

IN THE NORTH GAUTENG HIGH COURT, PRETORA

(REPUBLIC OF SOUTH AFRICA)

CASE NO: 29936/11

DATE:27/09/2011

REPORTABLE

IN THE *EX PARTE* MATTER BETWEEN:

W H

FIRST APPLICANT

UVS

SECOND APPLICANT

L G

THIRD APPLICANT

BJS

FOURT APPLCIANT

JUDGMENT

TOLMAY J AND KOLLAPEN J:**INTRODUCTION**

- [1] This is an application in terms of section 295 of the Children's Act 38 of 2006 ("the Act") for the confirmation of a surrogacy agreement. Surrogacy can be defined as an arrangement in which a woman carries and delivers a child for another couple or person.
- [2] Although one may be tempted to think that the problem of surrogacy is a new one, it would seem that since biblical times people who could not have children opted for forms of surrogacy. For example men were exhorted to impregnate their widowed sisters-in-law to secure heirs for their dead brothers¹. There are also instances where husbands whose wives were infertile engaged in sexual relationships with a family servant to provide a child for them². Informal surrogacy, arrived at more often by private agreement between family members or people known to each other, was and continues to be practised in many societies.
- [3] Surrogacy was not recognised in South-Africa before the enactment of the Act even though there have been many reported instances of informal surrogacy

1 Deuteronomy 25:5

2 Ruth 4:7, International Survey of Family Law 2011 Ed. This Child is My Child v Child is Your Child, this Child was made for You and Me – Surrogacy in England and Wales, Mary Gwalstead

being practised. The Act now provides a mechanism for many who desire a child and for whom informal surrogacy is not an option. This has understandably resulted in a growing number of applications in this division seeking the confirmation of the Court of surrogacy agreements.

- [4] Children occupy a special place in the social, cultural and legal arrangements of most societies .That this is so is understandable in recognition of both, the vulnerability of children and the almost instinctive need to advance their well-being and ensure their protection as well as the compelling human and social imperative to pursue and further their best interests as they are set on the path of developing their full potential and taking their rightful place as full and responsible citizens of society.

The Preamble to the United Nations Convention on the Rights of the Child provides that,

‘..... the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding. ‘

- [5] In South Africa the social order recognises this commitment and it is given expression in a variety of ways in the Constitution as well as the legal framework that has followed the adoption of the Constitution. Both the

preamble and the founding provisions of the Constitution evidences an intention to create a society based on fundamental human rights and freedoms and the recognition of the inherent worth and dignity of each person. The Bill of Rights, beyond it's unequivocal commitment to the achievement of equality and the prevention of unfair discrimination, deals extensively with the rights of children.

[6] In very much the same way as society's architecture is structured to advance the best interests of the child , so too does it reflect and give response to the desire of many to have children of their own. For some it represents the fulfilment of the agency of their own lives and existence as they seek to continue their lineage and their legacy, while for others the vision of a family living and loving together is rendered complete with the arrival of a child. Of course there are those who for valid reasons of their own elect not to have children and the law, in similar vein, recognises the choices people may make not to have children.

[7] To this end children play a vital role in how the values, cultures and traditions of a people are held in collective safe keeping and passed on to future generations, matters central to both the protection and the extension of the identity of a people. The law and social practices must accordingly and in an appropriate fashion be responsive to and facilitate, to the extent that it can,

this process which in many respects represents the animating energy in the lifeblood and in the continuity of a people.

- [8] In all of this the role and place of the family as an important social unit around which relations are structured and nurtured has been acknowledged and recognised as pivotal. **The Universal Declaration of Human Rights** proclaims that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’ **The International Covenant on Civil and Political Rights** as well as the **African Charter on Human and Peoples’ Rights** contain similar provisions which affirm and properly recognise the role and place of the family within the broader design of society.

BACKGROUND TO THE APPLICATION AND INVITATION TO THE *AMICI*

CURIAE

- [9] In order to ensure consistency and develop a uniform practice in matters of this nature, the Deputy Judge President constituted a Court to consider this application and to determine and provide guidelines on how similar applications should in future be dealt with.
- [10] Consequently the Court invited the Bar, The Law Society and the Centre for Child Law to make submissions as *amicus curiae* to the court regarding the

correct approach in surrogacy agreements and required them to address the following in their submissions:

- 10.1 the approach that should be followed where the genetic material used is not that of the parties;
- 10.2 the approach, if any, that should be followed when same sex couples apply for a surrogacy agreement to be made an order of court, and
- 10.3 the appropriate steps that should be followed and factors to be considered to determine the best interests of the child.

