Realising the right to reproduce with assistance in South Africa: a constitutional perspective

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CHAPTER 7
CONCLUSIONS AND RECOMMENDATIONS

7.1 Introduction

As previously indicated in chapter 1, an increasing number of individuals in South Africa are making use of ART to fulfil their desires for offspring.[1] This includes individuals who desire to conceive posthumously,[2] those who desire to produce bi-paternal twins,[3] and more recently those wanting to reproduce while in prison.[4] In two of the instances, permission was granted.[5] Yet in both those cases, the orders granted were problematic as there is no law on the subject in the once instance[6] and in the other instance the order granted was in conflict with existing law.[7] While these cases represent a victory for the applicants, decisions of this nature leave other prospective parents confused about their chances of similarly satisfying their desire for offspring.

What is equally clear is that the current legislative framework is incompatible with existing developments in ART. Furthermore, it is highly probable that technologies will continue to evolve. The position in other jurisdictions indicates that parents can and would like to benefit from these technologies in order to have offspring. China saw the creation of the first-ever genome edited babies using CRISPR technology[8] in order to create offspring that are more resistant to HIV.[9]

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1 See para 1.1 above.

2 *NC v Aevitas Fertility Clinic* (23236/2017) [2018] ZAWCHC (23 January 2018).

3 N. Nair, *Twins' fatherhood shared by dads* 21 October 2018 Sunday Times (https://www.timeslive.co.za/sunday-times/news/2018-10-21-twins-fatherhood--shared-by-dads/), last visited (12-04-2021).

4 *WP v Minister of Justice and Correctional Services and Others* [2021] 2 All SA 626 (GP). In this case the applicant sought conjugal visits with his spouse. The court however found that the right to found a family does not include the right to conjugal visits while a person is incarcerated [para 72]. At most it includes access to artificial insemination which the applicant had access to [para 65].

5 While the applicant was permitted to reproduce by means of artificial insemination, the other relief sought was denied.

6 As previously indicated, matters were further exacerbated by the fact that the judge indicated that the decision was not to serve as precedent for similar future applications. Nevertheless such a statement would encourage future applicants to rely on this decision in support of their claim for the same privilege.

7 C. van Niekerk, *Strange (and incompatible) bedfellows: The relationship between the National Health Act and the regulations relating to artificial fertilisation of persons, and its impact on individuals engaged in assisted reproduction* (10) 1 SAJBL (2017) 34 makes the following observation regarding the 2016 Regulations: "… in the definition of gamete donor, reference is made only to living persons. This … suggests that a gamete donor may not be a deceased person, regardless of whether consent has been obtained or not. The option of posthumous reproduction is thus ostensibly excluded."

8 CRISPR allows genes to be modified or edited so as to produce a better-quality product. For example, it can be used to create crops that are more nutritious or to prevent genetic diseases from manifesting in an offspring. B. Plumer, E. Barclay, J. Belluz & U. Irfan, *A simple guide to CRISPR, one of the biggest science stories of the decade* 27 December 2018 *Vox* (https://www.vox.com/2018/7/23/17594864/crispr-cas9-gene-editing), last visited (12-04-2021).

9 T.H. Saey, *News of the first gene-edited babies ignited a firestorm* 18 December 2018 Science News (https://www.sciencenews.org/article/gene-edited-babies-top-science-stories-2018-yir), last visited (12-04-2021). In response to this the Chinese government "promulgated the Regulation of the People's Republic of China on the Administration of Human Genetic Resources, which aims to protect public health, national security, and public

Some other jurisdictions have anticipated that legislative reform will be required. In the Netherlands, for example, a state commission has recommended that the domestic legislation should be amended to provide for and regulate multiple parentage and surrogacy.[10] The bid to create healthier offspring will undoubtedly have repercussions for the rest of the world. The question would be as to whether South African parents will similarly be able to access this technology when it becomes available locally.[11] The current state of affairs serves as evidence regarding the urgent need for clarity regarding prospective parents' rights.

This study attempted to provide such clarity and a basis for the necessary development of the law regarding some of the fundamental issues surrounding ART and prospective parents' rights that ought to be recognised from the outset. It is hoped that the study can also provide a stimulus and basis for further research on the subject. The South African Constitution, which contains a number of rights that could be interpreted as recognising prospective parents' rights, provided the framework for this investigation. A number of observations have been made, which will be discussed next. This chapter thus provides a summary of the major findings of this study; it further answers the research questions; and makes a number of recommendations as possible solutions to the issues identified.

