

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/~~NO~~

(2) OF INTEREST TO OTHER JUDGES: YES/~~NO~~

(3) REVISED:

...1-2-2017
Date

[Handwritten Signature]
Signature

9/2/2017

CASE NO: 45037/2016

IN THE EX-PARTE APPLICATION OF:

- | | |
|-----|------------------|
| HPP | FIRST APPLICANT |
| JTP | SECOND APPLICANT |
| SEW | THIRD APPLICANT |
| WJW | FOURTH APPLICANT |

CASE NO: 61935/2016

In the ex-parte application of:

- | | |
|------|------------------|
| DME | FIRST APPLICANT |
| CDE | SECOND APPLICANT |
| AMVH | THIRD APPLICANT |
| RS | FOURTH APPLICANT |

JUDGMENT

TOLMAY J:

INTRODUCTION:

- [1] Both these applications were brought by the applicants for confirmation of surrogate motherhood agreements in terms of sec 292(1)(e) read with sec 295 of the Children's Act of 2005 (the Children's Act).
- [2] In both these applications Ms Lee-Ann Strydom (Ms Strydom) acted as a so called surrogacy co-ordinator and provided surrogacy facilitation services for which she charged a fee.
- [3] The following issues arose from this:
- (i) Whether the surrogacy facilitation agreements constitute a transgression of sec 301 of the Children's Act; and
 - (ii) Whether the court could confirm the surrogate motherhood agreements if it is found that the agreements between Ms Strydom and the applicants were unlawful.
- [4] In both the applications the applicants had, but for the aforesaid, complied with the requirements pertaining to surrogate motherhood agreements as set out in the Children's Act as well as the guidelines provided by the Court for surrogacy applications.¹

¹ *In re: Confirmation of Three Surrogate Motherhood Agreements 2011(6) SA 22; Ex parte WH 2011(6) SA 514,*

- [5] I will refer to the application under case no 45037/2016 as the first application and the application under case no 61935/2016 as the second application.

THE FIRST APPLICATION

- [6] In the first application, the First and Second Applicants (HP and JP) states that they previously entered into a surrogate motherhood agreement which was confirmed by the Court on 19 November 2013. The surrogate in that instance was HP's best friend. As a result of the surrogacy process, a boy was born on 26 September 2014. HP and JP however want to expand their family and the previous surrogate mother was not able to assist them again. HP and JP then approached Ms Lee-Ann Strydom (Ms Strydom) of Destiny Babies. Ms Strydom describes herself as a surrogacy consultant and advertises her services as such on the internet.

- [7] Ms Strydom introduced HP and JP to the potential surrogate mother (SW) and apparently offered her services as a surrogacy co-ordinator. Ms Strydom informed HP and JP that her task as a surrogate co-ordinator would be to assist;

- 7.1 guiding and advising the surrogate;
- 7.2 with a referral to a clinical psychologist;
- 7.3 with any mediation with the surrogate;
- 7.4 if applicable, during the gestational period;
- 7.5 if required, manage any dispute resolution; and
- 7.6 in general, overseeing the entire surrogacy "*journey*"

- [8] The Applicants were amenable to enter into such an agreement with Ms. Strydom. Ms Strydom invoiced them in an amount of R 5 000-00 for the services rendered. It was pertinently stated that this amount does not include any introduction fee to the surrogate mother. Pursuant
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to the payment of R 5 000-00, Ms Strydom then referred HP and JP for purposes of assessment to the clinical psychologist Stavoula Samouris.

- [9] The applicants' attorney, quite correctly, disclosed the payment to Ms Strydom in the papers as she was concerned that the payment may be in contravention of sec 301 of the Children's Act. The conduct of the attorney must be commended as Courts must be able to rely on Applicants to act with the utmost good faith in *ex parte* applications. As Applicants themselves may not realise the duty they have in this regard it will ultimately be the duty of the attorney to ensure that all relevant information is brought under the Court's attention.
- [10] After perusal of the papers, Applicant was requested to file heads of argument and the Child Law Centre (CLC) was requested to assist as *amicus curiae*. They were requested to deal with the question of the enforceability of the agreement between HP, JP and Ms Strydom as well as the consequences if it should be found that the agreement between them is unlawful. The Court is indebted to CLC for their valuable assistance.
- [11] After considering the heads of argument, and at the first hearing of the application, the Court raised the point that Ms Strydom has an interest in the proceedings as the agreement entered into between HP, JP, and Ms Strydom seemed at a first glance to fall foul of the provisions of sec 301 of the Children's Act. As a ruling about the legality of the agreement will have an impact on Ms Strydom's rights it was deemed appropriate to alert her to the concerns raised. Consequently the application was postponed *sine die*. The application was served on Ms Strydom and she was called upon to show good cause why the agreement should not be declared unlawful and unenforceable. She had to file an affidavit