[11] The Pretoria Bar and the Centre for Child Law together with Counsel for the applicants filed helpful heads of arguments and also contributed by presenting oral argument at the hearing of the matter. We are indebted to them for their invaluable contribution.

[12] After perusing the papers in this matter and noting that an agency Baby-2-Mom introduced the surrogate mother to the commissioning parents the court also requested the applicant to deal with the following:

- 12.1 To file a supplementary affidavit setting out the procedures followed by Baby-2-Mom in facilitating surrogacy;
 - 12.2 To provide, if there was any additional agreement between the applicants and the potential surrogate mother, a copy of such agreement or the terms of such an agreement;
 - 12.3 All the agreements, if any, entered into between Baby-2-Mom and the applicants and Baby-2-Mom and the surrogate mother.
 - 12.4 To indicate whether the applicants paid Baby- 2-Mom any compensation for services rendered? If so, what amount was so paid?
 - 12.5 To indicate whether Baby-2-Mom paid the potential surrogate mother any compensation? If so, full particulars of such compensation was required.
- [13] It warrants mention that the rationale for requesting the additional information was not located in any suspicion or distrust of the parties or the agency but rather to ensure that in the determination of the application and the relief

sought the Court was appraised of all the facts which would include all facts relevant to the Baby-2-Mom agency.

THE BACKGROUND TO THIS APPLICATION

[14] The first and second applicants (referred to as the “commissioning parents”) are two males who are married to each other and who approach the Court to confirm a surrogacy motherhood agreement in terms of the Act. The third applicant is the surrogate mother and the fourth applicant is her life partner.

[15] The commissioning parents are a Dutch and a Danish citizen respectively, both of whom are domiciled in South-Africa and intend to stay here permanently. They have been in a relationship for eight years and entered into marriage in South Africa in September 2010.

[16] The applicants do not have children of their own and both being male persons are incapable of having children that are genetically related to them except via the process of surrogacy.

[17] They had on a previous occasion entered into a surrogacy agreement which was confirmed by this Court but was not implemented as the surrogate mother became ill during the process and had to withdraw.

- [18] The commissioning parents were introduced to the potential surrogate mother by an agency known as Baby-2-Mom. They confirmed that no funds with regards to the introduction of the surrogate mother had been or will be paid in contravention of the Act.
- [19] They allege that they are economically and emotionally stable enough to proceed with the surrogacy agreement and attach a comprehensive report from a clinical psychologist Ms Mandy Rodrigues to confirm the latter.
- [20] They proceeded to give information about their circumstances including their employment, financial circumstances, and assets and also declare that they do not have any criminal records. From the information provided it does appear that they possess the financial means to provide for a child now and into the future, that they live within a supportive social structure and that they are motivated by a ‘ deep seated desire to become parents ‘ . They also set out to persuade the Court that the child to be born will have appropriate “maternal influences”. We deal with this aspect later in the judgment.
- [21] The surrogate mother who is engaged to the fourth applicant is a personal assistant with 2 children of her own, who are presently 14 and 3 years old.

These are children born from a previous marriage and the older child lives with his father. The clinical psychologist, who interviewed the commissioning parents also interviewed her and stated that she is suitable to act as a surrogate mother. It is however obvious from the aforesaid report that the intended surrogate mother had a difficult childhood and may not be as privileged as the commissioning parents.

[22] It is important to note that the surrogate mother's gametes will not be used during the fertilization process. While the application is silent on the question who the donor of the eggs will be and from where it will be obtained, this information is not necessary for the determination of the matter.

[23] As previously indicated, an agency Baby-2-Mom was involved and introduced the surrogate mother to the commissioning parents.

[24] As a result of the involvement of Baby-2-Mom the Court requested that the commissioning parents address certain issues referred to in par [12] *supra* and a supplementary affidavit was filed prior to the hearing of this matter.

[25] In response to our request regarding the involvement of Baby-2-Mom, Jennifer Currie, the founder and owner of Baby-2-Mom filed an affidavit. She

described Baby-2-Mom as an online egg donation agency that had been facilitating egg donation services since 2007. Her only source of income, she stated, is derived from egg donation services. She states that she is fully aware that the Act does not allow for compensation for the rendering of services in relation to the facilitation of surrogacy and states that she proceeded with surrogacy services without charging a fee as an extension of her core business, being egg donation.

