MEDICINE AND THE LAW

Posthumous conception: Recent legal developments in South Africa

D W Thaldar, PhD

School of Law, Howard College, University of KwaZulu-Natal, Durban, South Africa

Corresponding author: *D W Thaldar (ThaldarD@ukzn.ac.za)*

Posthumous conception – when a deceased person's gametes are used for procreative purposes – made its debut in South African (SA) courts in *NC v Aevitas Fertility Clinic*. A widow was granted the right to use her deceased husband's sperm for procreation. Against the background of legislative ambiguity, this case creates legal certainty that posthumous conception is legally permissible in SA – at least where deceased persons provided written consent that their gametes can be used by their surviving spouses or life partners after their death, and where there is no controversy about such consent.

S Afr Med J 2018;108(6):471-473. DOI:10.7196/SAMJ.2018.v108i6.13182

It has happened since time immemorial that men conceive children, but then die before the birth of their children. However, the possibility of conceiving children after death is relatively new. Posthumous conception is made possible by modern reproductive technology – in particular the cryopreservation of sperm and eggs. While the legislation of some comparative jurisdictions specifically deals with posthumous conception, this is not the case in South Africa (SA). The legislation in SA is not only ambiguous on whether posthumous conception is legal, but gives rise to uncertainty regarding the nature of the legal relationship between the surviving spouse or life partner and the fertility clinic where the gametes are stored. This medicolegal conundrum was solved in the recent case of *NC v Aevitas Fertility Clinic* (*NC*).[1]

Background[2]

NC centres on the reproductive intentions and tragedies of a couple who married in 2008 and planned to have children. However, in 2010 the wife was diagnosed with Gitelman syndrome, making a pregnancy life-threatening for her. They decided to use a surrogate mother, but before these plans came to fruition the husband fell ill with cancer. Anticipating chemotherapy in 2013, he stored his sperm with Aevitas Fertility Clinic (Aevitas). They provided him with their standard sperm storage form, which offered four options for the stored sperm in the event of his death: (*i*) thawing and discarding it; (*ii*) assigning it to the 'care' of his wife or partner; (*iii*) using it for scientific research; or (*iv*) donating it to another couple. He selected that the stored sperm should be assigned to his wife's care. He completed the form and provided a sample of his sperm to Aevitas. Although the husband's prognosis was good, the couple discussed the possibility of his death and its impact on their reproductive plans. They decided that should he die, his wife would have a child using his stored sperm.

Despite the chemotherapy, the husband's health deteriorated, and it became evident that he would not survive the cancer. In this context, the couple again discussed the possibility of the wife having a child after the husband's death using his stored sperm and again agreed that she should proceed. The husband died in January 2017 and his widow set in motion their plans to have a child using his sperm, which Aevitas supported.

Legal issues

The main legal question was whether posthumous conception is at all legal in SA. If legal in principle, the next question is whether the law should require certain conditions to be met, and whether such conditions were in fact met in the specific case. A potentially complicating factor was the nature of the legal relationship between Aevitas and the widow concerning the deceased husband's sperm. Was Aevitas legally obligated to provide her with access to the sperm? The widow's legal representatives advised her to approach the court to obtain legal certainty.[2] She applied to the Western Cape High Court for a declaratory order – a legally binding form of preventive adjudication – that she had the legal right to use her deceased husband's sperm.[3]

The parties to the lawsuit

The widow, as applicant, cited Aevitas as respondent. Apart from being in *possession* of the sperm, Aevitas was also its legal *owner*. However, at common law, the human body, or parts of it, are not susceptible to *ownership*.[4,5] Breaking with this principle, the Regulations Relating to Artificial Fertilisation of Persons[6] (the Regulations) made in terms of the National Health Act[7] (the Act) provide that human gametes and embryos can be legally *owned*. Regulation 18(1)(a) provides that sperm *not* intended for the artificial fertilisation of the donor's spouse is owned by the 'authorised institution'. As the applicant was diagnosed with Gitelman syndrome, the couple intended to use a surrogate to have a child using the husband's stored sperm. Therefore, Aevitas (the 'authorised institution') legally *owned* the sperm.

