## **Children, genes, and ancestors: Understanding the judicial mind in AB v Minister of Social Development**

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*A long time ago, in a land far, far away…*

Shortly before the Interim Constitution entered into force, the case of *Van Rooyen v Van Rooyen*,[[1]](#footnote-1) was heard by the then Witwatersrand Local Division of the Supreme Court. The case concerned the revision of the visitation rights of a divorced mother. Subsequent to her divorce from her husband (and father of their children), she entered into a lesbian relationship. The father perceived the children being exposed to the mother’s homosexual relationship as risking psychological harm to the children. The court took specific note of the Bill of Rights that was soon to enter force, and held that – following the Bill of Rights – it respected the mother’s homosexuality. However, the court held that should the mother’s lesbian partner share the mother’s bedroom during a visit by the children, it would expose the children to ‘confusing signals’ regarding sexuality that would be ‘detrimental’ to the children. As such, the court framed the case as a balancing exercise between conflicting rights: On the one hand the right of the mother not to be discriminated against based on her sexual orientation, and on the other hand the best interests of the children. The court held that the best interests of the children should be paramount, and consequently that (a) the mother’s lesbian partner may not share the mother’s bedroom during the children’s weekend visits, and (b) the mother’s lesbian partner may not live in the same house as the mother during the children’s holiday visits. Was this court order really in the best interests of the children?

Since the time of the *Van Rooyen* judgment, dramatic progress that has been made regarding the legal and social equality of homosexual persons. For the contemporary legal analyst, it should be apparent that the *Van Rooyen* court’s reasoning entailed a false dichotomy between the parent’s open homosexual lifestyle, and the best interests of the child. From our current vantage point, the *Van Rooyen* court used the best interests of the child as a smokescreen for prejudice.

But, our present time may also suffer from social and cultural attitudes that may in future – or even presently, by more progressive members of society – be regarded as prejudice. Consider the question: What are the prejudices of our present time? Or, stated with more exactness, what are the social norms that have prominence in our present time that entail dislike towards an idea, group of persons, et cetera, but that are not evidence-based? Similar to what happened in the *Van Rooyen* judgment, our courts and lawyers may – consciously or unconsciously – fall prey to prevailing prejudice when interpreting rights, such as the best interests of the child, and interpreting the law in general. This is not only a hypothetical proposition. I suggest that it has indeed happened in a recent Constitutional Court case, which I introduce next.

*Not so long ago, in a land far, far away…*

The case of *AB v Minister of Social Development*[[2]](#footnote-2) (hereafter *AB*) centred on how the best interests of the child should be interpreted in a rather unconventional reproductive context, namely surrogate motherhood and the conception of the child by using anonymous donor gametes. AB, the first applicant, had a sad history of failed attempts to become a mother: First by undergoing in vitro fertilisation (IVF) using embryos created from her own eggs and her husband’s sperm; then, given that she was entering menopause and her own eggs were of insufficient quality, using embryos created from donor eggs and her husband’s sperm; and lastly, following a divorce, using embryos created from donor eggs and donor sperm.[[3]](#footnote-3) Altogether, AB underwent 18 failed IVF attempts. When IVF proved to be a cul-de-sac, AB started to explore surrogate motherhood as a reproductive avenue. This avenue, she soon discovered, was legally closed to her: The Children’s Act 38 of 2005, which regulates surrogate motherhood, requires in section 294 that, as a single commissioning parent, she had to use her *own* eggs for the conception of a surrogacy child. Apart from the fact that it was medically impossible for her to comply with this requirement of the Children’s Act, the bigger normative question was: Why is using one’s own genes so important? (Not to mention several legal questions, such as Why could AB use donor gametes for self-gestation, but not for surrogate gestation?)

AB challenged the constitutionality of section 294 based on six rights in the Bill of Rights: human dignity,[[4]](#footnote-4) equality before the law,[[5]](#footnote-5) non-discrimination,[[6]](#footnote-6) the right to make decisions regarding reproduction,[[7]](#footnote-7) privacy,[[8]](#footnote-8) and access to healthcare.[[9]](#footnote-9) She was joined by the Surrogacy Advisory Group, a non-profit company, as second applicant. The Minister of Social Development, supported by the Centre for Child Law as amicus curiae, opposed the application. The best interests of the (future) child took centre stage from the onset: While the applicants argued that the best interests of the child do not require a commissioning parent’s own gametes to be used for the conception of the child, the Minister and the Centre argued the opposite. Importantly, the applicants’ position was informed and supported by extensive evidence on child psychology. This included two expert opinions by academics at the University of Cambridge in the UK who specialise in the psychology of children who were brought into the world using new reproductive technologies, such as donor conception and surrogacy. These experts presented the court with overviews of numerous empirical studies on the psychological wellbeing of such children. The results consistently showed that a parent–child genetic link is not required for the psychological wellbeing of the child. The applicants further filed an expert opinion by a local South African clinical psychologist who specialises in the field of new reproductive technologies, and who agreed with opinions of the Cambridge experts. In contrast, the Minister filed an opinion by a bioethicist who presented an argument that a parent–child genetic link is essential for the psychological wellbeing of the child. This bioethics opinion suffered from numerous demerits, chief among them that a bioethicist is not qualified to present an opinion in the field of psychology. Eventually, the Minister abandoned her own expert (with good reason) and did not place any reliance on the bioethics opinion. The Centre did not file any expert opinion. Accordingly, from an evidentiary perspective, the interpretation of the best interests of the child in the context of the case should have been clear-cut.