7.2 Observations

The central research questions that this thesis set out to answer was whether there is a right to reproduce with assistance in South Africa, and if so, whether this right can be realised in practice.

Chapter two, as a background to the main research question, considered what the current legal issues hampering access to ART in South Africa are. It was shown that financial inequality and equity of access to ART still presents a major stumbling block for many prospective parents.[12] Furthermore, there are concerns about the use of ART and the impact that some forms have on

interest through effective protection and rational use of China's human genetic resources" on 28 May 2019. See S. Liu, *Legal reflections on the case of genome-edited babies* 5 (24) Global Health Research and Policy (2020) 2.

[10] Report of the Government Committee on the Reassessment of Parenthood (Staatscommissie Herijking Ouderschap), 114. (https://www.government.nl/topics/surrogate-mothers/national-commission-on-parenthood visited (12-04-2021). See also https://www.government.nl/documents/reports/2016/12/07/child-and-parent-in-the-21ste-century visited (12-04-2021).

[11] At present genome editing is prohibited in most countries, including South Africa. This is mainly based on the ethical concerns raised by the use of this technology. These include the use of CRISPR-Cas9 on human embryos, the status of which still needs to be determined in many countries; and the whether the use of this technology would lead to the return on eugenics. See, for example, C. Brokowski and M. Adli, *CRISPR ethics: moral considerations for applications of a powerful tool* 431(1) J Mol Biol. (2019) 88–101.

[12] See para 2.4.1 above.

the prospective child's right to know their genetic origins.[13] The legal status of embryos is additionally a concern which needs to be addressed.[14] Chapter two further highlighted the fact that postmenopausal motherhood and posthumous reproduction may negatively impact on the welfare of the prospective child where the parent(s) die.[15] Concerns also arise in the case of saviour siblings about the best interests of the "saviour" where they are subjected to medical treatment which is not for their benefit.[16] The South African legal landscape is clearly not equipped to address these issues as many of them remain unanswered, despite numerous advancements in ART. Given the rate at which advancements continue to occur in this field, it is unlikely that the South African legal landscape will ever keep up. The current system thus fosters uncertainty for prospective parents, which cause them to question their existing rights to reproduce with assistance.

Chapter three addressed the second and third research sub-questions and considered the meaning and existence of a possible right to reproduce. It was shown that the traditional meaning of this right did not envisage the possibility of reproduction occurring by non-sexual means.[17] Instead, reproduction was traditionally considered to be possible by means of sexual intercourse and almost always within the confines of marriage.[18] Over time, courts across the globe have however come to view assisted reproduction as falling within the realm of this right,[19] however questions still remained regarding the extent to which such a right can be applied to all parties involved in the reproductive process and to the various forms of ART currently available. It was further shown that under international human rights law, there is no express right to reproduce.[20] Instead, there are certain rights which can be interpreted as recognising such a right. These include the right to found a family and the right to decide on the number and spacing of one's children.[21] Certain general provisions under international law can also be interpreted as recognising the right to reproduce with assistance. These include the right to privacy and the right to dignity.[22] It is the former right, however, which affords the most protection to reproductive decisions involving ART.[23] Nonetheless, in respect of all these rights, there are limitations to the kinds of ART that are permitted. At a national level, chapter three has shown that the South African Constitution

13 See para 2.4.5. above.
14 See para 2.4.6 above.
15 See paras 2.4.8 and 2.4.9 above.
16 See para 2.4.11 above.
17 See para 3.3.1 above.
18 Ibid.
19 See para 3.3.2 above.
20 See para 3.3.3 above.
21 See paras 3.4.1 and 3.4.2 respectively.
22 See paras 3.5.1 and 3.5.2 above.
23 See para 3.5.1 above.

similarly does not contain an express right to reproduce with assistance, but there are general rights which may support the recognition of such a right.[24] Chapters four to six considered the constitutional bases of this right.