Ownership is the most comprehensive right that a person has in relation to an object, which includes the right to use, alienate and even destroy the object. An owner's rights in this respect can be limited through various legal means. However, a fertility clinic's ownership of sperm is created and mandated through statute, raising the question of whether this ownership can be transferred, wholly or partially, through a private transaction such as a contract between the fertility clinic and a man who wants to store his sperm with them. If the answer is in the affirmative, was there a contract that transferred any constituent rights of Aevitas's ownership of the sperm? Although

Aevitas supported the applicant's plans of posthumous conception, this is not determinative of the parties' legal *rights*. A fertility clinic owning sperm may feel ethically compelled to provide a person in the applicant's position with access to the sperm, but without a legally binding obligation there is no guarantee that a change in circumstances may not lead to a change in its position. Should persons in the applicant's position be content to have access to the stored sperm of their deceased husbands or life partners at the pleasure of a fertility clinic? The applicant decided to obtain certainty regarding her rights concerning her deceased husband's sperm, meaning that her rights would be defined *vis-à-vis* Aevitas's rights. Aevitas was cited as respondent – not as an antagonist in the lawsuit, but as a *de facto* possessor and statutory owner of the deceased husband's sperm, within the context of legal uncertainty brought about by the Regulations.

Is posthumous conception legal?

The Act provides: '56. (1) A person may use tissue or gametes removed or blood or a blood product withdrawn from a living person only for such medical or dental purposes as may be prescribed.' The Regulations mirror the Act: 'These regulations only apply to the withdrawal of gametes from and for use in living persons.'

The ambiguity in these provisions is evident: should the sperm donor be living only at the stage of donating the sperm (so-called 'withdrawal'), or at the stage of using the sperm for *in vitro* fertilisation, or at the stage of embryo transfer? While posthumous *retrieval* of sperm is clearly banned, is posthumous *use* of sperm also banned? The applicant argued that the legislative provisions only require that a sperm donor must be living at the stage when gametes are withdrawn. Had the legislature intended to ban posthumous *use*, the formulation of the statutory provisions would have been different. For instance, the provisions might have been 'withdrawn from a person who is still alive when the gametes are to be used'. The applicant therefore argued that posthumous conception is legal in SA law.

What are the conditions for posthumous conception?

The applicant argued that SA statutory law does not specifically deal with posthumous conception. Therefore, general legal principles must be applied. Referring to established precedent in medical law,[8] the applicant submitted that the principle of autonomy should guide the court. Autonomy is a principle of SA medical law and the SA Constitution.[9] Applied to posthumous conception, autonomy requires that deceased persons must have consented to their gametes being used posthumously. Where such consent by the deceased is evident, posthumous conception should be allowed.

The impact of the principle of autonomy is stronger than *allowing* posthumous conception: autonomy translates into a legal *right* of the surviving spouse or life partner to use the deceased spouse or life partner's gametes (subject to their consent). The literature suggests that posthumous conception should be regulated as surrogacy applications.[10] However, implicit in the applicant's argument based on autonomy, is that to require further conditions for allowing posthumous conception, e.g. requiring judicial oversight informed by psychological reports as for surrogacy applications, would restrict the surviving spouse or life partner's autonomy and would be *prima facie* unconstitutional.

The applicant's argument was simple: if posthumous conception is willed by the surviving spouse or life partner, consent by the deceased person is a necessary and sufficient requirement for posthumous conception. In this case, there was clearly consent: Aevitas's sperm storage agreement that was filled out and signed by the applicant's deceased husband provided documentary proof.