[26] She furthermore stated that no specific agreement is concluded between Baby-2-Mom and any prospective surrogate mother. An application form is either submitted online or telephonically. In this application, the necessary application was done via telephone with the surrogate mother who acquired Baby-2-Mom's details via the internet. She stated categorically that no form of payment was promised or paid to the surrogate mother and/or the commissioning parents by herself or Baby-2-Mom. The commissioning parents were known to her due to previous dealings, presumably the previous surrogacy agreement referred to above. She introduced the commissioning parents to the surrogate mother.

[27] She goes further to say that she did not receive nor was promised any form of compensation from the applicants regarding the surrogacy, introduction and/or for any egg donation with regard to this application. The second applicant and

the surrogate mother confirmed the facts regarding payment in a supplementary affidavit.

[28] The commissioning parents also attached a list of estimated costs regarding payments related to the surrogacy agreement and its implementation. With regard to the surrogate mother, these proposed payments include health insurance at R20 400 per annum, life insurance at R 6000.00 per annum and alongside an item "Surrogate's various expenditure (transport, maternity clothes etc')" an amount of R 20 000.00

[29] No details are given regarding the specifics in respect of this expenditure of the surrogate mother which is a matter of concern as generally speaking there may be a danger that generic payments for expenditure without specificity may well run the risk of disguising the payment of compensation. Without in any manner suggesting this to be the case in this matter, we are of the view that a detailed list of surrogacy expenses with sufficient specificity should be provided to minimise the possibility of abuse.

[30] While we accept the bona fides of the agency Baby-2-Mom as well as the assertion that no payment other than for expenses allowed in terms of the Act will be paid, we are of the view that as a general proposition and in the main

to avoid commercial surrogacy (either directly or indirectly) the Court should in all instances where an agency is involved , be fully appraised of all the facts and circumstances relating to the modus operandi of the agency , the relationship between the agency and the commissioning parents as well as the agency and the surrogate mother . We deal with this later in this judgment.

AN OVERVIEW OF THE LAW

[31] The rights of individuals to bear and raise children is broadly recognised and supported by the State through various measures including the provision of financial assistance, social and other support services. It encompasses the right to have one's own child with whom the parents share a genetic link , the right to adopt a child under certain circumstances and more recently in recognition of the physical and medical difficulties people may experience in seeking to have a child of their own , the right to have a child through a surrogacy arrangement. The Act provides in broad terms for the legal requirements attendant upon entering such agreements as well as requiring the confirmation of the High Court to render such agreements valid. The Act followed after considerable thought was given to the legal ramifications of the acknowledgment of surrogacy within our legal framework by the ad hoc committee on surrogacy motherhood.³

³ See report of the Ad Hoc Committee on Report of the S A Law Commission on Surrogate Motherhood, dated 12 February 1999

[32] Given the centrality of the concept of ‘ the family’ in matters involving the best interests of the child , the very understanding of what constitutes a family and the roles traditionally associated with the component members of the family has been the subject of considerable attention by our Courts over the past 17 years . A constitution founded as it is on the principle of equality and non discrimination has resulted in the substantial growth of a body of law that seeks to ensure the full enjoyment of all the rights in the Bill of Rights by all. In this context amongst others the rights of gays and lesbians to form personal relationships of their choice and to marry and to participate in family life has been unconditionally recognised as being consistent with the principles of equality and dignity enshrined in the Constitution.

[33] Skweyiya J said in the Du Toit matter:⁴-

‘The institutions of marriage and family are important social pillars that provide for security, support and companionship between members of our society and play a pivotal role in the rearing of children. However, we must approach the issues in the present matter on the basis that family life as contemplated by the Constitution can be provided in different ways and means and that legal

4 Du Toit and Another v Minister of Welfare and Population Development and Others 2003(2) SA 198 (CC)

conceptions of what constitutes family life should change as social practises and traditions change.’