In chapter four it was shown that the right to reproductive autonomy – as provided for in section 12(2)(a) of the South African Constitution – extends to decisions to reproduce as well as decisions not to do so.[25] In the context of ART, it has been shown that reproductive autonomy protects the desire for a child where the prospective parents' own gametes are used.[26] In the case of the desire for a specific child, this right has never been applied.[27] It is therefore uncertain whether this right would be of assistance to prospective parents in this context. In respect of the right to a healthy child, South African courts have on more than one occasion confirmed that there is no right to a healthy child.[28] However, these same courts have recognised claims for wrongful birth, which allow for delictual damages to be recovered where a child is born disabled as a result of a doctor's negligence.[29] The question thus remains whether section 12(2)(a) would permit prospective parents to make decisions to modify or manipulate embryos early on in the reproductive process if it will ensure that only healthy offspring are born.[30] This constitutes as a decision regarding reproduction and is, as such, arguably a permissible exercise of reproductive autonomy provided that the prospective parents' own gametes have been used.[31] In each of these instances the requirement of genetic relatedness between the prospective parent(s) and the potential offspring may place severe limitations on the rights of prospective parents to reproduce with assistance. Additionally, concerns about whether it is in the best interests of the child to be created by means of ART, feature heavily in the consideration regarding the rights of prospective parents.[32] Even though South African courts have on past occasions confirmed that potential offspring do not qualify for protection under the Constitution, some regard must be had for their welfare.[33] Section 12(2)(a) as a possible basis for the right to reproduce with assistance is therefore limited.[34] In light of the limitations inherent in this right, prospective parents wishing to realise their rights to reproduce with assistance in terms of the right to health under section 27(1)(a), will fare even worse.[35]

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24 See para 3.6 above.
25 See paras 4.2 and 4.6 respectively.
26 See para 4.4.1 above.
27 See para 4.4.2 above.
28 See para 4.4.3 above.
29 See para 4.4.3 above.
30 This is another area of possible research.
31 See para 4.4.3 above.
32 See para 4.5 above.
33 See paras 4.5.1 and 4.5.2 above.
34 See para 4.6 above.
35 See para 4.7 above.

As far as the other rights that have been considered are concerned, it has been shown that these rights are ineffective in some way or another. This prevents them from furthering the reproductive rights of prospective parents who wish to make use of ART.

Regarding the right to privacy, chapter five has shown that, while this right has proven quite successful on the European continent in promoting the rights of individuals to make certain reproductive decisions in furtherance of their family and private life, this right is of limited use in the South African context.[36] The propensity of our courts to interpret privacy as a continuum with greater protection awarded to activities at the core, compared to those on the periphery, means that certain reproductive choices that are based on preference are excluded from the ambit of this right.[37] The assumption that the European right to privacy is an equivalent to the South African right has since been disputed.[38] The effectiveness of the right in the European context is therefore not indicative of its applicability in this context in South Africa.

Regarding the rights to dignity and equality, as discussed in chapter six, it has been shown that these rights on their own do not provide individuals with the reproductive freedom that they may desire, or may even be entitled to. Instead, these rights are better suited to reinforcing the rights of claimants who want to pursue a particular reproductive option.[39]

To summarise: of the rights considered, the right to make decisions concerning reproduction (as contained in section 12(2)(a) of the Constitution) offers the most recognition to individuals' rights to make use of certain forms of ART, but it too is inadequate. Current interpretations of this right are limited to individuals who are able to genetically contribute to the reproductive process. This defeats the very purpose for which reproductive technologies were developed as it excludes those who would likely benefit most from using ART. It also excludes a wide array of technologies. In this respect the existing constitutional framework falls short.

In fact, it would be accurate to say that the entire existing legal framework is providing insufficient recognition of the reality. Current legislation is not able to keep abreast of developments within the field of ART or even to accommodate technologies that have been in existence for a number

36 See para 5.7 above.
37 See para 5.5 generally.
38 See para 5.7 above.
39 See para 6.4 above.

of decades.[40] Instead, the tendency is to avoid these developments, rather than to be proactive and make provision for them. While the reasons for this may be cultural conservatism,[41] these advancements continue to permeate society.[42]

This current state of affairs does not bode well for prospective parents.[43] The question thus remains as to what solutions can be offered in respect of the way forward.

