

IN THE NORTH GAUTENG HIGH COURT, PRETORIA
(REPUBLIC OF SOUTH AFRICA)

Case No: 48856/2010

(1)	REPORTABLE: YES NO
(2)	OF INTEREST TO OTHER JUDGES: YES NO
(3)	REVISED.
2/12/2013	
DATE	SIGNATURE

In the *ex parte* matter of:

M S & OTHERS

Applicants

In re Confirmation of Surrogate Motherhood Agreement

JUDGMENT

KEIGHTLEY AJ:

Introduction

- 1 This matter concerns an application for confirmation by this Court of a surrogate motherhood agreement in terms of section 292, read with section 295 of the Children's Act 38 of 2005 ("the Act"). The applicants are the commissioning parents (first and second applicant) and the surrogate mother (third applicant).

- 2 The application was made *ex parte* and was heard in Chambers. After requesting written submissions from counsel for the applicants, Ms Retief, and hearing her oral submissions, on 1 November 2013 I granted an order confirming the surrogate motherhood agreement between the parties.
- 3 While such applications do not ordinarily require a written judgment, this particular matter raised a novel issue that is not expressly dealt with in the Act. As this issue may arise in future cases, I took the view that it would be appropriate to hand down a written judgment providing reasons for my decision in the hope that it may provide some guidance to applicants and courts faced with similar situations in the future. I am grateful to Ms Retief for her very helpful submissions in this regard.
- 4 Crisply put, this case requires a determination of the issue of whether it is competent for the High Court to confirm a surrogate motherhood agreement in circumstances where the written agreement between the parties was only entered into, and confirmation of such agreement sought, after the artificial fertilisation and subsequent pregnancy of the surrogate mother. In fact, in the present case, the surrogate mother was 33 weeks pregnant at the time that the application for confirmation of the surrogate motherhood agreement was instituted.
- 5 I should make it clear from the outset that the pregnancy of the surrogate mother resulted from a process of artificial fertilisation using a donor egg from the surrogate mother, and the commissioning father (second applicant's) sperm. The artificial fertilisation took place following a verbal agreement

between the parties in terms of which the third respondent agreed to act as a surrogate mother for the commissioning parents. I will set out in more detail later the circumstances that gave rise to this situation.

- 6 There are very few reported judgments on the provisions of Chapter 19 of the Act dealing with the confirmation of surrogate motherhood agreements. I was able to find only two: Ex parte WH & Others 2011 (6) SA 514 (GNP), and In re Confirmation of Three Surrogate Motherhood Agreements 2011 (6) SA 22 (GSJ). Neither of these judgments deals with the issue raised in the present case. Ms Retief, who practices in this area of the law, confirmed that she was unaware of any case in which a High Court had been faced with this issue.

- 7 Surrogacy arrangements are multifaceted. They require a consideration of many interconnected concerns, ranging from those that are deeply personal to the parties involved, to those that deal with the necessary practical aspects of the arrangement. The legal complexities of surrogacy arrangements are of overriding concern, as these arrangements involve an intricate relationship of interests, rights and obligations on the part of all parties concerned. To deal with these complexities, our lawmakers embarked on an extended project over many years to establish the present legal regime regulating surrogacy arrangements. Chapter 19 of the Act, which governs surrogacy arrangements, is the result of a protracted process of investigation and evaluation.¹

¹ Anne Louw "Surrogate Motherhood" in CJ Davel & AM Skelton Commentary on the Children's Act, (Rev Service 4, 2012) pp19-5 to 19-6

8 The surrogacy scheme established under the Act is carefully structured so as to regulate this complexity of interests, rights and obligations. As I will demonstrate shortly with reference to the relevant provisions of Chapter 19 of the Act, one of the central requirements running through this highly structured scheme is that surrogate motherhood agreements must be formally encapsulated, and vetted and confirmed by the High Court before any steps are taken that may result in the conception of a child. To this end, artificial fertilisation of a surrogate mother is expressly prohibited unless and until a surrogate motherhood agreement has been confirmed by the court.²

9 The reason for this is obvious. In terms of our Constitution, the best interests of a child are of paramount importance in every matter concerning the child.³ In essence, surrogacy arrangements are all about the child to be born. Accordingly, although the hoped-for child is not a party to the surrogate motherhood agreement, his or her future rights and interests are the most important of all the rights and interests involved. To ensure that they are adequately protected, the law requires certainty and judicial scrutiny of the proposed surrogacy arrangement before there is even any prospect of a child coming into being.