[34] Consistent with this theme of the recognition of the rapidly changing nature of the constructs and the definition of family , the place of gender in the determination of the quality of the parental role also enjoyed the attention of the Court in van der Linde⁵ the Court concluded that :-

‘..... for decades it has been accepted that the quality of a parental role is determined by gender. It has been accepted that mothering was a component of a woman’s being only. At the present juncture it is to be doubted whether that acceptance can by itself serve as a universally prevailing axiom. These days mothering is also part of a man’s being. The concept of mothering is indicative of a function rather than a “persona” and this function is not necessarily situated in the biological mother. It includes the sensitive attachment which flows from the attention devoted from day to day to the child’s needs of love, physical care, nutrition, comfort, peace, security, encouragement and support.Today the man has the freedom to reveal and live out the mothering feeling”

⁵ Van der Linde v Van der Linde 1996(3) SA 509(O)

- [35] Before the enactment of the Act, it would appear that the only way in which commissioning parents could become the legal parents of the child was by way of adoption in terms section 17(a) of the Child Care Act 74 of 1983 after the birth of the child.
- [36] Most people opt for surrogacy because they cannot conceive or carry a baby to full term or on account of the risk that the mother's life will be endangered by pregnancy. Gay and lesbian people in a relationship also have little choice other than to enter into a surrogacy arrangement if they should wish to have a child genetically linked to either of them.
- [37] The Act provides the legal framework for willing parties to facilitate surrogacy agreements with the proviso that the confirmation by the High Court of all surrogacy agreements is required to render any such agreement valid.

[38] Section 292 of the Act provides for the formal requirements of a valid surrogate motherhood agreement⁶ and in terms of section 295⁷ a court may not confirm the agreement unless certain requirements are met.

[39] The Act is prescriptive about the content of the issues pertaining to the agreement, which include consent, genetic origin of the child, when artificial

6 292 Surrogate motherhood agreement must be in writing and confirmed by High Court. –

- (1) No surrogate motherhood agreement is valid unless –
 - (a) The agreement is in writing and is signed by all the parties thereto;
 - (b) The agreement is entered into in the Republic;
 - (c) At least one of the commissioning parents, or where the commissioning parent is a single person, is at the time of entering into the agreement domiciled in the Republic;
 - (d) The surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and
 - (e) The agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.
- (2) A court may, on good cause shown, dispense with the requirement set out in subsection(1)(d).

7 “Confirmation by court. – A court may not confirm a surrogate motherhood agreement unless –

- (a) The commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;
- (b) The commissioning parent or parents –
 - (i) Are in terms of this Act competent to enter into the agreement;
 - (ii) Are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and
 - (iii) Understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;
- (c) The surrogate mother –
 - (i) Is in terms of this Act competent to enter into the agreement;
 - (ii) Is in all respects a suitable person to act as surrogate mother;
 - (iii) Understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof;
 - (iv) Is not using surrogacy as a source of income;
 - (v) Has entered into the agreement for altruistic reasons and not for commercial purposes;
 - (vi) Has a documented history of at least one pregnancy and viable delivery; and
 - (vii) Has a living child of her own.
- (d) The agreement included adequate provisions of the contact, care and upbringing and general welfare of the child that is to be born in a stable home environment, including the child’s position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child;
- (e) In general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interest of the child that is to be born, the agreement should be confirmed”.

fertilization could take place, termination of the agreement, and the effect of termination of the agreement⁸.

[40] The Act also deals with the question of payments in respect of surrogacy and generally prohibits commercial surrogacy while only permitting payments related to compensation for expenses, loss of earnings and bona fide professional, legal and medical services related to the confirmation of a surrogate motherhood agreement⁹.

[41] Despite the fact that the Act attempts to comprehensively regulate and structure the important aspects regarding surrogacy agreements , the legal implications of this relative new development in our law could be rather complex and could have far reaching consequences for everyone involved.

[42] On a consideration of the Act, the International Law and our Constitution it became clear that a myriad of problems may arise surrounding the implementation of the peremptory requirements of the Act.

⁸ Section 293 – 294 and 296 - 300

⁹ Section 301

A BRIEF OVERVIEW OF THE INTERNATIONAL LAW

[43] While there appears to be a growing international trend to provide an adequate legislative basis to deal with surrogacy, informal surrogacy has been in existence for a long time. Practised as far back as the biblical era it is invariably shaped by the cultural, traditional and social norms of a given society. Family members or friends motivated by altruism would become surrogate mothers without any formalities being entered into and this practise probably continues without the oversight or the intervention of the State.

[44] However there is also growing recognition that private and familial relationships may not always provide the answer to parents who seek to have a child of their own resulting in both the recognition in some jurisdictions of formal surrogacy and the need to regulate it.