to this end. She was ordered to comply with sec 302(1) and (2) of the Children's Act which protects the identity of the parties involved in the surrogate motherhood agreement. Ms Strydom filed an affidavit and was joined as a Respondent to the proceedings in due course.

- [12] Although a Rule 16A notice was filed by Ms Strydom's legal team, this notice only states that a constitutional issue will be raised pertaining to the interpretation of Sec 301 of the Children's Act in the light of sec 22 of the Constitution. The Court was not called upon to declare sec 301 unconstitutional but rather to interpret sec 301 in such a way that Ms Strydom's constitutional right to follow the occupation or trade of her choice is protected. No response was forthcoming from any party as a result of the Rule 16A notice.
- [13] In the affidavit filed by Ms Strydom she states that she started to offer surrogacy facilitation services during August 2015, trading under the name "Destiny Babies". She says she works closely with fertility clinics and medical practitioners. In April 2016 Medfem clinic offered her fulltime employment as a surrogacy co-ordinator, which she took up.
- [14] She argues that she is entitled to choose her occupation in terms of sec 22 of the Constitution and the provisions of sec 301 should not deprive her of that right.
- [15] She states that she assisted the Applicants in terms of the facilitation agreement. She *inter alia* introduced HP and JP to SW, but she asked no introductory fee. She performed the following services:

- a) She arranged appointments with Ms Sumouris, the clinical psychologist;
- b) She attempted to arrange medical assessments with medical practitioners at Vitalab Clinic;
- c) She monitored WS throughout the surrogacy process;
- d) She offered WS around the clock emotional support;
- e) WS joined her surrogate support group; and
- f) She consulted HP, JP and WS regarding surrogacy related expenses.

[16] Ms Strydom explains that she acted as a surrogate mother herself 6 times during the past 11 years and regards herself as uniquely qualified to assist people who are involved in the surrogacy process. She attached a medical-psychological expert opinion, co-authored by Dr Antonio Rodrigues, a medical practitioner who specialises in reproductive medicine and Ms Mandy Rodrigues, a clinical psychologist, to support her claims about the value of her services. She also attached an ethics expert's opinion by Prof Thaddeus Metz. The opinion by Prof Metz seeks to persuade the Court that the facilitation agreement is morally and ethically sound and should not be declared unlawful.

[17] According to the medical-psychological report Ms Strydom's services are invaluable and she is described by the authors as "*the Florence Nightingale of surrogacy*". It states further that:

- a) Without her assistance, commissioning parents will have to find a surrogate mother themselves;

- b) She briefs the commissioning parents about medical and legal aspects;
- c) She makes sure that the surrogate mother is medically assessed;
- d) She determines whether the surrogate mother's living conditions would be amenable to carrying a pregnancy; and
- e) She reminds the surrogate mother to keep her medication regimen related to either artificial fertilisation or the pregnancy.

[18] Ms Strydom states furthermore that she *inter alia*, explains complicated medical reports, debriefs the surrogate mother after invasive medical procedures and prepares her emotionally for the said procedures.

[19] On an evaluation of the services rendered by her, I am concerned that these services encroach on the professional fields of *inter alia*, legal representatives, psychologists and medical practitioners. The concern is that Ms Strydom's only qualification seems to be her personal experience as a surrogate mother. Invaluable as her assistance may be, I am not convinced that her personal experience as a surrogate mother qualifies her to render these services.

[20] Ms Strydom's services are advertised on the internet and in addition to the aforementioned a perusal of Destiny Babies' website reveals that they:

20.1 Have dealt with national and international clients;

20.2 "Help you find a surrogate"; and

20.3 "Provide, for intended parents living out of state, personal consultation with the surrogate via home visits".