10 In the present case, the parties are in breach of this fundamental requirement. This gives rise to two questions:

² Section 296(1)

³ In terms of section 28(2) of the Constitution of the Republic of South Africa, 1996 ("the Constitution")

10.1 First, is it competent under the Act for a court to confirm the surrogacy agreement notwithstanding this breach? The Act does not deal with this question in any express terms, and I must derive the answer from an interpretation of all the relevant provisions.

10.2 Second, if, on a proper interpretation of these provisions I find that a court is so competent, what is the correct approach to be adopted in cases like the present? In other words, what is required of the applicants, and on what basis should courts exercise their discretion regarding confirmation of surrogacy agreements in such cases?

The facts in this case

11 The first and second applicants have been married since 1991. They are South African citizens and reside in Gauteng. Soon after their marriage they attempted to start a family. However, the first applicant was diagnosed with a chronic medical condition that interfered with her ability to fall pregnant. She sought the advice of fertility specialists from 2000, and tried various forms of medical treatments to assist her, including a number of *in vitro* fertilisation procedures. None of the treatments were successful, and she suffered two miscarriages.

12 Medical experts eventually advised the applicants that the first applicant suffered secondary infertility and that her condition was permanent and irreversible. The applicants were advised to consider a donor egg and surrogacy if they wished to pursue their desire to have a child.

- 13 Consequently, the applicants entered into a surrogacy agreement with their first surrogate mother. This agreement was confirmed by this Court on 8 September 2010. The first surrogacy agreement came to naught when the surrogate mother refused to honour the agreement. No fertility process was initiated as a result. The applicants were devastated but determined to continue in their quest to have a child. They entered into a second surrogacy agreement with their second surrogate mother. This agreement was confirmed by this Court on 8 June 2011. Unfortunately, two attempts at artificial fertilisation failed to result in a viable pregnancy.
- 14 At this point, the applicants aver that they were beside themselves with grief. They had gone to great lengths and had spent a considerable amount of money in attempting to have a child, and this second setback left them believing that there was no hope. At this stage, the third applicant approached the applicants and offered to assist them. She was a good friend of the second surrogate mother and she knew the applicants and their plight. The first applicant was reluctant to go down the same path again for fear of once more suffering disappointment. However, the second applicant persuaded her to reconsider and to make one final attempt through a surrogacy arrangement with the third applicant.
- 15 In light of their past disappointments, the applicants say that they decided to wait and see whether the third applicant would carry through with her promise, and that a viable pregnancy would result before they contacted their attorney. Consequently, although they entered into a verbal agreement with the third applicant in September 2012, they did not seek the assistance of their attorney

to formalise the agreement until after the third respondent had fallen pregnant as a result of her first artificial fertilisation procedure, and the pregnancy had stabilised.

16 The first and second applicants are not legal experts. Although they had been parties to two previous surrogacy agreements, they state that they did not appreciate the legal consequences of proceeding with the artificial fertilisation of the third applicant without having a confirmed surrogate agreement in place first. As they say, they were overwhelmed by circumstances when the third respondent's first artificial fertilisation process resulted in a healthy pregnancy. They were understandably shocked to discover from their attorney that their failure to secure a confirmed surrogacy agreement before the third respondent's pregnancy would have dire consequences for the legal status of the unborn child, and for the third applicant who had not envisaged the burden of having to care for another child. Acting on the advice of their attorney, they took steps to complete all the necessary formalities for a confirmation application to court in order to regularise their position.

17 The third respondent confirms that she entered into the arrangement with the first and second applicants for altruistic reasons and with no desire to have another child for herself. She already has four children of her own and is not in a financial position to care for a fifth child.