[45] Given the considerable diversity in culture, customs and traditions across nations there is no consistent international practise in the field of surrogacy and perhaps understandably so. While most countries prohibit commercial surrogacy, with India being the prominent exception, the responses of other countries have been varied ranging from an outright prohibition of both altruistic and commercial surrogacy in some jurisdictions to the recognition and legislative regulation of altruistic surrogacy in other jurisdictions.

[46] France, Iceland and Italy have legislative provisions prohibiting all forms (both altruistic and commercial) of surrogacy. Other countries seek to provide a comprehensive legal framework to regulate surrogacy. Surrogacy along with ovum and sperm donation has been legal in Georgia since 1992. Under applicable law, a donor or surrogate mother has no parental rights over the child born. In the Ukraine surrogacy and surrogacy in combination with egg/sperm donation has been legal since 2002. A donor or a surrogate mother has no parental rights over the child born and the child born is legally the child of the prospective parents¹⁰.

[47] In Israel, the Embryo Carrying Agreements Law of 1996 legalized gestational surrogacy. This law made Israel the first country to implement a form of state-controlled surrogacy in which each surrogacy agreement must be approved by the state. A state –appointed committee permits surrogacy arrangements to be filed only by Israeli citizens who share the same religion. Surrogates must be single, widowed or divorced and only infertile heterosexual couples are allowed to hire surrogates. The numerous restrictions on surrogacy under Israeli law have prompted some intended parents to seek surrogates outside the country.¹¹

10 <http://en.wikipedia/wiki/surrogacy>

11 *supra*

[48] In the Netherlands and Belgium there is a prohibition on commercial surrogacy while altruistic surrogacy is permitted¹².

[49] In Canada, the Human Reproduction Act of 2004 recognises surrogacy for altruistic purposes while prohibiting commercial surrogacy. The stance of the Canadian Courts in matters that came before it before the enactment of the 2004 Act was generally to recognise the commissioning parents as the legal parents of the child¹³.

[50] Australia allows for individual state regulation on surrogacy. In Queensland all forms of surrogacy are prohibited while in Victoria commercial surrogacy is forbidden and altruistic surrogacy is allowed in some limited circumstances. While Western Australia and South Australia allow for altruistic surrogacy under the Surrogacy Act of 2008 and the Family Relationships Act of 1975, it is only available for legal couples of the opposite sex. Single people and same sex couples may not enter into altruistic surrogacy arrangements.¹⁴

12 *supra*

13 *Rypkema v British Columbia* (2003) B.C.J No 2721, BCSC 1784, J.R. v L.H. O.J. No 3998, 2002 ON.C. LEXIS 799

14 Burpee A "Momma Drama: A Study of How Canada's National Regulation of Surrogacy Compares to Australia's Independent State Regulation of Surrogacy" (2008-2009) 37 *Ga. J Int'l & Comp. L* 305 at 319.

[51] In the United States of America, individual states regulate surrogacy under different laws which range from a total prohibition of all forms of surrogacy on the one hand to the recognition of commercial surrogacy on the other with some states in between allowing for altruistic surrogacy while prohibiting commercial surrogacy¹⁵.

[52] In California the position is that single men, single women, heterosexual couples and GLBT (gay, lesbian, bisexual and transexual) couples are able to successfully obtain parental rights¹⁶. In order to list the intended parents on the birth certificate an order of the Superior Court is required wherein the surrogacy agreement is acknowledged and the position of the intended parents is confirmed¹⁷. In Florida the intended parents must petition the court within three days of the child's birth for an 'expedited affirmation of parental status 'at which point the court shall schedule a hearing of the matter .If the court is satisfied that the intended parents have entered a valid surrogacy contract and that at least one of them is the child's genetic parent, the court

15 Hoffman D "Mama's Baby, Daddy's Maybe:" A State-By-State Survey of Surrogacy Laws and their Disparate Gender Impact" (2008-2009) 35 *Wm. Mitchell L. Rev* 449 at 461

16 supra

17 supra

shall enter an order finding the intended parents to be the legal parent of the child¹⁸.

[53] In conclusion it does appear that the position adopted in the Act is on par with the international position in countries where surrogacy is allowed.