[21] Ms Strydom proceeded in her affidavit to launch a scathing attack against the legal representatives of HP and JP and even asked for a special cost order against them. She also launched an attack on CLC which was ironically requested by the Court to assist. These attacks were also repeated and reiterated in the heads of argument filed on her behalf. At the hearing I specifically enquired from Counsel appearing for Ms Strydom whether Ms Strydom persists with these submissions and invited counsel to address me if this was the case as I *prima facie* deemed the attack ill-conceived and without any merit. No argument whatsoever was raised on these issues and I take it that those submissions were abandoned and correctly so. I consequently do not deal with these aspects in my judgement.

THE SECOND APPLICATION

[22] While the first application's hearing was pending the second application also came before me under case no: 61935/2016. It transpired from the psychologist's report that Ms Strydom was also involved in this case in the same capacity as the previous one. The psychologist who filed a report in this matter, Ms Mandy Rodrigues, is the co-author of the Medical-psychological report previously referred to. In this instance rather unfortunately, no reference to Ms Strydom's involvements was made to in the founding affidavit. I was merely stated that a staff member of the Medfem Fertility clinic put the Applicants into contact with the potential surrogate mother and no introductory payment was made. I requested that an affidavit be filed setting out Ms Strydom's role in the surrogacy proceedings. A supplementary affidavit was filed. As in the previous case, an amount of R 5 000-00 was paid to Ms Strydom for the services that I have already alluded to and no fee was paid for the introduction of the surrogate mother to the commissioning parents.

[23] I invited the legal representatives of the Applicants in the second application to attend and make submissions at the hearing of the first application. They did and submissions were made pertaining to the issues that arose.

COMMERCIAL SURROGACY

[24] At the heart of the problem that arises in these two applications, is the fact that commercial surrogacy is, as in most other countries, unlawful in South Africa and payments are limited to those specifically provided for in the Children's Act.² The justification of the prohibition of commercial surrogacy has been the cause of some debate, but the fact remains that it is unlawful and the Courts must apply the law within the existing legislative framework.³

[25] In the UK certain acts relating to surrogacy arrangements are criminalised, these acts include, negotiating or facilitating arrangements on a commercial level and the publication or distribution of an advertisement indicating a willingness to act as a surrogate or expressing a need for a surrogate mother.⁴

[26] The foundational principle to the legislative framework applicable is the objective to protect people who are involved in surrogacy arrangements.⁵ In **WH** the potential for abuse of, particularly, underprivileged women was pointed out.⁶ Despite some voices calling for commercial surrogacy to be allowed the commonly held view seems to be that the potential for abuse far outweighs any possible advantage.

² *Sec 301 of the Children's Act, Davel & Skelton, Commentary on the Children's Act , 19 - 30 [2013] 564 at 570, See Ex Parte WH, supra, par 43 – 53 for a summary of the position pertaining to commercial surrogacy in other countries*

³ *Louw A, THRHR [2013] 564 at 580, Surrogacy in South Africa: Current approach to be Reconsidered?*

⁴ *Louw, Supra, p 572*

⁵ *Ex parte: MS 2014 (3) SA 415 GP par 49*

⁶ *WH, supra, par 64*

This is recognised in most countries and consequently legal commercial surrogacy is the exception rather than the norm.

[27] Section 301 prohibits payments in respect of surrogate motherhood agreements and provides for limited exceptions only. This reinforces the principle that commercial surrogacy is unlawful.⁷

[28] Section 301 reads as follows:

(1) *Subject to subsection (2) and (3), no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or kind;*

(2) *No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for:*

(a) *Compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and confirmation of the surrogate motherhood agreement;*

(b) *Loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or*

⁷ AB, *Surrogacy Advisory Group v Minister of Social Development and Centre for Child Law* Case CCT 155/15 (CC)

(c) Insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

(3) Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 295 or the execution of such an agreement, is entitled to reasonable compensation therefor.

[29] A person who contravenes section 301 commits an offence and if found guilty is liable on conviction to a fine or imprisonment for a period not exceeding 10 years, or to both a fine and such imprisonment. If found guilty more than once, such a person is liable to a fine and imprisonment for a period not exceeding 20 years or both a fine and imprisonment.⁸

[30] Section 303(2) of the Children's Act states that no person may, in any way for (or with a view to) compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement. This then makes the payment of any introductory fee pertaining to the surrogate matter unlawful and that also explains why Ms Strydom categorically states that she did not receive any introductory fee.

[31] In addition to the offences provided for in section 305, section 297(2) of the Children's Act states that any surrogate motherhood agreement that does not comply with the provisions of the Children's Act is invalid and any child born as a result of any action taken in execution of such an

⁸ Sec 305 (6) and (7) of the Children's Act

agreement is for all purposes deemed to be the child of the woman that gave birth to that child.