The relevant provisions of the Act

18 Section 292 of the Act lays down what is required for purposes of a valid surrogate motherhood agreement: critically, it must be in writing, signed by all

of the parties, and *"confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident"* (emphasis added).⁴

19 Section 295 regulates the discretion of the Court to confirm a surrogate motherhood agreement. It provides that: *"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 includes adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child's position*

⁴ Section 292 includes additional requirements that are not pertinent to the present case: the agreement must be entered into in the Republic, and there are additional domicile requirements in respect of the commissioning parents and the surrogate mother.

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; and

- (e) *in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed (emphasis added)."*

20 Section 296 regulates the artificial fertilisation of the surrogate mother.

Critically, section 296(1)(a) provides that: "*No artificial fertilisation of the surrogate mother may take place ... before the surrogate motherhood agreement is confirmed by the court.*"

21 This prohibition is reinforced by section 303(1), which provides that: "*No person may artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act*" (emphasis added). In terms of section 305(1)(b), read with sections 305(6) and (7), a person who contravenes section 303(1)(b) is guilty of an offence and may be liable to a fine and/or imprisonment for a period not exceeding 10 years or, for a second or further offence, to a fine and/or imprisonment for a period not exceeding 20 years.

22 Section 297 deals with the effect of a surrogate motherhood agreement on the status of the child. As regards a valid surrogate motherhood agreement, in terms of section 297(1), the consequences are as follows:

- "(a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned;*

- (b) *the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;*
- (c) *the surrogate mother or her husband, partner or relatives has no rights of parenthood or care of the child;*
- (d) *the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties;*
- (e) *subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and*
- (f) *the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives."*

23 Section 297(2) deals with the consequences of an invalid surrogate motherhood agreement. It provides that: "*Any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.*" (emphasis added)

24 These provisions indicate that in terms of the statutory scheme, parties do not have *carte blanche* to enter into surrogacy arrangements. Only parties who fall within the categories prescribed by the requirements of section 295 may enter into a legally sanctioned surrogate motherhood agreement. The agreement itself must obtain judicial sanction, and the sanctioning court must be satisfied that the requirements of sections 292 and 295 are met before it can confirm an agreement. Both commissioning parents, and the surrogate mother must be found to be suitable to fulfil the responsibilities that will rest on them. Section 295 (d) and (e) make it clear that, ultimately, it is the care, welfare and best

interests of the child to be born that will determine whether a court should confirm an agreement.

- 25 The strict regulation of surrogate motherhood agreements in terms of these provisions is coupled with a firm prohibition against any steps being taken towards the conception of a child without the prior authorisation of a court. The Act requires the court to confirm the surrogacy agreement⁵ and, in addition, to authorise the artificial fertilisation of the surrogate mother,⁶ before such fertilisation takes place. The Legislature clearly viewed the latter prohibition in a serious light in that it attached a criminal sanction, involving the possibility of a substantial punishment, to a breach of the prohibition.
- 26 It is also significant that the statutory scheme attaches very different consequences to valid and invalid surrogate motherhood agreements. An agreement that is confirmed by a court is valid, with the effect that, for all intents and purposes, the child that is born is the child of the commissioning parents. On the other hand, in respect of an invalid surrogate motherhood agreement, the child that is born is deemed to be the child of the surrogate mother. The Act describes an invalid surrogate motherhood agreement as being one that does not comply with the provisions of the Act.⁷
- 27 What then, of agreements that parties seek to validate after conception of the child to be born, in circumstances where neither the agreement, nor the artificial fertilisation of the surrogate mother enjoyed pre-existing judicial sanction? Do

⁵ In terms of section 296(1)

⁶ In terms of section 303(1)

⁷ Section 297(2)

these agreements fall into that category of agreements that do not comply with the provisions of the Act? Do courts have the power to validate them, by way of confirmation under section 292, despite their failure to comply with these prerequisites of the statutory scheme?

