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THE EXCLUSION OF PARENTAL RIGHTS AND RESPONSIBILITIES FOR UNMARRIED PARENTS OF CHILDREN CONCEIVED VIA ARTIFICIAL INSEMINATION

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Abstract: *The Children's Act 38 of 2005, as the mechanism which gives effect to the rights of children as contained in the Constitution of the Republic of South Africa, 1996 as well as the international treatises, such as the African Charter on the Rights and Welfare of the Child and the United Nations Convention on the Rights of the Child, brought about welcome changes to the concept of parental rights and responsibilities. This is evidenced by the fact that the Children's Act is child-centred and accentuates the equality and dignity of children. Notwithstanding the noteworthy improvements made by the Children's Act with regard to the rights and protection of children, there was still a lacuna in the law in respect of section 40 of the Children's Act as parental rights and responsibilities were not automatically conferred on permanent life partners where their child was conceived by artificial insemination. This was the position until the Constitutional Court confirmation order in V VJV and Another v Minister of Social Development and Another [2023] ZACC 21 which confirmed the decision of the Gauteng High Court declaring section 40 unconstitutional on the basis of marital status and sexual orientation. This legal note discusses the decisions of both the High Court and the Constitutional Court in respect of section 40 of the Children's Act.*

Keywords: *Same-sex life partners, artificial insemination, parental rights and responsibilities, Children's Act, Constitution of the Republic of South Africa, unfair discrimination.*

Introduction

In June 2023, the Constitutional Court in *V VJV and Another v Minister of Social Development and Another*[1] confirmed the decision of the Gauteng High Court in *VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development*[2] that section 40 of the Children's Act 38 of 2005 was unconstitutional as it was discriminatory on the basis of marital status and sexual orientation. This section had previously denied permanent life partners automatic parental rights where their child was conceives as a result of artificial insemination. The legal note firstly discusses the Gauteng High Court decision and thereafter the Constitutional Court's confirmation of the order of unconstitutionality which was granted by the High Court in respect of section 40 of the Children's Act is addressed.

1. VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development

1.1. Facts of the case

The facts of the case were as follows: The first applicant met the second applicant at their place of work in July 2016:[3] They have been in a lesbian same-sex permanent life partnership since January 2019.[4] They were regarded as a couple in a permanent life partnership by their close relatives from both sides of the family as well as by their friends, and the

[1] [2023] ZACC 21.
[2] (27706/2021) ZAGPPHC 114.
[3] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 6.
[4] Ibid.

community in which they lived.[1] The second applicant has a son from a previous marriage and both parties have been clear that they would like to have children of their own.[2] They were of the opinion that they have much to offer a family as they are both financially stable and are both fully committed to the caring and rearing of children should they have children in the future.[3] The parties proceeded with *in vitro* fertilisation (IVF) where the gametes of the first applicant and that of a donor were fertilised through the IVF process. The fertilised embryos were then successfully transferred into the uterus of the second applicant, resulting in a pregnancy. The second applicant subsequently gave birth to twins.
The Centre for Child Law in Pretoria was admitted as *amicus curiae* in the proceedings in the Gauteng High Court as per Rule 16A of the Uniform Rules of Court.[4]

1.2. Issue

Section 40 of the Children's Act provides:
(1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.
(b) For the purpose of paragraph (a) it must be presumed, until the contrary is proved, that both spouses have granted the relevant consent.
(2) Subject to section 296, whenever the gamete or gametes of any person have been used for the artificial fertilisation of a woman, any child born of

[1] Ibid.
[2] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 7.
[3] Ibid.
[4] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 1.

that woman as a result of such artificial fertilisation must for all purposes be regarded to be the child of that woman.
(3) Subject to section 296, no right, responsibility, duty or obligation arises between a child born of a woman as a result of artificial fertilisation and any person whose gamete has or gametes have been used for such artificial fertilisation or the blood relations of that person, except when-
(a) that person is the woman who gave birth to that child; or
(b) that person was the husband of such woman at the time of such artificial fertilisation.