[32] In addition to these statutory requirements, the Court in **WH**⁹ set out guidelines that need to be complied with, the Court also confirmed the fact that commercial surrogacy is unlawful. The following was said: *“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 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”* (my emphasis)

[33] It is important to note that the payment of a facilitation fee or any compensation of any nature other than those that the Act makes provision for to any person was expressly prohibited and the affidavit should state that no such payment is made. In the light of this there was a duty on the Applicants in the Second Application to inform the Court in the affidavit about the payments made to Ms Strydom. As already stated there is an ethical and professional duty on attorneys to ensure that a Court, especially in *ex parte* applications, are made aware of all relevant information. In the light of this duty the attorney in a surrogacy application should file an affidavit confirming that as far as they could ascertain no payments were made to anyone apart from those provided for in the Children’s Act.

[34] In **WH** an agency, whose principal business was egg donation introduced surrogates free of charge. In order to ensure that Courts be

⁹ *WH, Supra, Par 65*

put in a position to consider whether there is compliance with the law and specifically section 301 the Court ruled as follows, pertaining to the involvement of these agencies:

“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 regards 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 (iii) whether the surrogate mother received any compensation at all from the agency or the commissioning parents”*

[35] The purpose of the directives in **WH** were clearly to enable the Court to (a) obtain all relevant information pertaining to compliance with the Children’s Act and (b) to determine whether there was any contravention of the Children’s Act.

[36] The papers do not set out how Ms Strydom became aware of the fact that the potential surrogates were willing to act as such. I accept that her website played a role and that she could have been contacted by them and informed that they are willing to act as such. This information

should have been included in the applications and Ms Strydom, being the person who introduced them to the commissioning parents, should have made an affidavit setting out these facts.

[37] On a proper reading of **WH** it is clear that the purpose for the requirement to reveal certain information is to ensure compliance with the Children's Act, therefore the same requirements should apply to whoever introduces the surrogate mother and whoever provides related services.

[38] Ms Strydom's legal representatives argues that the surrogacy facilitation services provided by her in pursuance of the facilitation agreement are beneficial to all persons involved, and are not the kind of social ill that section 301 aims to prohibit. They argue that the purpose of section 301 cannot be to aimlessly criminalise the provision of paid-for services that relate to surrogate motherhood agreements, but is rather to avoid commercial surrogacy – *id est* payments in money or in kind to the surrogate mother. This argument however loses sight of the fact that commercial surrogacy entails much more than mere direct payments to surrogate mothers. There could also be third parties involved, who could benefit financially from the process in contravention of the law.

[39] I am alive to the fact that commissioning parents are in a difficult situation when they start looking for a potential surrogate and can't find someone who is willing to assist from their circle. It is this need that created space for services provided by agencies and individuals like Ms Strydom. The solution may well be that a regulatory framework should be created which may also include a possible data base of potential

surrogate mothers. If this database is properly regulated the possibility of abuse can be eliminated. Until and unless that is done, similar situations as the ones we encounter in these applications will arise. In the meanwhile, the only solution is to require of anyone, whether an agency, or an individual or any entity whatsoever to file an affidavit, as was required in **WH**. A Court can also, if the need arises, request any further information that it may deem relevant from the parties. The Court should then in each case exercise its discretion and determine on a case to case basis, whether there was compliance with the Children's Act, while keeping in mind that commercial surrogacy is unlawful and that only certain expenses are allowed.

[40] It is with the principle that commercial surrogacy is prohibited that one should proceed when interpreting sec 301. Ms Strydom argues that section 301 should be read with section 22 of the Constitution. Section 22 reads as follows:

“Every citizen has the right to choose their trade, occupation or profession freely. The practice of trade, occupation or profession may be regulated by law.”

[41] She implores the Court to interpret section 301 of the Children's Act, read with section 22 of the Constitution in a manner that will allow the services that she renders to be regarded as lawful. The argument proposed by her is that her services fall within those provided for in sec 301.

[42] The following should be kept in mind when interpreting the relevant sections. Section 39(2) of the Constitution, mandates Courts to interpret legislation in a manner that would promote the spirit, purports and objects the Bill of Rights. In terms of sec 36 of the Constitution the limitation of rights contained in the Bill of Rights must be reasonable and justifiable in an open and democratic society. A Court should when

interpreting legislation follow a purposive and contextual approach.¹⁰ In doing so a Court is enjoined to provide a broad and generous reading in determining the ambit of constitutionally enshrined rights¹¹.