The competence of a court to confirm surrogate motherhood agreements post-fertilisation

- 28 As I have indicated, the first question I am required to determine is whether it is competent for a court to confirm a surrogate motherhood agreement where artificial fertilisation of the surrogate mother has resulted in the conception of a child in the absence of pre-existing judicial sanction?
- 29 Unfortunately the Act does not provide a clear answer to this question. What it is clear about is that artificial fertilisation without the authorisation of the court is prohibited. As I have discussed above, there is also no doubt that the general scheme of the Act is to require judicial confirmation of the surrogacy agreement before any steps are taken to give effect to the arrangement between the parties.
- 30 However, the Act does not say what the consequences of non-compliance with these provisions will be on the validity of a written agreement subsequently entered into between the parties. It is also silent on the concomitant question of whether the court has the power to validate such an agreement under section 292.

- 31 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 commission of an unlawful act, even if indirectly, may be unenforceable, provided the connection is sufficiently close.⁸
- 32 It is appropriate to bear these common law principles in mind when interpreting the provisions of the Act for present purposes. The unlawful act in this case, i.e. the artificial fertilisation of the surrogate mother, preceded the written agreement entered into between the applicants, which they now seek to validate. However, it was the very absence of a written agreement duly confirmed and authorised by the court that rendered the artificial fertilisation unlawful. The parties now seek to rectify the situation by obtaining retrospective confirmation of the agreement by this Court, thus rendering it valid and enforceable between them.
- 33 In the absence of clear provisions to the contrary, a court would normally be slow to interpret a statute so as to give the court a power to condone, and even to encourage, unlawful and criminal conduct by giving retrospective effect to an agreement linked to a prohibited act.
- 34 However, while these common law principles cannot be ignored, they are not determinative of the issues that arise in this case. As this Court has said in Ex

⁸ Richards v Guardian Assurance Co 1907 TH 24, at 28-9, and see further the discussion in RH Christie & GB Bradfield Christie's The Law of Contract in South Africa (6 ed) p370-1

parte WH & Others, a surrogacy agreement “*is a contract of a special kind, unique if regard is being had to its subject-matter.*”⁹ It is an agreement ultimately aimed at ensuring the best interests of the child to be born from a surrogacy arrangement, and at protecting and advancing his or her right to family and parental care.¹⁰

- 35 In seeking to regulate the rights and obligations of the respective parties to the agreement, a surrogacy agreement advances additional constitutional rights. These include the right to dignity,¹¹ the right to make decisions concerning reproduction,¹² and the surrogate mother’s right to security in and control over her body.¹³
- 36 Courts are enjoined in terms of section 39(2) of the Constitution to promote the spirit, purport and objects of the Bill of Rights in interpreting any legislation. Statutory interpretation must positively promote the rights contained in the Bill of Rights.¹⁴ The authors, Currie & De Waal,¹⁵ point out that courts are, however, constrained to adopt an interpretation that is “reasonably possible”, or plausible. The process of reaching a plausible, constitutionally compliant interpretation of legislation entails reading legislation purposively and contextually. They also point out that in some instances it may be necessary to interpret a statute generously in order to ensure that it is constitutionally

⁹ Supra, at 530E

¹⁰ Section 28(1)(b) of the Constitution

¹¹ Section 10 of the Constitution provides that: “Everyone has inherent dignity and the right to have their dignity respected and protected.”

¹² In terms of section 12(2)(a) of the Constitution

¹³ In terms of section 12(2)(b) of the Constitution

¹⁴ Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd v Smit NO 2001 (1) SA 545 (CC) at para 22

¹⁵ I Currie & J de Waal The Bill of Rights Handbook (6 ed), at p61, citing as an example, Richter v Minister of Home Affairs 2009 (3) SA 615 (CC) at paras 60, 63.

compliant . For example, in circumstances where there is a lack of an express grant of a discretionary power, it may be necessary to interpret the legislation so as to confer such a discretion.¹⁶

37 I am required to interpret the relevant provisions of the Act with these constitutional injunctions in mind.

38 As I have indicated, the prohibition on artificial fertilisation of the surrogate mother prior to confirmation of the surrogacy agreement, and in the absence of authorisation by a court is aimed largely at ensuring that there is certainty in the legal relationship between the parties involved before the prospect of a child becomes a reality. In this sense, the prohibition serves the interests of all of the parties involved. It also advances the principle of the best interests of the child in that there can be no doubt that it is in the prospective child's best interests for his or her legal and parental status to be settled at the earliest possible opportunity. Ideally, this should be before there is any prospect of conception.