7.3 Recommendations

The first problem that emerged in chapter two is that there was a need for legislative reform in respect of the regulation of ART, in particular due to the inconsistencies between the various pieces of legislation.[44] Even though the Regulations relating to the artificial fertilisation of persons have been amended since 2012, the 2016 version does not provide the requisite clarity that prospective parents require.[45] Similarly, while the Children's Act is in the process of being amended, the new bill[46] still presents a particular challenge. Prospective parents have to consult a number of different pieces of legislation in order to find some clarity regarding their legal position. This is an indication of the disjointedness of the existing legislative framework. What is thus needed is one piece of legislation that regulates existing forms of ART and additionally a mechanism that makes provision for future forms that will emerge. I will return to this last point later on.

The second problem that emerged during this study, is that current interpretations of rights are at times too narrow to accommodate and support the reproductive decisions of prospective parents. This is the case in respect of the right to make decisions concerning reproduction contained in section 12(2)(a) and the right to privacy contained in section 14.[47] This has the propensity to

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40 Posthumous reproduction has been possible for a number of decades, yet the existing legislative framework does not make provision for this.

41 In a country like South Africa where the majority of its citizens ascribe to African customary law, which does not readily embrace reproduction by means of ART, these developments may be ignored.

42 The examples identified earlier in this chapter bear testament to this. See para 7.1 above.

43 This potentially implies that the right of children born as a result of ART may not be adequately protected, e.g. the right to know his/her origin. This is an area of research that requires investigation.

44 One such inconsistency is referred to in my article (van Niekerk, supra note 7, at 35) where it is observed that the 2016 regulations make no mention of "commissioning parents". This is interesting as the regulations were drafted after the Children's Act and should as such have been consistent with it especially in light of the fact that surrogacy involves artificial fertilisation.

45 In some instances, still no provision is made for certain forms of ART. For example, the Regulations do not allow PHR even in circumstances where gametes were obtained from a living person and consent has been given. New regulations have since been promulgated (Regulations relating to Assisted Conception of Persons, RN 251 Government Notice 44321 (25 March 2021), however, provision is still not made for PHR.

46 Children's Amendment Bill, 2018.

47 See paras 4. 6 and 5.5 above.

exclude a number of newer forms of ART. South Africa could benefit from wider interpretations of these rights in order to accommodate various family forms.[48]

The third problem identified is that perspectives on ART are either centred on the prospective parents or – at the other end of spectrum – the focus is on the potential offspring. This is evident from the South African Law Reform Commission's (SALRC) current project which examines the prospective offspring's right to know its origins.[49] The approach adopted there is seemingly child-centred. Throughout this study, it has further become apparent that prospective parents' rights to engage in ART are largely dependent on some consideration of the future child's rights. These rights cannot be ignored. What is ideally needed is an interconnected approach that considers the rights or interests of both parties:[50] an approach where the reality exists that prospective parents' rights are dependent on the interests of the prospective offspring and vice versa. The next section considers how an interconnected approach can best be accomplished.

7.3.1 Towards accomplishing a common goal

With reference to the children's rights issue identified in chapter four, one of the problems in South Africa at present is that there is an inconsistent approach being applied in respect of the interests of prospective offspring. In some instances, the courts and legislature have been clear that the unborn are not rights-holders under the Constitution.[51] They are therefore not entitled to the protection afforded to legal subjects in general and this includes the protection afforded under section 28. The courts, however, are simultaneously mandated by certain provisions of the Children's Act to consider the interests of prospective offspring in surrogacy applications.[52] In fact, courts have on occasion denied such applications where a surrogacy arrangement was not in the child's best interests.[53] This indicates two very different approaches, which not only raises the question as to why such inconsistencies exist but why they continue to be advocated. This approach amounts to double standards.

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48 If a wider interpretations could be adopted it would obviate the need for an entirely new right, as suggested in chapter 3, n 13.

49 This is Issue Paper 32 Project 140.

50 C. Pickles, Pregnancy Law in South Africa - Between Reproductive Autonomy and Foetal Interests (2017) 289f on the approach to be adopted in the regulation of pregnancy in South Africa suggests the adoption of an interconnected notion of pregnancy.

51 See for example *Christian Lawyers Association of Southern Africa v Minister of Health and Others* 1998 (4) SA 1113 (T).

