weeks. Abortion for sex selection reasons is a crime. For this reason, no information may be given to parents regarding the sex of the embryo or foetus before the end of the 12th week of pregnancy.[117]

[123] The Australian government published guidelines to prohibit sex selection by whatever means, with the reasons given to prevent eugenic abuse.[118]

[124] In Canada, the *Assisted Human Reproduction Act* of 2004 prohibits sex selection. However, the law does not protect the resultant foetus from subsequent termination because of its sex. While the Society for Obstetricians and Gynaecologists of Canada has policies against prenatal testing to identify the sex of the foetus, there is no law in Canada to prevent sex-selective abortion.

[125] Objections raised against sex selection in the Netherlands include that sex selection treats children as mere objects of the wishes and preferences of their parents and not as being which should intrinsically be valued, impacting the human dignity of the child to be born. With this comes the concern that a single trait obliterates the whole – in other words, that the future sex of a child becomes the paramount trait when considering the future of the embryo.[119]

[126] In Israel, preimplantation sex selection is generally restricted except for use in preventing sex-linked disorders. Sex selection, as well as the termination of a pregnancy, is only allowed by the approval of a committee. Sex selection is not listed as a ground for termination of pregnancy. The new laws will do away with the committee, which might mean

---

[115] Bongaarts J and Guilmoto CZ "How many more missing women? Excess female mortality and prenatal sex selection, 1970–2050" 2015 (41) *Population and Development Review* 242.

[116] Gesetz zum Schutz von Embryonen [EschG] of 1990.

[117] Wilhelm M, Dahl E, Alexander H, Brähler E and Stöbel-Richter Y "Ethical attitudes of German specialists in reproductive medicine and legal regulation of preimplantation sex selection in Germany" 2013 (8) *PloS one* .

[118] National H and Medical Research C *Ethical guidelines on the use of assisted reproductive technology in clinical practice and research : 2004 (as revised in 2007 to take into account the changes in legislation)* (2007)

[119] Embryowet, 2000.

that no reason needs to be given for a termination (thereby allowing prenatal sex selection). However, Israel allows parents to use sex selection in non-medical instances under the following conditions: [120]

a) There is a real and imminent risk of significant damage to the mental health of one or both parents, if the procedure is not conducted;

b) Applicants received genetic counselling;

c) Applicants are married and have at least four children of the same sex and want a child of the other sex;

d) Applicants understand that if healthy non-selected sex embryos remain and couples want additional in-vitro fertilisation, those embryos will first have to be used;

e) Both parents give written consent.

[127] In Thailand, sex selection is legal, and Thailand is as such one of the few countries that allow most types of sex selection.[121] The patient however must meet one of the criteria below:

a) the patient should be 35 years or older;

b) the patient should have a history of two or more miscarriages;

c) the patient should have a history of abnormal pregnancy;

d) the husband or wife should possess an abnormal gene; or

e) patient has done at least two or more IVF treatments but was not successful.

[128] In Mexico, preimplantation sex selection is allowed. It has become a very popular technique as it allows parents to prevent genetic diseases and select the sex of babies, allowing for family balancing. Abortion was recently decriminalized.

[129] In the United States of America, this issue is not regulated.[122]

---

[120] https://www.gov.il/en/service/national-gender-selection-committee, Zuckerman S, Zeevi DA, Gooldin S and Altarescu G "Acceptable applications of preimplantation genetic diagnosis (PGD) among Israeli PGD users" 2017 (25) *European Journal of Human Genetics*.

[121] Bhatia R "Cross-border sex selection: Ethical challenges posed by a globalizing practice" 2014 (7) *IJFAB: International Journal of Feminist Approaches to Bioethics*.

[122] Bayefsky MJ "Comparative preimplantation genetic diagnosis policy in Europe and the USA and its implications for reproductive tourism" 2016 (3) *Reproductive biomedicine & society online*.

[130] Apart from these few examples, it should be kept in mind that the vast majority of jurisdictions are not regulating it. With this background, I now turn to the specific arguments of the applicant.