[43] On a reading of section 301, it would seem that two distinct categories of lawful expenses are catered for. The first category consists of costs directly related to:

- (a) The artificial fertilisation and pregnancy;
- (b) The birth of the child; and
- (c) The confirmation of the motherhood agreement.

The second category deals with *bona fide* professional legal and medical expenses.

[44] Ms Strydom's legal representative argued that on a proper interpretation of sec 301, the surrogacy facilitation agreement and expenses provided by Ms Strydom falls within the ambit of section 301. To come to that conclusion, her services must fall within either of the aforementioned two categories.

[45] When the first category of expenses is considered it must be noted that the expenses must be directly related to the processes referred to. The expenses listed are limited to that which is necessary to ensure that the process of surrogacy and the subsequent pregnancy are successfully completed and the motherhood agreement confirmed. This will

10 *Natal Joint Municipal Pension Fund v Edumeni Municipality* 2012(4) SA 593 (SCA); *S v Zuma* 1995(2) SA 642(CC) at par 15; *S v Makwanyane* 1995(3) SA 391 (CC)

11 *Department of Land Affairs v Goedgeleegen Tropical Fruits (Pty) Ltd* 2007(6) SA 199 CC; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999(1) SA 6 (CC)

obviously include costs that are necessary to ensure that the fertilisation process can be completed as well as costs that are directly linked to the pregnancy. This will *inter alia* include the costs of the embryologist, which although necessary for the fertilisation process, may not qualify as a medical expense. In my view the services rendered by Ms Strydom are not directly linked to either the fertilisation process or the subsequent pregnancy as they are not essential to ensure either the fertilisation or the pregnancy. Neither can it be argued that her costs are directly related to the birth.

- [46] The costs pertaining to the confirmation of the motherhood agreement will include costs necessary to attend to the confirmation which will include costs to comply with the Court's requirements, this will include i.e. psychologists, social workers or any costs that may be occasioned by the requirements set by the Court and which will ensure that the surrogacy motherhood agreement is confirmed. Ms Strydom's services are on the same grounds set out above not directly related to the confirmation of the motherhood agreement.
- [47] Consequently the services rendered by Ms Strydom will not fall under expenses provided for under section 301(2)(a). It needs no further argument that her costs could not be regarded as professional legal or medical costs as provided for in the second category. Consequently Ms Strydom's services do not fall within those provided for in sec 301.
- [48] If one then proceeds to consider whether Ms Strydom's right to follow the trade or occupation of her choice is violated, one must look at section 22 of the Constitution in the context of what section 301 is trying to accomplish, while keeping in mind the provisions of sec 36 of the Constitution. As already stated sec 22 provides for the right to follow a

trade or occupation but also provides that the practice of a trade may be regulated by law.

[49] The Constitutional Court held as follows regarding the right to freedom of trade, occupation and profession in **Affordable Medicines Trust**¹²;

“What is at stake is more than one’s right to earn a living, important though that is. Freedom to choose a vocation is intrinsic to the nature of a society based on human dignity as contemplated by the Constitution. One’s work is part of one’s identity and is constitutive of one’s dignity. Every individual has a right to take up any activity which he or she believes himself or herself prepared to undertake as a profession and to make that activity the very basis of his or her life. And there is a relationship between work and human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity; it is the foundation of a person’s existence.

Though economic necessities or cultural barriers may unfortunately limit the capacity of individuals to exercise such choice, legal impediments are not to be countenanced unless clearly justified in terms of the broad public interest. Limitation on the right to freely choose a profession are not to be lightly tolerated... (my emphasis)

[50] In the case of **Nazo**¹³ the Free State High Court held as follows:

“However and although the practice of trade, occupation or profession may be regulated by law, in my view the constitutional right of freedom of trade should not be undermined by restrictions, unless necessary in order to protect the rights of the public in general.” (my emphasis)

¹² *Affordable Medicines Trust and Others v Minister of Health and Others* 2006(3) SA 247 (CC) [59] – [60]

¹³ *Nazo v Free State Gambling & Liquor Authority and Another, In re: Jacobs V Free State Gambling & Liquor Authority and Another* (2386/2015) [2015] ZAFSHC 227