The High Court had to determine whether section 40 of the Children's Act was inconsistent with the Constitution and therefore discriminatory as it did not contain the words "permanent life partner" after the word "spouse" or "husband" in section 40. Furthermore, the High Court had to decide whether the word "parent" as defined in section 1 of the Children's Act was also inconsistent with the Constitution as the definition as expounded in section 40 above excluded any person who is biologically related to a child by reason only of being a gamete donor for purposes of artificial fertilisation.[1] In this matter the first applicant was the gamete donor of the children carried by the second applicant. In terms of section 40, the first applicant is excluded from being a parent notwithstanding the fact that she will indeed be the parent to the children conceived via artificial insemination because she will be caring and rearing the children with her same-sex life partner.[2]

1.3. Discussion of the Gauteng High Court Application

In the Gauteng High Court, the first applicant submitted the following:

The definition of the term "parent" in terms section 1 of the Children's Act precludes the first applicant from being a parent to any children born to the second applicant because the first applicant is the

[1] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 4.
[2] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 9.

gamete donor. The definition of "parent" excludes a person from being a parent who is biologically related to a child by reason of only being a gamete donor for the purposes of artificial insemination. The first applicant is excluded from being the legal parent although in reality she will be a parent insofar as taking care and responsibility of the children are concerned.[1]

Furthermore, the first applicant furthermore contended that the legislature did not intend to extend parental rights to the non-genetic partner of the biological mother, notwithstanding the use of the word "spouse" in section 40 of the Children's Act and despite the fact that it was impossible for the gametes of both spouses to be used where the parties are partners to a same-sex relationship.[2]

It was, therefore, submitted by the first applicant that there is a lacuna in our law because both mothers in a same-sex relationship do not obtain parental rights and responsibilities upon the birth of a child who was conceived by means of artificial fertilisation.[3] As a consequence, there exists discrimination against same-sex female partners because parental rights and responsibilities are not automatically assigned to same-sex female couples.[4]

The result of being excluded from being a parent, although the first applicant was in a permanent relationship with the second applicant and the gamete donor, meant that:[5]

(a)The first applicant will not be legally obligated to maintain the children born via artificial insemination.

(b)The children will not be able to inherit intestate from the first applicant.

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[1] Ibid.

[2] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 10.

[3] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 11.

[4] Ibid.

[5] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 12.

(c)The first applicant will also be required to prove that it is in the best interest of the children if she would like to have access to them.
(d)The consent of the first applicant will not be required while the children are still minors, for the marriage of the children, for the removal of the children from South

Africa, for the application of a passport or for the alienation or incumbrance of immovable property.

The first applicant, therefore submitted that the exclusion of her as a parent is legally unfair her because:[1]
(a)*She* may be deprived of the children if anything should happen to the second applicant.
(b)She will not receive the full social recognition to which she is entitled as a parent.
(c)The automatic allocation of parental rights and responsibilities to the second applicant gives the latter a degree of autonomy with regard to decision-making in respect of the children.

The second applicant automatically acquired parental rights and responsibilities towards the children by virtue of the fact that she gave birth to them.

It must be noted that the Centre for Child Law as *amicus curiae* in principle agreed with the applicants that section 40 of the Children's Act is unconstitutional but disagreed with the reasons provided by the applicants for the unconstitutionality of section 40.[2] The Centre for Child Law submitted that the legal question is not whether section 40 discriminates against people on the basis of their sexual orientation but rather whether the exclusion of parental rights and responsibilities to unmarried persons in a permanent life partnership can pass constitutional muster.[3]

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[1] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 13.
[2] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 14.
[3] Ibid.

The Centre for Child Law submitted that when conducting a proper interpretation of section 40, the following can be deduced:[1]

(a) A child born as a result of using a gamete of any person other than those of the married person or his or her spouse for the purpose of artificial fertilisation is deemed to be the child of the married spouses. It is irrelevant as to which spouse's gametes are used for the purposes of artificial fertilisation.

(b) Section 40 is only applicable to married spouses which includes civil unions under the Civil Union Act 17 of 2006, civil marriages in terms of the Marriage Act 25 of 1961 as well as customary unions in terms of the Recognition of Customary Marriages Act 120 of 1998.

(c) The exclusion of unmarried persons from section 40(1)(a) is applicable to both heterosexual as well as same-sex relationships. This meant that the partner who does not give birth to the child, even if such partner was the gamete donor, does not automatically acquire parental rights and responsibilities. The non-birthing parent is required to apply for parental rights and responsibilities in terms of sections 23 and 24 of the Children's Act. This was essentially the crux of the matter and the reason why the applicants brought the application.

(d) The donor of a gamete which is used in the artificial fertilisation process does not acquire parental rights and responsibilities and is not considered the parent of the child except where the donor is also the spouse of the woman who gave birth to the child.

Whilst the High Court acknowledged that while much progress has been made in respect of the rights and recognition of parties to same-sex relationships, the court also noted that the Children's Act was conservatively lagging in respect of artificial fertilisation and the subsequent recognition of unmarried partners as parents.[2]

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[1] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 15.

[2] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 17.