SPECIFIC LEGAL AND CONSTITUTIONAL ISSUES ARISING OUT OF SURROGACY APPLICATIONS

[54] Certain constitutional and legal issues invariably arise out of surrogacy applications and we deal with some of them below:

(i) SURROGACY AND SAME SEX RELATIONSHIPS

54.1 As South African Law recognises heterosexual as well as same sex civil marriages and in the light of the fact that no discrimination on grounds of sexual orientation is allowed same sex couples must be treated in exactly the same manner as any heterosexual couple and any deviation from that will be unconstitutional. This has already been confirmed in numerous cases¹⁹.

18 supra

19 See *Minister of Home Affairs v Fourie and Another* 2006(1) SA 546 CC, *Du Toit v Minister of Welfare Population Development* 2003(2) SA 196 CC, *J v Director General Department of Home Affairs* 2002(5) BCL on 436 CC, *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs* 2002(6) SA 1 CC, *Gory v Glover NO and Others* 2007(4) SA 97 CC.

54.2 In our view care should be taken that different tests are not applied to same sex couples which could be discriminatory, for example in some of the cases same sex couples were required to show that there will be so called “maternal influences” the child would be subjected too. The mothering of the child is a function that very often does not have anything to do with the gender of a parent²⁰. In any event many children grow up without a father or a mother and the court should safeguard that it does not try and create a utopia for children born from surrogacy that is far removed from the social reality of society.

[55] If one considers the provisions of Section 292(1) (c) then it is evident that the Legislature has contemplated that a single person may also be a commissioning parent. This appears to be in line with the prohibition of non discrimination located in Section 9 of the Constitution.

(ii) **THE BEST INTERESTS OF THE CHILD**

²⁰ See Ex Parte Gritchfield 1991(1) All SA 318 W, Van der Lindde *supra*

[56] In terms of section 28(2) of the Constitution a child's best interests are of paramount importance in every matter concerning the child. This approach is echoed in section 7 of the Act.

[57] Prior to the enactment of the Act the position with regard to the acquisition of parental responsibilities, in relation to the child by the commissioning parents was that the mother who gave birth to the child and her husband, if married were regarded as the parents of the child²¹. Therefore the commissioning parents could only become the legal parents if they followed adoption procedures. The result of this was that where the surrogate mother changed her mind and did not wish to consent to the adoption of the baby she could do so irrespective of the genetic origin of the child. This issue was clearly a concern as it could impact directly on the best interests of the child as uncertainty regarding the parents could impact negatively on the child.

[58] In terms of section 297(b) and (c) of the Act the surrogate mother has to hand the child over as soon as is reasonably possible after the birth and neither she or her partner or relatives have any right of parenthood or care.

²¹ Section 5 of the repealed Children Status Act 82 of 1978

[59] The best interests of the child are furthermore addressed, in that the agreement may not be terminated after the artificial fertilization has taken place. However, a surrogate mother who is also a genetic parent of the child may prior the lapse of the 60 days after the birth of the child terminate the agreement.

[60] Section 298(2) of the Act dictates that the court must terminate the confirmation of the agreement upon finding, after notice to the parties and a hearing, that the mother has voluntarily terminated the agreement and that she understands the effect of the termination, and a court may issue any other appropriate order if it is in the best interests of the child. In the light of the fact that the Court can issue “an appropriate order” the Court will be in a position to ensure that the best interests of the child is protected on termination of the agreement.

[61] The best interest principle has not been given an exhaustive content, but the standard should be flexible as individual circumstances will determine the best interests of the child²².

[62] In the De Reuck matter²³ it was held that:

²² See Minister of Welfare and Population Development v Fitzpatrick and Others 2000(3) SA 422 CC

“... constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that s 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with s 36.”

[63] Thus when a court considers the question of the best interests of the child care should be taken that the rights of the commissioning parents in terms of the Bill of Rights and the Promotion of Equality and Prevention of Unfair Discrimination Act, Act no 4 of 2000 are not violated by unnecessary invasion of the privacy of commissioning parents or by setting the bar too high for parents whose only option is to have a child by way of surrogacy. This will entail a value judgment by the court taking into consideration the circumstances of the particular case.

(ii) **THE SURROGATE MOTHER AND THE RISK OF COMMERCIAL SURROGACY**

[64] While agencies that introduce potential commissioning parents to potential surrogate mothers generally play an important facilitative role, there are at the same time concerns that the involvement of agencies in the introduction of surrogate mothers can also easily lead to abuse. One would be naïve not to

23 See De Reuck v Director of Public Prosecutions Witwatersrand Local division and Others 2004(1) 406 CC

see how it is possible to develop to a point where “a womb for hire” could become *de facto* part of surrogacy practise. From an overview of international practise it becomes clear that, particularly in countries such as ours with deep socio-economic disparities and the prevalence of poverty, that the possibility of abuse of underprivileged women is a real and ever present danger. Ideally the involvement of agencies should be the subject of regulation and oversight in order to avoid abuse which ordinarily is very difficult to detect from the face of a contract of surrogacy. Commercial surrogacy can quite easily be disguised and payments in contravention of the law can just as easily be included under the guise of legal and legitimate payments.