[51] As far as the alleged limitation of Ms Strydom's right to exercise her chosen profession is concerned, it would not seem to me that her choice to exercise her chosen profession is limited, what is limited is her right to ask for payment of expenses which fall foul of the provisions of sec 301. The reason why sec 301 prohibits payments other than those provided for is to prevent commercial surrogacy. As already pointed out the limitations' purpose is to prevent commercial surrogacy, which is ultimately enacted to protect the public interest. Important issues of public policy arises which justifies a limitation of Ms Strydom's right to ask payment for her services. Surrogacy is strictly regulated, not only here but also internationally, and the reason for this regulatory framework is ultimately to protect the public against unscrupulous people who may abuse vulnerable people. The limitations which are enacted are therefore acceptable in an open and democratic society and any limitation in this regard is accordingly justifiable in terms of sec 36 of the Constitution. I must pause to state that on the papers there is no indication that Ms Strydom herself is unscrupulous or abuse vulnerable people, to the contrary it seems that her services are highly regarded, but this does unfortunately not make receiving payment for those services lawful. The purpose of the limitation is there for a greater good and as such is justifiable.

[52] There is a very real danger in allowing surrogacy facilitation agreements as literally anyone could give himself/herself out as a surrogacy coordinator. The floodgates will be opened and with no control, this could and probably will lead to exactly what the legislator attempted to prevent, namely, commercial surrogacy and the abuse of vulnerable people.

[53] It may well be that Ms Strydom renders an invaluable service, but this is not the question. One appreciates that she can assist people who go

through the process of surrogacy, because of her experience, but I am of the view that the expenses she claims fall foul of the provisions of section 301 and accordingly the agreements between her and the commissioning parents are declared unlawful and unenforceable.

CONFIRMATION OF THE SURROGATE MOTHERHOOD AGREEMENTS

- [54] The question that now needs answering is whether the surrogate motherhood agreements can be confirmed in the light of the fact that the surrogacy facilitation agreements were declared unlawful.
- [55] The pertinent question is whether the Court should refuse to confirm a surrogate motherhood agreement, which complies with the Children's Act, because the Applicants have entered into an unlawful collateral agreement with a third party.
- [56] On a perusal of the applications before me, there is no doubt that the applicants in both the applications are competent to enter into a surrogate motherhood agreement, suitable to be parents or act as surrogates and accept and understand the legal consequences of the surrogate motherhood agreement . The only impediment which may jeopardise their applications is the fact that they have entered into the surrogacy facilitation agreements which the Court has now found falls foul of the provisions of section 301 and are consequently unlawful.
- [57] It was argued that irrespective of what the Court may find about the legality of the surrogacy facilitation agreement that the Court should confirm the surrogate motherhood agreements as the Applicants have complied with all the requirements of the Children's Act and the guidelines required by the Court. This contention, it was argued, is

further re-enforced by the provisions set out in section 295(c)(e) of the children's Act, which reads:

"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"

[58] The applicants' relied on the decision in **Ex Parte Ms & Others**¹⁴ where the Court confirmed a surrogate motherhood agreement post fertilisation despite the fact that section 298 prohibits insemination of a surrogate mother before the surrogacy agreement is confirmed by Court. It was argued that, as was held in **Ex Parte Ms & Others**, in the event that a section of the Children's Act is contravened, such contravention, even if rendered an offence, will not preclude a Court from confirming an agreement.

[59] In **Ms & Others** the Court found that to interpret the Act as precluding the Court from confirming a surrogacy agreement after artificial fertilisation has taken place would undermine the Constitutional rights of the parties, as the effect would be to render the agreement invalid and the child born a child of the surrogate mother. It would also mean, that the Court's finding impinges the dignity of the commissioning parents who would be denied the opportunity to experience a family life of their own.¹⁵

[60] The Court in **MS & Others** however importantly also states as follows:
"It is a well-established principle of our common law that an agreement to commit an unlawful act is not enforceable. This includes acts that are unlawful in terms of a statute. An agreement to commit an unlawful act is unenforceable, and an agreement to facilitate or encourage the

¹⁴ 2014(3) SA 415 GP; Sec 303 makes it an offence to artificially to fertilise a woman in execution of a surrogacy agreement without authorisation by a court for such fertilisation

¹⁵ *Supra*, par 50 and 51

commission of an unlawful act, even if indirectly, may be unenforceable, provided the connection is sufficiently close”¹⁶

[61] The situation in **Ex Parte MS** is distinguishable from the present matter as there is no danger that the rights of the unborn child will be affected as the fertilisation process has not commenced yet. The rights of the commissioning parents will be impinged only to a limited extent as they could still enter into another surrogate motherhood agreement which is not tainted by an unlawful collateral agreement.