The High Court noted that while, for various reasons people may elect not to enter into a civil marriage, this does not detract from the reality that these partners regard themselves as being in a committed lifelong relationship which includes the possibility of having children where they would then share parental rights and responsibilities.[1]

The High court also pointed out that notwithstanding the concern that domestic partnerships lacked the formality associated with civil marriages in respect of making a commitment to remain together permanently, this concern is also one that is prevalent in civil marriages and customary unions as the latter formalised unions are also privy to a breakdown. The difference between formalised unions and permanent domestic partnerships is that the law protects the former while the parties to the latter remain largely unprotected.[2]

The court then proceeded to cite both international, national and domestic instruments and legislation that recognises that the family is one of the core institutions in all societies. For example, Arts 12 and 16(1) of the Universal Declaration of Human Rights, art 18 of the African Charter on the Rights and Welfare of the Child, section 28(1)(b) of the Constitution and the Preamble of the Children's Act.[3] Case law[4] was also cited to lend weight to the fact that children occupy a special place in the social, cultural and legal arrangements of most societies.[5]

The court furthermore stated that notwithstanding the importance attributed to the institution of marriage and the family, the court stated that family life as contemplated by the Constitution can be provided in many different ways and should reflect societal and tradition changes occurring

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[1] Ibid.

[2] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 18.

[3] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 19.

[4] Ex Parte WH and Others 2011 (6) SA 514 (GNP) which was cited in EJ and Others v Haupt 2022 (1) SA 514 (GP).

[5] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 20.

in modern day South Africa.[1] The court furthermore acknowledged the difficulty in providing a definition for the concept "family" as families come in many different shapes and sizes and care must be taken not to entrench particular forms of family at the expense of other forms of family.[2] The court noted that the Children's Act still regards a marriage as a prerequisite for the establishment of a family and no provision is made in terms of the Children's Act for families who do not conform to the definition as expounded in the Children's Act.[3] The court acknowledged the marriage-centrism aspect of South African family law and that the institution of marriage is granted preference over informal intimate partnerships.[4] The court pointed out that the differentiation and supremacy afforded to spouses married in terms of civil law or customary compared to the lack of recognition and regulation of partners to a permanent domestic partnership is problematic.[5] The court also noted that in all matters concerning the child, the best interests of the child as a consideration is of paramount importance.[6] The court questioned whether section 40 served the best interests of the child.

1.4. Decision of the High Court

The court found that section 40 of the Children's Act unfairly discriminates on the basis of marital status in respect of permanent or lifelong domestic partners who have had children by means of artificial

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[1] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 21.

[2] See Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs 200 (3) SA 936 (CC) & Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa ([1996] ZACC 26.

[3] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 23.

[4] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 26.

[5] Ibid.

[6] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 30.

fertilisation on the basis that their right of equality and dignity are infringed in regard to the inroads to their right to family life.[1]

The court furthermore found that section 40 unfairly discriminates on the basis of marital status in that it differentiates between children born of married parents and children born of unmarried parents.[2]

The court held that the right to family or parental care of children born via artificial fertilisation to unmarried parents are also violated as if such child got injured at school, for example, the school is only required to inform the biological parent and only the biological parent has the authority to determine the treatment of the injured child.[3] The court held that section 40 also violates section 28(2) of the Constitution which requires that the child's best interests is of paramount importance. It would not be in the child's best interest for the child born by means of artificial fertilisation to domestic partners not to have the right to inherit intestate from the other partner to the domestic partnership.[4]

The court held that it was clear that the right to dignity and equality of children born of artificial fertilisation to unmarried personas are violated as well as the right to dignity and equality of the parties to a permanent lifelong relationship.[5]

The High court, therefore, declared section of the CA to be unconstitutional as it was unfairly and unjustifiably discriminatory on the basis of marital status and sexual orientation. To remedy this mischief the court held that the words "or permanent life partner(s)" must be read in after the word "spouse (s)" and "husband" wherever such words appear in section 40 of the Children's Act.

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[1] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 28.

[2] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 27.

[3] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 29.

[4] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 30.

[5] VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 28.

An application for confirmation of the order of constitutional invalidity granted by the High Court, Gauteng Division in respect of section 40 of the Children's Act was made to the Constitutional Court. The Constitutional Court decision will now be discussed.

2. VJV and Another v Minister of Social Development and Another

An application for the confirmation of the order of unconstitutionality in respect of section 40 of the Children's Act, made by the High Court, was lodged in the Constitutional Court.