39 However, this does not mean that the best interests of the child may not also be served by a subsequent confirmation of the surrogacy agreement, i.e. after the child has been conceived. The question is whether the relevant provisions of the Act, properly interpreted, may be read as giving a court the discretion to grant such confirmation.

¹⁶ Currie & De Waal (supra) at p60, citing as an example, De Beer NO v North-Central Local Council & South-Central Local Council 2002 (1) SA 429 (CC)

- 40 Turning to the wording of the relevant provisions that deal with the power of the court to confirm a surrogacy agreement, there is some ambiguity. In certain respects, the confirmation provisions of Chapter 19 envisage that confirmation of an agreement must be given prior to fertilisation and conception: section 295(b)(ii) requires the court to be satisfied that the commissioning parents are in all respects suitable to accept "*the parenthood of the child that is to be conceived*". However, the section is not consistent in this regard: both sections 295(d) and (e) refer, in contrast, to the need for the court to be satisfied as regards the provision made in the agreement for the care, upbringing, welfare and interests of "*the child that is to be born*". The latter category is broader, and would include unborn children who were already conceived, but not yet born, at the time that confirmation of the surrogacy agreement is sought.
- 41 Accordingly, the provisions of section 295 appear to cover both the situation where a child has not yet been conceived at the time that confirmation of a surrogacy agreement is being sought, and the situation where a child has already been conceived, but is not yet born, at such time.
- 42 Added to this is the fact that neither section 292 nor section 295 require the court to be satisfied that the surrogate mother has not yet undergone the process of artificial fertilisation and that she is not already pregnant as a result.
- 43 In the circumstances, it appears to me that the provisions conferring the power on a court to confirm a surrogacy agreement in and of themselves do not preclude the court from doing so where the surrogate mother has already

undergone the process of artificial fertilisation in terms of a verbal surrogacy agreement between the parties and is already pregnant.

- 44 This, of course, is not the end of the inquiry. I must consider the effect of the provisions that prohibit artificial fertilisation without authorisation from the court and in the absence of a confirmed surrogacy agreement. The question is whether these prohibitory provisions were intended by the Legislature to have the effect of rendering a post-fertilisation surrogacy agreement invalid and incapable of subsequent validation through confirmation by a court under sections 292 and 295.
- 45 Section 296 prohibits artificial insemination of a surrogate mother before the surrogacy agreement is confirmed by a court. Section 303 makes it an offence artificially to fertilise a woman in the execution of a surrogacy agreement without authorisation by a court for such fertilisation. In both instances, the prohibited act is that of artificial fertilisation without judicial sanction. The objective of these provisions is to render the artificial insemination unlawful. The Act provides a clear sanction for such unlawful conduct, viz. punishment in the form of a criminal offence.
- 46 However, the Act does not make it unlawful for the parties involved in the prohibited act to proceed subsequently to enter into a valid surrogacy agreement with the sanction of the court. Had the Legislature intended this, then it would have stated expressly that such an agreement is unlawful, and it would have made it clear, in section 292 or 295, that a court is precluded from

confirming a post-fertilisation surrogacy agreement in those circumstances. As I have already indicated, the Act does not do so.

47 As far as section 297(2) is concerned, this provision states that a surrogacy agreement that does not comply with the provisions of the Act is invalid. The Act spells out very clearly what is required for purposes of a valid surrogacy agreement, viz. compliance with the requirements of section 292, and confirmation of the agreement by a court if it is satisfied that the requirements of section 295 have been met. If a surrogacy agreement meets these requirements, and is confirmed by the court, it will be valid.

48 It may be that, as in the case before me, a prohibited act of artificial fertilisation has already occurred. However, for the reasons set out above, it is clear to me that this fact does not impinge on the validity of the surrogacy agreement, or prevent the court from confirming that agreement. The Act prescribes an express criminal penalty for the commission of a prohibited act of artificial fertilisation; it does not provide for invalidity of the surrogacy agreement as a penalty.