- **The right to bodily and psychological integrity**

[131] S 12(2) makes it clear that

> "Everyone has the right to bodily and psychological integrity, which includes the right
>
> (2)(a) to make decisions regarding reproduction;
>
> (2)(b) to security in and control over their body;"

[132] This provision informs the Choice Act,[123] which provides for the termination of a pregnancy by choice and without having to give a reason within the first trimester of gestation.[124]

[133] The applicant's argument can be summarised as follows: women who conceived through sexual intercourse intend to select the sex of their future child must do so prenatally, testing at ten weeks of pregnancy, together with an elective termination (abortion) of the pregnancy, rather than preimplantation sex selection.

[134] Abortion can directly affect such a woman's bodily integrity, as it involves medical risks. Furthermore, destroying a woman's in vitro embryo (or foetus) destroys an embryo (or foetus) in a woman's body. Many women value embryonic life, and such destruction also impacts a woman's psychological integrity. Women who want a child of a specific sex must thus repeat this cycle until they fall pregnant with a child of the desired sex.

[135] The respondent replies that s 12(2)(a) deals with women's right to enjoy security in and control over their bodies and not the body of another. It, therefore, does not affect the applicant's bodily and psychological integrity but instead deals with the prohibition of genetic testing of an embryo purely to select the sex of the embryo before implantation in vitro.

[136] The applicant states that the Sex Selection Prohibition is invalid as it limits a woman who conceived through artificial fertilisation right to terminate her pregnancy within the first

---

[123] 92 of 1996.

[124] S 2(1)(a).

trimester, including terminating the pregnancy for no therapeutic purposes. In other words, it is invalid because it prohibits non-therapeutic *prenatal* sex selection (available to women who conceived through sexual intercourse).

[137] The applicant states that there is a clear conflict between the regulation that *prohibits* the prenatal testing for "sex selection" of a person impregnated by artificial insemination, and the Choice Act that allows for the termination of a pregnancy in the first trimester of pregnancy without having to provide reasons. The applicant states that given that the Choice Act is primary legislation and the Regulations secondary legislation, the Choice Act must take precedence.

[138] Replying to this, the respondent states that the prohibition on preimplantation sex selection cannot be contrasted with the decision under the Choice Act, as different considerations inform the two. Likewise, the Choice Act cannot be regarded as the primary legislation, as the regulations emanate from the National Health Act and not the Choice Act.[125]

[139] The applicant concludes that if prenatal sex selection must be legally allowed, then the prohibition of non-therapeutic preimplantation sex selection becomes constitutionally untenable. This is because a law that prohibits a woman from selecting the sex of her future child *preimplantation* but allows her to make such a decision *prenatally* is "a cynical paradox" as it increases the physical and psychological health risk to women. The expert opinion of Dr Rodrigues and Ms Samouri supports this contention.

[140] Furthermore, preimplantation sex selection does not per se require the destruction of any embryos (as they can be stored or donated). In contrast, prenatal sex selection necessarily destroys an embryo (of foetus). In other words, an option that legally allows for embryo destruction also for sex selection but makes it illegal to select the sex without embryo destruction simply does not make sense. The applicant also avers this "forces a woman into an avoidable moral quandary".

[141] For these reasons, the applicant states that the regulations infringes s 12(2)(a) and (b) of the Constitution and is therefore unconstitutional and invalid.

---

[125] Respondent's answering affidavit, CaseLines 0002-81.

- **The right to privacy**

[142] The applicant submits that most parents prefer to build their families with children who are the product of the parent's own genes or the genes of the parent's chosen reproductive partner. The applicant then states that the law protects privacy in the truly personal realm. Decisions about building a family using one's own genes, or the genes of a chosen reproductive partner, thus relate to a person's family life that is in the personal realm.[126]

[143] The applicant argues that "[j]ust as a woman can determine the race of her future child by choosing a reproductive partner of a certain race", a woman can also choose the sex of her future child by using preimplantation sex selection. Using this analogy, they base the choice of the child's race and sex in the realm of the *decisions* made by parents. And since these decisions relate to the family life that parents intend to create, it is protected by the right to privacy.