How did the courts decide? Although the Pretoria High Court found in favour of the applicants, a majority of the Constitutional Court found in favour of the Minister and the Centre – disregarding the evidence before it without analysis or good reason. I have previously analysed the *AB* legal saga from an evidentiary perspective, and highlighted this disconcerting snub of the rule of law. What ideas regarding the best interests of the child were so deeply ingrained in the judicial minds of those deciding the *AB* case to mentally block out the evidence? In this present article, I explore the social normative context of the *AB* decision, identify the social norms that were reinforced by the decision, and consider the constitutional tenability of such social norms and their judicial reinforcement. But first I familiarise the reader with the argument about the best interests of the child that won the day in the Constitutional Court.

*The child’s right to know his or her genetic origins*

If the evidence is against you, invent a new right. This appears to have been the litigation tactic employed by the Minister (and eagerly endorsed by the Centre) that ultimately proved successful in securing a majority of the Constitutional Court justices’ votes. For purposes of analysis, the right-inventing argument can be formulated as two interconnected syllogisms:

* Knowing one’s genetic origins is important to a child’s development of a positive self-identity (Premise 1a)
* Having a positive self-identity is in the best interest of a child (Premise 1b)
* Therefore: Knowing one’s genetic origins is in the best interest of a child (Conclusion 1, Premise 2a)
* The paramountcy of the best interest of a child is a constitutional right (Premise 2b)
* Therefore: A child has the right to know his or her genetic origins (Conclusion 2)

This then is how new rights are born from old ones: A child’s (purported new) right to know his or her genetic origins is derived from the (existing and remarkably nebulous) best interest of a child principle – reminding one of how Athena was born from the head of Zeus. The applicants took issue with the very first premise (1a), namely that knowing one’s genetic origins is important to a child’s development of a positive self-identity, and hence rejected the conclusions of both the syllogisms. The applicants argued that the first premise a factual statement within the proper province of child psychology, and that there was no psychological expert opinion presented to the court to support this statement.

*Brief notes on the remainder of the article:*

* What exactly is meant by the concept ‘genetic origins’? The new right is vague. Is a name enough? Or does it include other information on the genetic parent?
* In traditional black culture, a genetic link is essential for the ancestors to accept a child. If the ancestors do not accept a child, bad luck will follow the child for the rest of his or her life. As such, the idea of intentionally creating a child who will not know the identity of his or her parents is viewed as evil.
  + The minority hinted that this prejudice informed the majority decision.
  + During oral argument, Justice Moseneke made it clear that his aversion in the applicants’ case stems from traditional black culture.
* Constitutional value of pluralism: Why privilege traditional black culture? Or more specifically, why enforce a social norm of traditional black culture on everyone?
* Constitutional commitment to the open society – open society rejects the authority of the merely traditional, and requires that all values be subjected to reason.
* Psychological expert opinion: Not knowing one’s genetic origins can *complicate* identity formation, but does not necessarily impact negatively on a child’s psychological wellbeing.
  + Thaddeus Metz’s example of the child from a mixed-race or inter-cultural marriage – the development of self-identity of such a child would also be complex (not dissimilar from to a child who does not know his or her genetic origins).
  + Is being faced with a more *complicated* psychological process something that should be avoided? Is it in the best interests of the child to have an *uncomplicated* or *simple* life? And should the law take note of this and enforce it?
* Remember, we are considering the best interests of a *future* child. What the majority’s decision means, is that it is better for the future child (that AB wanted to create) never to come into existence. How is non-existence in the best interest of the future child?

*And the conclusion will bring the article full circle:*

Similar to the *Van Rooyen* judgement two decades ago, the majority judgement in *AB* reduced the best interests of the child criterion to a vehicle for prejudice. The times have changed, the subject matter is different, but the stratagem of disguising prejudice as ‘the best interests of the child’ is the same.

1. 1994 2 SA 325 (W). [↑](#footnote-ref-1)
2. [2016] ZACC 43, 2017 (3) SA 570 (CC). [↑](#footnote-ref-2)
3. It is interesting to note that women who undergo in vitro fertilisation themselves can *elect* to use donor gametes for the conception of their children. This choice is not limited to women who cannot, for a medical reason, use their own eggs; this choice is also not limited to just using donor eggs, but can include donor sperm too. Therefore, a woman can choose to be impregnated with an embryo that was created using eggs and sperm from donors of her choice. [↑](#footnote-ref-3)
4. Constitution of the Republic of South Africa 1996, s 10 (hereafter the ‘Constitution’). [↑](#footnote-ref-4)
5. Constitution s 9(1). [↑](#footnote-ref-5)
6. Constitution s 9(3). [↑](#footnote-ref-6)
7. Constitution s 12(2)(a). [↑](#footnote-ref-7)
8. Constitution s 14. [↑](#footnote-ref-8)
9. Constitution s 27(1)(a). [↑](#footnote-ref-9)