49 This interpretation is consistent with the constitutional injunction on courts positively to promote constitutional rights in their interpretation of statutes. As I indicated earlier, the broad objective of the regulatory scheme established under Chapter 19 of the Act is to ensure sufficient protection for the rights and interests of all parties involved in surrogacy arrangements. It is for this reason that the scheme requires, as a first step in the process, a judicially sanctioned surrogacy agreement. However, even in circumstances where the parties have

missed out on this first step, the court must retain a discretion nonetheless to confirm a surrogacy agreement if it is satisfied that all the requirements of section 292 and section 295 are met.

50 To interpret the Act as precluding the court from confirming a surrogacy agreement after artificial fertilisation has already taken place would undermine the constitutional rights of the parties involved, and would be contrary to the broad objective of the Act. The effect would be to render the agreement invalid, with the result that, once born, the child would be deemed for all purposes to be the child of the surrogate mother.

51 This would impinge on the dignity of the commissioning parents, who would be denied the opportunity to experience a family life of their own. As this Court has said: *"The rights of individuals to bear and raise children are 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."*¹⁷ It would impinge also on their right to make reproductive choices, as the commissioning parents' only recourse would be to seek to adopt the child born to the surrogate mother. This is precisely the problem that the Act sought to overcome in making it possible for

¹⁷ Ex parte WH & Others, supra at 522G-H

commissioning parents under surrogacy agreements to acquire parental rights without the necessity of following an adoption process.¹⁸

- 52 The rights of the surrogate mother likewise would be infringed if a court were precluded from confirming a surrogacy agreement post-fertilisation. Most importantly, it would impose on her full parental rights and responsibilities in respect of the child, contrary to her constitutional right to make her own decisions regarding reproduction.
- 53 Above all else, it is the rights and interests of the “sleeping partner” in the surrogacy relationship, i.e. the unborn child, that demand the most protection. Section 28(1)(b) of the Constitution guarantees to every child the right to family or parental care. In addition, section 28(2) specifies that: “*A child’s best interests are of paramount importance in every matter concerning the child*”.
- 54 A surrogacy agreement that is not confirmed by a court is invalid. The invalidity of a surrogacy agreement potentially has a profoundly detrimental effect on the legal and parental status of the child born to the surrogate mother. As this Court has pointed out, “*uncertainty regarding the parents could impact negatively on the child*”.¹⁹ He or she is denied the family life that was planned for him or her. The child will have to rely instead on the parental care of the surrogate mother, who, by virtue of the agreement, has deliberately chosen not to take responsibility for another child.

¹⁸ As Louw, *supra* n1 p19-4, points out, prior to the enactment of Chapter 19 of the Act, the only way in which commissioning parents could acquire legal parental rights in a child born to a surrogate mother would be by way of an adoption application under the Child Care Act 74 of 1983, or by approaching the High Court, as the upper guardian of minors, for a guardianship, custody or access order.

¹⁹ *Ex parte WH & Others*, *supra* at 527F

- 55 Such an effect should never follow without a court considering all of the facts at hand and making a determination as to what would be in the best interests of the child. For this reason, it would be patently contrary to section 28(2) of the Constitution to hold that a court has no discretion to confirm a surrogacy agreement in circumstances where confirmation is sought post-fertilisation. The courts must retain the discretion to do so if it is satisfied that this is in the best interests of the child to be born.
- 56 Accordingly, I find that the Act does not preclude a court from confirming a surrogacy agreement subsequent to the artificial fertilisation of the surrogate mother, and in circumstances where she is already pregnant with the child to be born under the agreement.
- 57 However, this does not mean that parties are free to ignore the general requirement that surrogacy agreements must be confirmed by a court before artificial fertilisation of the surrogate mother takes place. Parties should not assume that the court will rush to their aid if they neglect to follow the prescripts of the Act. As I proceed to discuss below, the scope for courts to come to the aid of parties seeking post-fertilisation confirmation of surrogacy agreements is not open-ended. Generally, the discretion to confirm such agreements should only be exercised in exceptional circumstances, and when the best interests of the child demand confirmation.
- 58 It is also important to bear in mind that it remains an offence for any person artificially to fertilise a woman in the execution of a surrogate motherhood agreement or to render assistance in such artificial fertilisation without