[62] In the absence of any authority pertaining to surrogacy agreements the principles that evolved in contractual law should be considered whilst keeping in mind that a surrogacy agreement is an agreement of a special kind. **Christie**, states as follows:

“In considering the effect of the illegality of a contract or transactions collateral or connected to it, the Court is concerned to ensure that it does not become an instrument to defeat the object of the legislature or the common law in defining illegality. This concern has led to the evolution of two principles which must not be confused. The first is that the indirect enforcement of an unenforceable contract will in no circumstances be permitted, whether the law condemns the contract in the strongest terms as legal and immoral or merely renders it unenforceable. The second principle is that the stronger the law’s condemnation of the illegal contract the further the condemnation spread to include transactions which, while not amounting to indirect attempts at enforcement, tend to facilitate or encourage the performance of illegal contract”¹⁷

[63] In **Gibson v Van Der Walt**¹⁸ the following was said:

¹⁶ *Supra*, par 31, p 422

¹⁷ *Christie, The law of Contract*, 4th ed, p 456

¹⁸ 1952(1) SA 269 H

“When one has to consider whether connected acts are all tainted by a reprobation attaching to one of them, the nature and degree of that reprobation cannot but play an important part. While, for instance, a taint of criminality or immorality may attach to a compromise on a dispute arising out of a criminal or immoral transaction, a similar compromise on a merely unenforceable but otherwise not reprehensible claim obviously carries no such taint, and the question of its enforceability will have to be decided by some other test.”

[64] In the same vein the following was said in **Richards v Guardian Assurance**¹⁹:

“In cases where indirect facilities are given to the commission of illegal or immoral acts, the Court must use its discretion in deciding whether such facilities are too remote to have any bearing upon such acts or whether they fall within the degree of prohibition”.

[65] **Christie** correctly states that *“the Courts must feel their way from the example to example”*²⁰ as it would seem that no definitive answer to the question exists and the conclusion will depend on the circumstances of the case. One will accordingly have to look at the purpose of the limitations provided for in the Act, the nature of the unlawful agreement, the way in which it is connected to the lawful agreement as well as the impact of a declaration of either lawfulness or unlawfulness, depending on the circumstances, of each case. In this regard, the rights of the parties, the purpose of the limitation as well as the interests of society should be considered.

[66] The reason why the facilitation agreement was found to be unlawful is that it falls foul of the provisions of sec 301, and the reason for the

¹⁹ 1907 TH 24 28

²⁰ *Christie, supra*, p 457, See also *Pick 'n Pay Stores Ltd v Trek Petroleum (Pty) Ltd* 1976(2) SA 302 W on 306

limitations set out in sec 301 is to prevent commercial surrogacy. Court's must be loath to be seen to facilitate or encourage the performance of illegal contacts. There is a real danger that Courts may unwittingly facilitate and encourage illegal agreements if the surrogate motherhood agreement which emanates from the illegal facilitation agreement is confirmed.

[67] Consequently, when deciding whether one should confirm the motherhood agreement, it is important to keep in mind why the legislature has created a strict regulatory framework within which only certain limited expenses are allowed. The unlawfulness of commercial surrogacy sits at the heart of the limitations provided for in the Children's Act. This entails that one must establish whether the unlawful contract has tainted the lawful contract to such an extent that the lawful contract cannot be endorsed. From the aforesaid, it would seem that the appropriate approach would be that the Court has a discretion, which discretion must be exercised keeping in mind the purpose of the legislative framework and the ban on commercial surrogacy.

[68] I am of the view that a Court should be sensitive to the fact that if Courts proceed to declare surrogacy agreements valid, despite the fact that it is tainted by an unlawful surrogacy facilitation agreement, it might actually negate the whole purpose of section 301, and commercial surrogacy will have sneaked in through the back door. Courts can't be seen to condone commercial surrogacy directly or indirectly in the light of the existing legislative framework. In my view the invalidity of the subsequent surrogate motherhood agreements may in many instances be the unfortunate result of entering into an unlawful surrogacy facilitation agreement.