[144] The respondent states that the right of privacy does not entail that an individual can do whatever they please, without regard to the rights of others or the public.[127] In its heads of argument, it refers the court to the arguments made in relation to the psychological evaluation requirement.

- **Right to equality**

[145] As to equality, the applicant makes the following argument: The Sex Selection Prohibition bans "testing for selecting" the sex of a child. However, methods for selecting the sex of one's future child that do not amount to "testing for selecting" are not banned. This is discrimination based on culture and/or belief systems.

[146] The argument postulated is that a woman praying to God to grant her a child of a desired sex is legal. Likewise, consulting an African traditional healer to assist in conceiving a child of a particular sex is allowed. But selecting the sex of one's child using science-based medicine (and therefore based on a belief in science) is legally bad. This is unfair discrimination based on culture and belief (prohibited grounds) and consequently a breach of the Constitution's s 9(3).

---

[126] Soni S "Prêt-à-Porter Procreation: contemplating the ban on preimplantation sex selection" 2019 (22) *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 13 makes the argument that it relates to the right to decide, and not the content of the decision.

[127] Respondent's answering affidavit, par 81, CaseLines 0002-82.

[147] The respondent's answer to this argument is that the applicant has failed to demonstrate a violation of the right, and the challenge should therefore be dismissed.

- **S 36 limitation**

[148] Pre-empting the reason for the prohibition of sex selection, the applicant argues that it is to promote equality between the sexes. This, they argue, is a tenuous argument, as most parents that select the sex of their future child are not necessarily motivated by prejudice against a certain sex – but also relates to desiring a child of a specific sex as a companion or "family balancing".

[149] Furthermore, not allowing sex selection limits women's reproductive choices and, as such, is also infringing on equality.

[150] Aware of the moral issues surrounding sex selection, the applicant argues that "in South Africa we adhere to the constitutional value of pluralism, entailing that the state acknowledges that there is a diversity of opinions on moral issues and that the state should refrain from enforcing one opinion on everyone". Thus, the issue of preimplantation sex selection should be left to each recipient to decide for themselves, based on their *own* value system.[128]

- **Discussion and findings**

[151] I am guided on how to approach the issue of moral pluralism and the court's role in pronouncing on morally laden matters by the Constitutional Court. First, in *Prince v President, Cape Law Society,*[129] speaking about minority rights and battling with what issues fall squarely within the realm of the judiciary, Sachs J stated[130]

> "The search for an appropriate accommodation in this frontier legal territory accordingly imposes a particularly heavy responsibility on the courts to be sensitive to considerations of institutional competence and the separation of powers. Undue judicial adventurism can be as damaging as excessive judicial timidity […] Both extremes need to be avoided."

---

[128] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC) par 136.

[129] 2002 (2) SA 794 (CC), 2002 (3) BCLR 231 (CC).

[130] Paras 155 – 156.

[152] In the *Minister of Health v Treatment Action Campaign*[131] the court, per Ngcobo J, stated

> "[W]hile the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty."

[153] In the case of sex selection, the moral issue is not only an individual moral issue but an issue that can impact society as a whole. It asks whether we as a society should allow people to choose the sex of their child and live with the possible consequences of such a choice (e.g. sex ratios).

[154] I am thus cognizant of the moral context of the issue. In addressing the issues that the applicant raises, I start from the current law that allows for *prenatal* sex selection (up to 12 weeks) and that, in line with the common law and case law, an embryo does not have rights of its own until it develops into a foetus and is born alive.

[155] From the outset, I should note that neither the applicant nor the respondent placed evidence before the court indicating the prevalence of sex selection abortion. Such research may also be difficult, as in South Africa, up to 12 weeks of pregnancy, no reasons need to be given for the termination of a pregnancy.[132] Given the physical and emotional inconvenience and unpleasantness of abortion, I would assume that this form of "sex selection" is rare.