[65] Any payment to any person other than those set out in section 301 of the Act is prohibited. This would include any facilitation fee to any person who introduced the surrogate mother to the commissioning parents or any compensation of any nature other than those that the Act makes provision for and which can only include the expenses of the surrogate mother as set out in the Act, legal and medical expenses. The affidavit should state that no such fee was paid to any person.

[66] If any agency is involved, full particulars regarding that agency should be revealed. An affidavit by the agency should also be filed containing the following:

- (a) the business of the agency,
- (b) whether any form of payment is paid to or by the agency in regard of any aspect of the surrogacy,
- (c) what exactly the agency's involvement was regarding the (i) introduction of the surrogate mother, (ii) how the information regarding the surrogate mother was obtained by the agency and (d) whether the surrogate mother received any compensation at all from the agency or the commissioning parents.

[67] Full particulars should be set out in the founding affidavit on how the commissioning parents came to know the surrogate mother and why she is willing to act as a surrogate to them. The surrogate mother's background as well as her financial position should be investigated and set out in the affidavit. Furthermore a comprehensive report by psychologist is essential to assess the suitability of the surrogate mother. This should deal in particular with her background, psychological profile and the effect that the surrogacy and the giving up of the baby will have on her. Full medical reports should also be obtained regarding her physical condition to indicate whether surrogacy pose any dangers for her and/or the child. In our view the medical report should deal with the HIV status of the mother, as well as any disease that could be transferred from her to the child in order to protect the child and

to allow the court to exercise its discretion properly in confirming the agreement.

[68] In our view the application should also state where the gametes will come from, without revealing the identity of the donor.

(iv) **A SUITABLE PARENT**

[69] The Act prescribes in section 295(b) (ii) that the commissioning parents should in all respect be suitable parents to accept parenthood , which raises the critical question as to who would constitute such ‘suitable persons” and what would their attributes be . In our view the individual idiosyncrasies of judicial officers should not determine the matter nor should the dominant prevailing view (whatever it may be) in society be necessarily decisive of the matter. One person’s idea of a suitable parent may vary significantly from that of the next person. The bewildering diversity that is South Africa will mean that cultural, social, religious backgrounds as well as issues such as gender may well be just some of the factors which may form views on what a suitable parent may be. Therefore courts should consciously guard that in the exercise of their discretion personal perceptions should not operate to influence any decision on the suitability of a person to either accept parenthood or to act as a surrogate mother. On the other hand a Court should have regard to the personal and character details of a commissioning parent and in this regard

details of previous criminal convictions, particularly those relating to violent crimes or crimes of a sexual nature should be disclosed and the circumstances surrounding them should be fully set out.

[70] It would be timely to remember that for most people there are no restrictions or prohibitions on their ability to procreate. We should accordingly guard against setting unreasonably high standards that are not justifiable for people who choose surrogacy as an option for having a child. To do so will contravene the spirit of the principle of equality enshrined in the Constitution and the Equality Act. When a court needs to decide on the suitability of a parent in our view an objective test should be applied which would include an enquiry into the ability of the parents to care for the child both emotionally and financially and to provide an environment for the harmonious growth and development of the child, bearing in mind the constitutional principles already referred to.

THE ROLE OF THE COURT AND REQUIREMENTS FOR SURROGACY

APPLICATIONS

[71] While a surrogacy agreement is a contract whose validity is dependant upon the confirmation of the High Court, it is a contract of a special kind, unique if regard is being had to its subject matter. The arrangement that comes into

place when a surrogacy agreement is arrived at and the consequences that may follow have far reaching and sometimes unintended consequences.