[69] I proceed to consider the circumstances in the matters before me, keeping in mind the principles that should be applied. In these two

applications a perusal of the psychologists reports reveal that the two surrogate mothers do not seem to be vulnerable women who may be exploited. They seem to have considered the process and are willing to do it on a purely altruistic basis. I also take into consideration the difficulty that people may have to find a suitable surrogate, which difficulty is exacerbated by the absence of a proper regulatory framework pertaining to potential surrogates. I also take into consideration that Ms Strydom may have been under the *bona fide* impression that she is allowed to enter into the agreements with the Applicants. In future however, with the Court's declaration of unlawfulness of the facilitation agreements now determined, there may be some difficulty in persuading a Court that similar agreements were entered into *bona fide*.

[70] I also consider the fact that the Applicants were obviously unaware of the unlawfulness of the facilitation agreement and the possible consequences thereof. Although commercial surrogacy as such may be morally reprehensible and unlawful the parties in these applications did not act in a morally reprehensible manner that could impact on the validity of the agreement.

[71] I also consider the very human desire of the Applicants to have children and the fact that they, through no fault of their own, are unable to conceive a child themselves. In the light of the aforesaid I am, in the circumstances of these two applications of the view that I should exercise my discretion and confirm the surrogacy motherhood agreements despite the declaration of unlawfulness of the facilitation agreement.

Consequently the following orders are made:

1. The surrogacy facilitation agreement entered into between the Applicants and Ms Strydom is declared unlawful and unenforceable, in both application 45037/2016 and application 61935/2016;
2. The surrogate motherhood agreements entered into between the parties hereto are confirmed;
3. In both application 45037/2016 and application 61935/2016 an order is granted in the following terms:
 - 3.1 The child/children born of third applicant, in accordance with the surrogate motherhood agreement entered into between the parties, is/are for all purposes the child/children of the first and second applicants from the moment of the birth of the child/children concerned;
 - 3.2 The first and second applicants shall have full parental rights and responsibilities in respect of the child/children born of the surrogate motherhood agreement, whether in terms of the common law or the Children's Act, 38 of 2005 ("the Children's Act") (and any amendments thereto) and/or any other statute which may be promulgated or has been promulgated dealing with parental rights and responsibilities;
 - 3.4 The registration of birth of the child/children as required in terms of Chapter II of the Births and Deaths Registration Act, 51 of 1992, shall be effected such that the first and second applicants shall be registered as the parents of the child/children respectively, as from date of birth, given that first and second applicants are the parents of such child/children;

- 3.5 No adoption procedures will be required in respect of the child/children to be born of the surrogate motherhood agreement in terms of sec 297(1)(a) of the Children's Act;
- 3.6 The third and fourth applicants shall have no rights of parenthood or care in respect of the child/children born of the surrogate motherhood agreement, no rights of contact with such child/ children and the child/children will have no claim for maintenance or of succession against the third or fourth applicants or any of their relatives save such relatives who are the relatives of the first and second applicants and provided that such relatives have any duties and or obligation in law in respect of the child/children born;
- 3.7 The identity of the parties to this application, or any facts which may cause them to be identified, shall not be published;
- 3.8 The doctors concerned are authorised to perform the artificial fertilisation procedures referred to in sec 303 of the Children's Act;
- 3.9 No artificial fertilisation on the third applicant may take place after the lapse of eighteen months from the date of this order.
4. Each party is to pay his/her own costs.



TOLMAY J

Judge of the High Court

Gauteng Division, Pretoria

CASE NO: 45037/16

DATE OF APPLICATION: 23 NOVEMBER 2016

DATE OF JUDGMENT: 9 FEBRUARY 2017

ATTORNEY FOR APPLICANTS: ADELE VAN DER WALT INC

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AMICUS CUERIAE: CENTRE FOR CHILD LAW, UP

ADVOCATE FOR AMICUS: ADV K OZAH

ATTORNEYS FOR RESPONDENT: ADAMS & ADAMS

ADVOCATE FOR RESPONDENT: ADV D JORDAAN

CASE NO: 61936/16

DATE OF APPLICATION: 23 NOVEMBER 2016

DATE OF JUDGMENT: 9 FEBRUARY 2017

ATTORNEY FOR APPLICANTS: ROBYNNE FRIEDMAN ATTORNEY

ADVOCATE FOR APPLICANTS: ADV C WOODROW