Aevitas's affidavit

Aevitas filed a short affidavit in support of the applicant.[11] The gist of the affidavit was that Aevitas respects its patients' autonomy, in particular the autonomy of the men who store their sperm with Aevitas to determine the fate of their sperm after their deaths. Interestingly, given this ethical position, Aevitas states that it had in fact in 2015 performed posthumous conception for another patient (and deceased patient). Although this fact shows Aevitas's ethical consistency, it had to be handled carefully by the applicant, for at least two reasons. First, it may have been damaging to her case if she was perceived to rely on the *fact* of the previous posthumous conception as implicitly having any *normative* effect on the lawsuit. The fact that something has been done does not make it legal to do it. The applicant avoided any insinuation of posthumous conception being a *fait accompli* in our law. Second, it could have damaged the applicant's case if she was perceived to rely on Aevitas's *ethical* judgement to influence the court's *legal* judgment. Although Aevitas's 2015 posthumous conception was recorded in the papers, the applicant did not rely on it in argument, and the court did not bring up the issue.

The judgment and its meaning

During oral argument in open court, the court observed that the applicant's deceased husband clearly consented to his sperm being used posthumously and granted the relief sought, declaring that the applicant had the right to use her deceased husband's sperm for procreation.[12] *NC* therefore created legal certainty regarding the basic aspects of posthumous conception. It is now established that the relevant legislation allows posthumous conception, and that the surviving spouse or life partner has a legal *right* to use the stored gametes for conception. This right may be subject to the consent by the deceased person, but this is not a valid inference from the judgment. What can be inferred from the judgment is that consent by the deceased person is *sufficient* as condition for allowing posthumous conception, and that the evidence before the court in *NC* was sufficient to prove such consent. However, uncertainty still remains whether consent is a *necessary* condition.

Regarding a fertility clinic's statutory ownership of sperm, the right of the surviving spouse or life partner to use the deceased spouse or life partner's stored gametes for posthumous conception renders a fertility clinic's statutory ownership, where applicable, mere nominal ownership.

Conclusion: Implications for the practice of reproductive medicine

In cases that are analogous to the *NC* case, in other words where deceased persons provided written consent that their gametes can be used by their surviving spouse or life partner after their death, and where there is no controversy about such consent, fertility clinics may legally assist the surviving spouse or life partner with posthumous conception. In such cases, it will not be necessary to approach the court – the legal position has now been sufficiently established. However, in cases that differ from the facts of *NC*, e.g. where there was no written consent or no evidence of consent, it would be advisable to approach the court before proceeding with posthumous conception, as this requires further development of the law. A practical step for fertility clinics is to include the same options in their gamete storage agreements, in the event of death, as did Aevitas.

Acknowledgements. None.

Author contributions. Sole author.

Funding. None.

Conflicts of interest. None.

The author was legal counsel in the case under discussion.

1. NC v. Drs Aevitas Inc t/a Aevitas Fertility Clinic (23236/2017) [2018] ZAWCHC (23 January 2018).
2. NC v. Drs Aevitas Inc t/a Aevitas Fertility Clinic (23236/2017) [2018] ZAWCHC (23 January 2018). Applicant's founding affidavit.
3. NC v. Drs Aevitas Inc t/a Aevitas Fertility Clinic (23236/2017) [2018] ZAWCHC (23 January 2018). Notice of motion.
4. Grotius. Inleidinge tot de Hollandsche Rechts-Geleerdheid. 2.1.3.
5. Digesta 9.2.13 pr.
6. Regulations Relating to Artificial Fertilisation of Persons GN R1165 GG 40312, 30 September 2016.
7. South Africa. National Health Act 61 of 2003.
8. Castell v. De Greef 1994 (4) SA 408 (C) 421C–D.
9. British American Tobacco South Africa (Pty) Ltd v. Minister of Health [2012] ZASCA 107, [2012] 3 All SA 593 (SCA) [13].
10. Kruuse H. From the Grave to the Cradle: The Possibility of Post-Mortem Gamete Retrieval and Reproduction in South Africa?. S Afr J Hum Rights 2012;28(3):532-552. https://doi.org/10.1080/19962126.2012.11865059
11. NC v. Drs Aevitas Inc t/a Aevitas Fertility Clinic (23236/2017) [2018] ZAWCHC (23 January 2018). Respondent's affidavit.
12. NC v. Drs Aevitas Inc t/a Aevitas Fertility Clinic (23236/2017) [2018] ZAWCHC (23 January 2018). Court order.

Accepted 22 March 2018.