authorisation from a court. In other words, the health professionals involved in the pre-confirmation artificial insemination remain open to criminal prosecution notwithstanding that the relevant surrogacy agreement may have been confirmed by a court subsequent to the fertilisation. This should continue to act as a strong deterrent to health professionals to proceed with extreme caution, and to insist on an authorisation from a court before they agree to assist parties in the artificial fertilisation process. To the best of my knowledge, no criminal complaint was lodged in this respect in the present matter, and this issue need detain me no further.

What approach should be adopted in post-fertilisation confirmation applications?

59 The question of how the parties and the courts should approach post-fertilisation confirmation applications must be considered within the framework of the relevant provisions of the Act. In addition, it goes without saying that a court will always be guided by the particular facts of each case before it.

60 As the outset it must be borne in mind that Chapter 19 of the Act represents a carefully constructed scheme to regulate surrogacy arrangements, with the courts playing an important role in this process. In Ex parte WH & Others, this Court described the courts' role as follows: "*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.”²⁰

- 61 This dictum is particularly appropriate in circumstances where a court is faced with an application for post-fertilisation of a surrogacy agreement. One of the guiding principles of the scheme is that a formal surrogacy agreement must be reduced to writing, concluded and confirmed by the court in advance of the parties taking steps to implement the surrogacy arrangement between them. Accordingly, confirmation of a surrogacy agreement post-fertilisation should be considered as an exception to the general rule.
- 62 In addition to all of the information that a court would normally require in a confirmation application,²¹ the applicants must place sufficient facts before the court to explain why confirmation is being sought at a late stage, and why the confirmation is warranted, notwithstanding their being in breach of the general scheme. Unless an application is adequate in this regard, the court will not be able properly to fulfil its judicial function in exercising its discretion under section 295.
- 63 The parties will also have to satisfy the court that the application is not aimed at, or will not have the effect of, permitting the parties to circumvent the objectives of the regulatory scheme. Thus, the parties must satisfy the court that, from the outset, the arrangement between them fell within the permissible scope of a lawful surrogacy agreement.

²⁰ Supra at p530G

²¹ The requirements for a confirmation application are spelled out in Ex parte WH & Others, supra in paras 74-78.

- 64 The Act defines a “*surrogate motherhood agreement*” as being “*an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent.*”
- 65 Evidence of a pre-existing verbal or written agreement between the parties, which would have been a valid surrogacy agreement but for the absence of confirmation of the court, would be a good indicator that the parties are *bona fide* in their application.
- 66 On the other hand, if the pregnancy was not the result of artificial fertilisation and the real purpose of the application is to allow the “commissioning parents” to circumvent adoption processes, the court would not confirm the agreement. Thus, the responsibility lies on the applicants to place sufficient facts before the court to convince it of the *bona fides* of an application for post-fertilisation confirmation of a surrogacy agreement.
- 67 The window period for a post-fertilisation confirmation of a surrogacy agreement exists only during the period before the child is born. An application for confirmation of a surrogacy agreement cannot be made, or granted, after the birth of the child concerned. The purpose of Chapter 19 is to establish certainty regarding the legal and parental status of, and in relation to, the child to be born. As I indicated earlier, there is scope to apply these provisions to

children who are not yet conceived at the time of confirmation of a surrogacy agreement, as well as those who have been conceived but have not yet been born at this time. However, there is no scope for applying the provisions to children once they have been born.

68 The Act defines a “child” as being “a person under the age of 18 years”. In terms of the common law, a “person” is someone who is born. Parental rights and responsibilities in respect of a child are established and take effect at birth. They vest in the biological parents of the child in accordance with the prescripts set out in sections 20 to 21 of the Act.