[156] Sex selection is a contested moral and ethical issue marred with contradictions. If we state that sex-selective abortion should not be allowed due to the moral worth of the human foetus, then it becomes difficult to make the argument that abortion as such should be allowed. Likewise, from a sex equality perspective,[133] this issue contradicting: if we view abortion through the lens of giving women the autonomy to make decisions about their own body and reproductive rights, the effect might be that women exercise these rights in certain

---

[131] (2) 2002 (5) SA 721 (CC), 2002 (10) BCLR 1075 (CC) at para 99.

[132] The Choice Act 92 of 1996 s 2(1)(a).

[133] See O'Sullivan M "Reproductive rights" 2008 *Constitutional Law of South Africa (Juta Cape Town Revised Service 3 2011)* par 37.4 for this perspective in the South African context.

cultural contexts to abort females, leading to the entrenchment of sex inequality.[134] It is possible to say that aborting a child due to its sex attaches greater moral repugnancy in a similar way that assaults motivated by sexism do: it is the motivations that are not regulated, rather than the act itself.

[157] Sex selection is also inherently sexist. It relies on stereotypes of what it means to be a girl or boychild, and it rests on assumptions that we make about the behaviours based on the sex of a child. Still, through all these moral issues, in South Africa, a woman need not give reasons for the termination of her pregnancy. This means that should a woman choose to terminate the pregnancy due to the sex of the child, she is free to do so.

[158] In the absence of a justification given why preimplantation it is not prohibited and prenatally it is allowed, it seems an indefensible situation. S 12(2)(a) does not reduce reproductive choices to only when an embryo is inside a woman's body.[135] Also, if my argument is plausible that an embryo enjoys more protection as it grows (later into a foetus), then an embryo preimplantation is on the side of the continuum where there is the least protection in the context of the right to bodily integrity.

[159] Therefore, in this instance, I agree with the applicant that the prohibition is an infringement of s 12(2)(a).

[160] As for the argument that women who are impregnated through sexual intercourse are allowed to test for the sex of their child to enable prenatal sex selection, but not women impregnated through artificial insemination, the argument seems conflated. While the applicant is correct that subordinate legislation in conflict with superordinate legislation is of no effect to the extent of the conflict, only if they deal with the same subject.

[161] Regulation 13 prohibits the testing for the sex of the child, not the termination of pregnancy. The Choice Act does not deal with testing but termination. However, if the argument is that since the testing is prohibited, it precludes the applicant from making a selection and thereby limits the option of electing to terminate the pregnancy within 12

---

[134] See Greasley K *Arguments about abortion: Personhood, morality, and law* (2017) 227.

[135] In *AB v Minister of Social Development* [2016] ZACC 43 par 314 the court clarified that in the case of surrogacy, s 12(2)(a) is only applicable to a woman's own body and not the body of another woman (ie the person carrying the child). This is not the case here, as the woman who seeks protection is the person carrying the child.

weeks, the argument is valid.[136] In such a case, the two provisions must be read together and reconciled as far as possible. If they cannot be reconciled, the Choice Act will take preference.[137]

[162] The privacy argument was fully canvassed under the psychological evaluation, and I need not repeat it here. The argument that the applicant is making in this regard was accepted by the European Court for Human Rights[138] in the context of testing for genetic conditions. However, Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms expressly includes a right to family life. The question is whether it can be extended to testing for sex.

[163] It should be noted that the applicant's argument that a woman can determine the child's race by choosing a reproductive partner of a certain race and, therefore, should also be able to choose a sex, cannot hold. Race, in this instance, refers to the genetics of the partner that will be inherited rather than the sex that will be chosen.

[164] It is also so that the right of privacy does not afford a person to "do what they please". The state, also through the courts, often interferes with the private realm. The *Freedom of Religion South Africa v Minister of Justice and Constitutional Development*[139] case dealing with corporal punishment at home is one such example. There might well be a good reason for the state to limit this right, but none was before the court.