[72] What is often at stake is not only the physical well being of the surrogate mother and the child to be born but also the psychological consequences that may follow upon the birth of the child and the process of the handing over by the surrogate mother to the commissioning parents of the child born out of the arrangement. That being so a Court has a vital role to play in the confirmation of the agreement. While on the one hand it is enjoined to advance the spirit and the objectives of the Act without creating or placing additional obstacles in the path of litigants who seek relief , on the other as the upper guardian of all minor children it cannot simply be a rubber stamp validating the private arrangements between contracting parties.²⁴

[73] As such it must ensure that both the formal and the substantive requirements of the Act are complied with .Invariably applications of the kind contemplated by the Act are brought on an ex parte basis and the Court is invariably dependant upon the information placed before it by the Applicants and thus the utmost good faith would be expected and required of applicants.

24 (See Judgment of Wepener J in Ex Parte Applications for the confirmation of Three Motherhood Agreements South Gauteng High Court Case Nos 2011/53)

[74] In satisfying itself that the peremptory requirements of the Act have been met the Court must be placed in possession of sufficient information to support any of the conclusions that the applicants contend for. Where an applicant seeks to draw certain conclusions with regard to matters which may include the financial, emotional or general suitability as a parent, there should be facts to support such conclusions that a Court can interrogate. Ultimately the Court must be satisfied that the conclusions arrived at are supported by the facts. Accordingly vague and generic allegations in this regard that fall short of supporting a conclusion may well render an application defective.

[75] It would also follow where such an application is brought on the basis of urgency , the proper grounds for urgency should be clearly set out in the papers as contemplated in Rule 6 (12) (b) of the Uniform Rules of Court.

[76] A Court hearing such an application and in the exercise of its judicial discretion may request any additional information from the parties or any other institution to assist it in the determination of the application.

[77] The affidavit should contain the following:

- 77.1 All factors set out in the Act together with documentary proof where applicable. The affidavit should also contain the information referred to in par [67] and [74] hereof.
- 77.2 whether there have been any previous applications for surrogacy; the division in which the application was brought, whether such an application was granted and/or refused. If it was refused the reasons for the refusal should be set out;
- 77.3 a report by a clinical psychologist in respect of the commissioning parents and a separate report in respect of the surrogate and her partner;
- 77.4 a medical report regarding the surrogate mother which must include the details referred to in par [67] in this judgment;
- 77.5 details and proof of payment of any compensation for services rendered, either to the surrogate herself or to the intermediary, the donor, the clinic or any third party involved in the process;

77.6 all agreements between the surrogate and any intermediary or any other person who is involved in the process;

77.7 full particulars, if any agency was involved, any payment to such agency as well as an affidavit by that agency containing the information referred to in par [65] and [66] this judgment;

77.8 whether any of the commissioning parents have been charged with or convicted with a violent crime or a crime of sexual nature, as envisaged in par [69] of this judgment.

[78] Regarding the enrolment of the matter the following guidelines should be followed in order to protect the identities of the parties:

77.1 any party who seeks to bring an application will cause same to be issued by registrar in the ordinary course;

78.2 the court file must thereafter immediately be brought to the office of the Deputy Judge President, together with a letter explaining the facts and that the application is brought in terms of section 295 of Act 38 of 2005 and requesting a date for hearing. In the event that there exist any

urgency in the hearing of the matter that must be set out in the letter as well;

78.3 the Deputy Judge President will then give further directions as to how this matter shall be heard in due course, including the allocation of the judge for the hearing the matter;

78.4 any consideration as to hearing in camera must be addressed to the judge allocated to hear the matter once the parties are notified of the relevant date of the hearing.

CONCLUSION

[79] If regard be had to the requirements of the Act, the commissioning parents in this case have made out a proper case for the relief they seek. The formal requirements found in Section 292 of the Act have been met and we are satisfied that both the commissioning parents as well as the surrogate mother are suitable persons as contemplated in the Act , both to accept parenthood as well as to act as surrogate mother respectively. We are satisfied that arrangements for the care and welfare of the child to be born , including the stability of the home environment and the provision for the child's needs in the event of death of the commissioning parents or divorce or separation have

been more than adequately provided for. Finally we conclude that the parties have arrived at the agreement we are required to confirm for altruistic rather than commercial reasons. In the circumstances the applicants would be entitled to the relief being sought in the Notice of Motion.

[80] We therefore make the following order:

80.1 The surrogate motherhood agreement annexure “FA4” is confirmed.

80.1 The provisions of section 297(1) of the Children’s Act of 2005 will apply to the agreement for all purposes.

R G TOLMAY
JUDGE OF THE HIGH COURT

N KOLLAPEN

JUDGE OF THE HIGH COURT