52 See s 295(e) of the Children's Act 38 of 2005.

53 An example of this is the case of *Ex parte CJD and Others* 2018 (3) SA 197 (GP).

What is clearly needed within the South African context is clarity regarding the legal position of the unborn and this includes those who have yet to be conceived.[54] Over the years, academics have raised concerns about the continued existence of the common law rule that states that legal subjectivity begins at birth.[55] In an age of technology the science exists to predict whether a foetus will be born alive. On the other hand, awarding legal subjectivity sooner places severe constraints on the lives of existing legal subjects.[56] While this challenge will not be resolved overnight, what is needed is a consistent standard, be it the awarding of rights or a standard that requires the interests of the unborn to be considered. Awarding rights to the unborn is not necessarily the best possible solution, because the legal position of the unborn, including those who have yet to be conceived, has not yet developed to make provision for this. However, where ART is contemplated by prospective parents, some consideration should be given to the fact that once born, children will be rights holders. As such it is in their interests that choices be made prior to conception and birth that will not hamper or frustrate the children's futures. For example, donor anonymity will not be in their best interests in light of their right to know their genetic origins once born.[57]

Ideally in every case of ART the overriding question should be whether, when permitting prospective parents to proceed with ART, sufficient consideration has been given to the potential child's future interests. Courts should ideally have a list of factors that should be considered in order to qualify as "sufficient consideration".[58]

Clarity regarding the legal position of the unborn and yet to be conceived is only part of the problem. South Africa's legal framework is not progressive enough to deal with the advancements in ART. This is not to say that such knowledge does not exist. Instead, ART, which falls under the portfolio of the Department of Health, may not be prioritised when compared to other health concerns currently facing South Africa. As a result, the regulation of ART may not be getting the attention that it requires. Furthermore, the regulation of ART will also fall under the scope of other governmental departments, such as the Department of Social Development that is

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54 In other words, do these entities qualify for legal rights or not?

55 See for example, R. Pillay, *The beginning of human personhood: Is South African law outdated?* 21 Stell LR (2010) 230; H. Kruuse, *Fetal 'Rights'? The Need for a Unified Approach to the Fetus in the Context of Feticide* 2 THRHR (2009) 126; and G. du Plessism, *Feticide: Creating a Statutory Crime in South African Law* 24(1) Stell LR (2013) 73. In all three articles the authors call for law reform to afford better protection to the interests of the unborn.

56 For example, pregnant women will be prevented from terminating their pregnancies if legal subjectivity commences at conception rather than birth.

57 Even though the existence of this right has not been clearly established within the South African context.

58 Factors similar to those considered in surrogacy applications in terms of s 295 of the Children's Act would potentially suffice. This includes, but is not limited to, the arrangements for the care and upbringing of the child as well as the provision of a stable home environment.

responsible for the regulation of matters relating to children.[59] As a result, legal development in this area may at times be staggered and incompatible.[60]

While the recommendation made above will provide some relief to prospective parents, what is ultimately needed is comprehensive legislation dealing with various aspects of ART in one act and which considers the interests of all the parties concerned.

In a previous article, I suggested that South Africa adopts a model similar to the Canadian model.[61] I, however, noted that

> [w]hile the Canadian Assisted Human Reproduction Act of 2004 was struck down by the Supreme Court of Canada for 'invading provincial jurisdiction',[62] there is much that can be learned from this model. One of the striking features of the Assisted Human Reproduction Act was the fact that it 'addressed five of six major areas that constitute the typical policy space with respect to ARTs'. These included embryonic research, reproductive cloning, assisted conception, surrogacy and offspring engineering. The only area omitted relates to the parentage policy, an area that is included in the UK's ART legislation.[63]

I further recommended that

> the creation of an independent regulatory body, similar to the UK's Human Fertilisation and Embryology Authority, which would have oversight over matters related to ART, and in particular, new technological advancements.[64]

In my opinion, implementing these two suggestions "would go a long way toward creating legal certainty for those engaged in assisted reproduction, and towards ensuring that SA stays abreast of developments in the field."[65]

Furthermore, the narrow interpretation of section 12(2)(a) should be rejected in favour of a wider one which recognises the rights of individuals to engage in ART, allowing them to fulfil their desire for a child, their desire for a healthy child and in limited instances their desire for a specific child. What is ultimately needed, is the promulgation of legislation that ties section 12(2)(a) to the

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59 The Children's Act, for example, falls within the portfolio of this department.