[165] The state can thus limit this right to choose the sex of a child, even if it is in the truly private realm and limits parents' autonomy. However, the state neither provided reasons nor justified such a limitation. In the absence of such, I find that the applicant did make a case that there was an infringement of the right of privacy.

[166] However, the right to equality argument must fail. The applicant compares the content of belief systems that goes to the innermost sanctum of a person's being, intertwined with their understanding of how the world works, with science-based medicine (and not the belief in science-based medicine). Nothing would, for instance, bar a Christian person from using the science-based medicine to fall pregnant (or even choose the sex of

---

[136] This can be done through the interpretative rule of *ex correlativis* relating to cases where there is some sort of reciprocal relationships, see Du Plessis LM *Re-interpretation of Statutes* (2002) 239.

[137] Du Plessis LM *Re-interpretation of Statutes* (2002) 178.

[138] *Costa and Pavan v Italy* 54270/10.

[139] [2019] ZACC 34; 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC); 2020 (1) SACR 113 (CC).

her child), or even thank her God for creating this medicine that enables all this. Likewise, a hope expressed as prayer is not comparable with a medical procedure with a near-certain outcome.

[167] The applicant, therefore, did not make out a case that the right to equality has been infringed.

[168] To summarise:

a) Regulation 13 infringes on the right to bodily integrity and reproductive choices as it allows for prenatal sex-selection, but not preimplantation sex selection. There was no justification given for the limitation of the right.

b) The right to decide about your family composition falls within the personal realm. This can be limited by the state, if such a limitation can be justified in terms of s 36 of the Constitution. No such justifications were before the court, and there are no other facts from which to make logical inferences. This means that regulation 13 is an infringement of the right to privacy.

c) Lastly, the regulation is not an infringement of the right to equality.

(iii) The prohibition of disclosure of certain facts

[169] Regulation 19 states

> "No person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders."

[170] It places a blanket ban on any communication by any persons – also a person who donated towards or resulted from artificial fertilisations about any matter related to the artificial fertilisation or reproduction resulting from such artificial fertilisation.

[171] This regulation, the applicant avers, infringes on the right to privacy and the right to freedom of expression.

[172] The respondent states that the proposed new regulations will only prohibit fertility clinics and staff and no longer on donors or recipients of gametes. Again, the Respondent

states that should the regulations be adopted in their current form, the issues raised will become "academic".[140]

Right to privacy

[173] The applicant states that what one chooses to communicate with one's personal circle of family and friends about one's own involvement with artificial fertilisation is in the sphere of privacy. The current regulation legally bans a recipient from sharing and discussing her experience with family and friends. The same goes for husbands and male partners who donate their gametes for the artificial fertilisation of their wives or partners. Likewise, anonymous gamete donors cannot discuss their experiences with family or friends. The applicant avers this is an infringement of their right to privacy.

[174] The respondent refers the court to their arguments regarding the right to privacy under the previous two regulations.

Freedom of expression

[175] The applicant avers that the regulation silence the voices of persons who undergo, donate, or result from artificial fertilisation and that they can thus not share their experiences. This, they aver, infringes the right of freedom of expression.

[176] The respondent, in its heads of argument, states that freedom of expression is one of a web of mutually supporting rights. The right (along with its related rights) protect individuals, also to express their opinion individually or collectively, even where views are controversial. Thus, they state, that the prohibition of disclosure of facts cannot by any stretch of imagination fall within the ambit of the right to freedom of expression.

S 36 limitation

[177] These limitations, the applicant states, does not serve a legitimate government purpose, and as such is unconstitutional. The respondent does not address this issue.

Discussion and findings

[178] The right to privacy has been dealt with under the other two regulations and need not repeating here. Relying the information in the inner most realm of an individual's private life deserves the strongest protection. I am satisfied that the prohibition, insofar as it bars

[140] Respondent's answering affidavit, par 81, CaseLines 0002-75.

parties involved in artificial fertilisation from finding comfort with their family and friends by sharing their experiences, is unconstitutional.

[179] The respondent's short reply did not convince me otherwise. There was also no justification given for the infringement.