2.1. The decision of the Constitutional Court

The Constitutional Court confirmed the order of constitutional invalidity of section 40 of the Children's Act made by the High Court as section 40 unfairly and unjustifiably discriminates on the basis of both marital status and sexual orientation by omitting the words "permanent life partner" after the word "spouse" and "husband" wherever these words appear in section 40 of the Children's Act.[1]

2.2. Discussion of the decision of the Constitutional Court

The Constitutional Court stated that section 40 creates differentiation as it automictically assigns parental rights and responsibilities to married parents in respect of children born of artificial fertilisation but fails to do the same for unmarried parents of children born via artificial fertilisation.[2] This amounts to differentiation of treatment to two different categories of persons, namely, married and unmarried persons. In doing so, section 40 elevates the institution of marriage above all forms of relationships and in effect excludes other forms of relationship. As there is no legitimate governmental purpose for this exclusion, the Constitutional Court held that

[1] [2023] ZACC 21 para 97.
[2] [2023] ZACC 21 para 31.

the impugned provision violates the section 9(1) equality rights of the applicants.[1]

As a result of the differentiation being on a specific ground, namely, marital status this means that it will also constitute discrimination in terms of section 9(3).[2] The existence of discrimination on a specific ground activates the presumption that the discrimination is unfair.[3]

The impact of discrimination on the ground of marital status has far-reaching consequences as section 40 sends the message that the conscious choice that permanent life partners to become parents is less respected that the same choice made by married spouses.[4]

The consequence is that the permanent life partnership is devalued which in turn impacts on their dignity.

The Constitutional Court differed from that of the decision of the High Court in respect of section 40 discriminating against the applicants on the basis of their sexual orientation.[5] The Constitutional Court stated that section 40 has a disparate impact on lesbian life partners as it is biologically impossible for two females to reproduce and that that by necessity they are completely reliant on artificial fertilisation if they chose to have a biologically related child.[6] Two men in a same-sex partnership would not rely on section 40 for the conception of their biological child as neither man would be capable of being artificially fertilised. The Constitutional Court, therefore, found that section 40 violates section 9(1) and indirectly discriminates against lesbian permanent life partners on the basis of their sexual orientation.[7]

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[1] [2023] ZACC 21 para 43.
[2] [2023] ZACC 21 para 42.
[3] Section 9(5) of the Constitution of the Republic of South Africa, 1996.
[4] [2023] ZACC 21 para 44.
[5] [2023] ZACC 21 para 48.
[6] [2023] ZACC 21 para 52.
[7] [2023] ZACC 21 para 53.

2.3. Order of the Constitutional Court

The Constitutional Court, therefore, ordered that the words "or permanent life partner(s)" must be read in after the word "spouse (s)" and "husband" wherever such words appear in section 40 but the reading-in remedy was subject to the following:[1]

(a) The reading-in will not apply to persons who were permanent life partners at the time of the artificial fertilisation unless they invoke the benefit of this order by a written declaration signed by both of them. In such event the provisions of section 40(1)(a) as read-in will apply.

(b) In the event that rights and responsibilities in respect of the child/children so born has been assigned to any third party/ies in terms of the Children's Act or any other legislation, or are enjoyed by a former partner of the permanent life partnership only, then:

(i) The party seeking to invoke the benefit of this order will give written notice to the party/ies or former partner of their intention to do so and afford the third party or former partner with an opportunity to object thereto.

(ii) If the third party or former partner objects in writing thereto, the matter must be referred to the Children's Court which will determine the procedure to be followed and issue appropriate orders and directions within its powers.

(iii) The Children's Court, after considering the matter may make any order that is just and equitable and in doing so shall be guided by what the best interest/s of the child/children in question require.

The Constitutional Court, furthermore, ordered that declaration of constitutional invalidity is retrospective as it takes effect from 1 July 2007, but that its operation is suspended for 24 months from the date of this order to afford Parliament an opportunity to remedy.[2] In the event that Parliament does not remedy the constitutional deficiency in section 40 within the period provided for in this order, or any extended period granted

[1] [2023] ZACC 21 para 97.
[2] [2023] ZACC 21 para 97.

by this Court, section 40 will be deemed to read with words "permanent life partner(s)" appearing after the words "spouse(s)" and "husband".[1]

Conclusions

The apex court judgment signifies a departure from discriminatory practices and recognises the equal dignity and worth of all individuals, regardless of marital status or sexual orientation. In legally acknowledging the parental rights of lesbians in a life partnership, the Constitutional Court judgment marks a significant step forward in the ongoing struggle for equality and justice**.** The Court's judgment underscores the transformative nature of the post-democracy era, a triumph for inclusion and diversity over historical exclusion**.** It signifies a departure from discriminatory practices and recognises the equal dignity and worth of all individuals, regardless of marital status or sexual orientation in the ongoing struggle for equality and justice in our rapidly evolving democratic society.

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[1] *Ibid*.

VJ and TR v Minister of Social Development and Minister of Justice & Constitutional Development at para 10.
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