60 Van Niekerk, supra note 7.

61 Van Niekerk, supra note 7, at 35.

62 D. Snow and R. Knopff, *Assisted reproduction policy in federal states: What Canada should learn from Australia* (5) 12 University of Calgary: School of Public Policy (2012) 2 (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2056442), last visited (08-07-2021).

63 United Kingdom, Human Fertilisation and Embryology Act of 1990, United Kingdom Parliament, 1990 (http://www.legislation.gov.uk/ukpga/1990/37/contents), last visited (12-04-2021).

64 Van Niekerk, supra note 7, at 35.

65 Van Niekerk, supra note 7, at 35.

reproductive technologies that are permitted in the statute. This will bolster the reproductive decisions made involving ART and will mirror the position adopted in the Choice Act which in the preamble links the act to section 12(2)(a).

7.3.2 Suggestions for practically implementing the conclusions

While these recommendations will go a long way to strengthen the position of prospective parents in South Africa, rights mean very little unless they can be implemented. It has become evident throughout this study that individuals who rely on ART are very differently situated compared to those who are able to reproduce sexually. The former group faces challenges that the latter group will possibly never encounter. Additionally, ART is quite expensive.[66] More often than not, treatment is not covered by medical aids and ART is assumed to be for the rich and affluent.[67] This stands in stark contrast to the position regarding the prevention of pregnancy which predominantly occurs by means of sexual reproduction.[68] What is ultimately needed is for the reproductive playing fields to be levelled. This ideally involves an inquiry into how ART can be made more accessible to individuals who require them in South Africa.[69] In order to do this, what is needed first and foremost is a change in perception regarding infertility and other reproductive challenges.[70] To date, the South African legislature has still not recognised infertility as a disability,[71] this despite the fact that organisations such as the World Health Organization did so decades ago.[72] Changing the culture about the need for ART will go a long way in promoting the rights of prospective parents.

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66 C. Huyser & L. Boyd, *Assisted reproduction laboratory cost-drivers in South Africa: value, virtue and validity* 25 O & GF (2012) 15.

67 The exception to this is Discovery Health Medical Scheme, which announced its plan to start funding IVF from 2021 for members on their more elite plans/options. See para 2.4.1 (n 101) above.

68 Government makes a number of services available to individuals in order to prevent procreation from taking place. These include access to free contraceptives, terminations of pregnancy and sterilisations at state facilities.

69 For example, in South Africa medical services and insurance supports individuals who choose to terminate pregnancies and choose other alternatives to prevent procreation in an exercise of their decision not to reproduce. Interestingly similar support is not available to individuals who want to access ART in order to delay fertility in an exercise of their decision to reproduce at a time of their choosing.

70 G.O. Obajimi, O. Saanu and A.O. Ilesanmi, *Expanding access to assisted reproductive technology in a developing country: getting more for less* 50 (2) African Journal of Medicine and Medical Sciences (2021) 171 describe this as follows:

A paradigm shifts by government towards prioritizing infertility management against the background of a delicate balance between overpopulation and paucity of resources will provide succor to the financially vulnerable and often forgotten infertile couples.

71 A. Botes & L. Fourie, *Why South Africa should redefine disability to include infertility* 19 January 2017 The Conversation (http://theconversation.com/why-south-africa-should-redefine-disability-to-include-infertility-71117), last visited (15-03-2021). Botes and Fourie are law academics at North West University and the University of the Free State respectively.

72 The World Health Organization, *Infertility definitions and terminology* (https://www.who.int/reproductivehealth/topics/infertility/definitions/en/), last visited (12-04-2021) views "Infertility as a disability" and states the following: "Infertility generates disability (an impairment of function), and thus access to health care falls under the Convention on the Rights of Persons with Disability."

7.3.3 Final thoughts

The challenges that prospective ART parents face will not be overcome overnight. It is further evident that the interests of potential offspring simply cannot and should not be avoided. What will, however, improve the prospective parents' position is comprehensive legislation covering the six key areas identified above, the establishment of a regulatory board to deal with emerging technologies and the adoption of an interconnected approach towards the rights of the key role-players involved in ART. These developments would go a long way to realising the right to reproduce with assistance in South Africa and it would undoubtedly provide clarity on the existence this right.