[180] Freedom of expression serves two important functions. Firstly, it is vital for the establishment of a democratic society. But it is also, secondly, an essential aspect of what it is to be human. It empowers individuals, gives them agency, and helps with informed decision-making. It has been regarded as a *sine qua non* for a person's right to realise their potential as a human being, which is important for every individual's empowerment to autonomous self-development.[141]

[181] I am satisfied that the applicant made a case that the regulation, as applicable to parties undergoing artificial insemination treatment, infringes on these rights.

[182] The respondent's short reply did not convince me otherwise. There was also no justification given for the infringement.

[183] Therefore, regulation 19 infringes the right to privacy, and the right to freedom of expression.

Remedy

[184] S 172(1)(a) gives the court the power of constitutional review. It places a duty on the courts to "declare any law or conduct that is inconsistent with the Constitution" as invalid to the extent of its inconsistency.[142]

[185] These powers must be exercised with restraint to ensure that the courts do not step into the realm of other branches of the state. When courts deal with legislation, extra care should be taken not to overstep the boundaries of the executive (or legislature).

[186] The court may make an order that is just and equitable.[143] This links to s 38 of the Constitution that allows for "appropriate relief", which requires a balancing exercise between the various interests of all those who may be affected by a court order granting

---

[141] *Case v Minister of Safety and Security, Curtis v Minister of Safety and Security* [1996] ZACC 7; 1996 (3) SA 617; 1996 (5) BCLR 608 par 26.

[142] The Constitutional Court need not confirm regulations that are declared constitutionally invalid.

[143] S 172(1)(b).

such relief. This broad discretion allows the court also to manage the consequences of a declaration of invalidity in a sensible manner. The remedies I give are thus within this discretion.

[187] To structure the remedy, the applicant referred the court to the judgment of *Nandutu v Minister of Home Affairs*.[144] In the *Nandutu* case, the court declared specific provisions unconstitutional, suspended the declaration of invalidity for 24 months from the date of the order, gave the remedy of reading-in in the interim, and ordering that if the defect is not remedied within the period of suspension for the interim reading-in to become final. This seems to be a sensible approach that provides relief to the applicants but also shows enough deference for the executive to amend or replace the regulations.

(i) The remedy requested: psychological evaluation

[188] The applicant asks that regulation 7(j)(ii) of the *Regulations Relating to Artificial Fertilisation of Persons* be declared unconstitutional and invalid to the extent that it applies to married couples or people in permanent relationships. This declaration should be suspended for 24 months, with the reading-in of the following words during the period of suspension:

> "shall, in the event of a request in respect of which the donor and recipient are known to each other, <u>except where such donor and recipient are a couple that is married or in a permanent domestic life-partnership, ensure that there is…</u>"

[189] The respondent questions the choice of remedy, stating that "reading-in" if the court declares the regulations to be unconstitutional is not permissible. Rather, the appropriate remedy is to allow the legislative amendment to process to unfold and to complete before a pronouncement can be made due to the complex legal and ethical issues raised by the subject matter of the regulations. "Reading-in" constitutes a departure from the policy decisions of the executive. In the alternative, should the court find the regulations invalid, it should be remitted back to the Minister for amendment.

[190] The remedy of reading-in allows a court to read words into an unconstitutional legislative provision to cure it from its unconstitutionality. This is where the

[144] [2019] ZACC 24.

unconstitutionality is due to an omission of certain words or to narrow the reach of the provision that is unduly invasive of a right.[145]

[191] While this raises concerns about whether a court is not unduly interfering with the powers of the executive (in this case), the Constitutional Court also rightly indicated that reading-in does give the judiciary the final word on how these provisions should be formulated. The executive (in this case) can still, within the constitutional limits indicated in the judgment, amend the remedy by re-enacting regulations (as it purportedly plans to do).[146]

[192] In this instance, I regard reading-in as the applicant suggested as an appropriate remedy, cognisant of the fact that the executive is free to re-enact the regulations within the limits of the Constitution.

(ii) The remedy requested: sex selection

[193] The applicant asks for the court to declare the Sex Selection Prohibition invalid and to strike out Regulation 13 of the *Regulations Relating to the Artificial Fertilisation of Persons* and the mirroring provision, Regulation 6 of *the Regulations Relating to the use of Human Biological Material*.

[194] The respondent denies that the remedy is to declare the regulations invalid and that the legislative amendment process should unfold before any pronouncement can be made on the validity or not of the impugned regulations.

[195] I have taken great care to set out the possible constitutional problems in my judgments regarding "sex selection". I have also given reasons why the regulation is unconstitutional and invalid. I do, however, deem it prudent to suspend the order of invalidity for 12 months to allow the executive to amend or replace the regulations by including possible conditions for preimplantation sex-selection or if the new regulations still prohibits it, to provide adequate reasons for such a decision within the confines of the Constitution. Should the regulations not be amended or replaced within 12 months of the order, the regulations must be struck out.

---

[145] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2007 (5) SA 400 (CC) par 74; *S v Manamela* [2000] ZACC 5.

[146] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2007 (5) SA 400 (CC) par 76.

(iii) The remedy requested: prohibition on disclosure

[196] For Regulation 19 of the *Regulations Relating to the Artificial Fertilisation of Persons*, the applicant initially requested the remedy of reading-in as well but later stated that reading-down is a better option. The purpose of the regulations, they proffer, is to protect the people undergoing treatment's privacy and not to prohibit them from speaking about the experience if they choose. Therefore, they ask the court to read down that "no persons" does not include the persons who undergo, donate towards, or result from artificial insemination themselves.

[197] Again, the respondent states that this is not appropriate. Instead, the legislative process of the draft regulations must first be completed. Should the court find the regulations invalid, the appropriate remedy is to revert the matter to the Minister for consideration to consider the amendment.

[198] When the court finds a regulation constitutionally invalid, it must first attempt to interpret it in a way that would render it constitutionally valid through reading down. Reading down a less that reading-in, as the text does not change. It is no so much a remedy, than a rule of interpretation that saves the provision from unconstitutionality.

[199] I find reading down to be a sensible remedy in this case. If the prohibition's purpose is to protect the persons undergoing or donating towards artificial fertilisation from having their information shared unauthorised (it was not disputed), then it follows that if they themselves elect to share the information, they are not prohibited from doing so. Therefore, interpreting "no person" to exclude the persons who undergo, donate towards, or result from artificial fertilisation themselves, would save it from unconstitutionality.

Costs

[200] The applicant asked the court for a punitive cost order since the respondent did not place a case before the court to defend or rationalise the impugned provisions. Despite the respondent’s shortcomings in its affidavit and argument (relying mostly on its points *in limine* to succeed rather than to engage substantively), I am not inclined to give a punitive cost order.

ORDER

[201] In the result, the following order is granted:

1. Regulation 7(j)(ii) of the *Regulations Relating to the Artificial Fertilisation of Persons* is declared unconstitutional and invalid. The declaration of invalidity is suspended for 24 months from the date of this order.
2. During the period of suspension, the following is to be read into Regulation 7(j)(i) "except where such donor and recipient are a couple that is married or in a permanent domestic life-partnership".
3. Should the defect not be remedied within the suspension period, the interim reading-in shall become final.
4. Regulation 13 of the *Regulations Relating to the Artificial Fertilisation of Persons* and Regulation 6 of *the Regulations Relating to the use of Human Biological Material* are declared unconstitutional and invalid. The declaration of invalidity is suspended for 12 months from the date of this order.
5. Should the defect not be remedied within the suspension period, the regulation must be struck.
6. The respondent must pay the applicant's costs.

WJ du Plessis
Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	DW Thaldar
Instructed by:	M van Aarde/ Gouse van Aarde attorneys
For the respondent:	P de Jager SC / H Mpshe
Instructed by:	State Attorney (Nelson Govender)
Date of the hearing:	21 April 2022
Date of judgment:	19 July 2022