69 If parties to an unconfirmed, and hence invalid, surrogacy agreement wish to formalise their agreed parental rights and responsibilities in respect of a child after it is born, their remedy does not lie in a post-fertilisation confirmation application. At birth, the child is deemed to be the child of the surrogate mother, and the parties will have to explore other available options to afford them relief. These options include adoption; a parental rights and responsibilities agreement under section 22 of the Act; and an application for guardianship of the child under section 24 of the Act.

70 Finally, the granting of a post-fertilisation confirmation order will depend on the court being satisfied that this will be in the best interests of the child. Section 295(e) expressly places primacy on this factor. It provides that: “*in general, having regard to the personal circumstances and family situations of all the parties concerned, but above all the interests of the child that is to be born, the agreement should be confirmed.*”

71 However, parties who apply for a post-fertilisation confirmation order should take heed that confirmation applications “*have serious implications for all the applicants concerned, and also for the children to be born*”.²² Therefore, courts will not blithely reach the conclusion that a surrogacy agreement is in the best interests of the child to be born. They need adequate time to consider the application and to make a properly considered judicial decision in this regard. Thus, applicants should understand that if they leave the application for confirmation too late, they run the risk that a decision will not be made before the child is born. For this reason, post-fertilisation confirmation applications should be made timeously, and as soon as practically possible in the circumstances.

Confirmation of the surrogacy agreement in the present case

72 The applicants in the present case filed substantial papers in support of their application for the confirmation of their surrogacy agreement post-fertilisation. They included all of the information necessary to meet the requirements laid down in Ex parte WH & Others. In addition, the parties attached copies of the previous two surrogacy confirmation applications made by the first and second applicants, and the orders that were granted in those applications.

73 The first and second applicants have been found, on two previous occasions, to be suitable parents for purposes of section 295 of the Act. Of course, this does not mean that I should automatically conclude that they are suitable for purposes of this application. However, the applicants have provided up to date psychological reports confirming that they remain suitable as parents. A recent

²² Ex parte Confirmation of Three Surrogate Motherhood Agreements, supra at 24B

psychological report confirms that the third applicant is a suitable person to act as a surrogate mother.

74 I am also satisfied that from the outset the applicants fully intended to enter into a lawful surrogacy arrangement, and that they are bona fide in their application for confirmation of their subsequent agreement. Furthermore, I accept that the applicants have taken the court into their confidence in explaining their failure to apply for confirmation of the surrogacy agreement prior to the artificial fertilisation of the third applicant. I note that the application was made at a late stage in the third respondent's pregnancy, and that this was by no means ideal. On the other hand, the applicants spent considerable effort, and time, in compiling a fully motivated application, which allowed me to deal with the matter efficiently, and avoided any further delay.

75 I am satisfied that the parties have met all of the requirements set out in section 292 and 295 of the Act. Further, I have no doubt that it is in the best interests of the child soon to be born out of this surrogacy arrangement that the agreement be validated through confirmation by this Court.

76 In conclusion, in ordering confirmation of this specific agreement, I am mindful of the need for courts to facilitate a balance between ensuring compliance with the regulatory scheme established under Chapter 19 of the Act, on the one hand and, on the other, *"not setting the bar too high for parents whose only option is to have a child by way of surrogacy"*.²³ In my view, this balance is well

²³ Ex parte WH & Others, supra at 528E

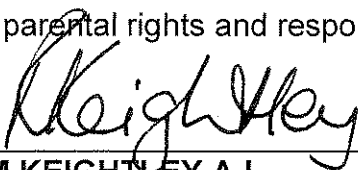
struck by confirmation of the surrogacy agreement on the particular facts that present themselves in this case.

77 It was for these reasons that I made an order on 1 November 2013 in the following terms:

77.1 The surrogate motherhood agreement annexed hereto as "A", is hereby confirmed in terms of section 292(1)(e) of the Children's Act 38 of 2005.

77.2 The child born of the Third Applicant, in accordance with the surrogacy agreement ("the child"), is for all purposes of the child of the First and Second Applicant from the moment of the child's birth.

77.3 The First and Second Applicants will have full parental rights and responsibilities in respect of the child whether in terms of the common law or the Children's Act, 38 of 2005 (and any amendments thereto) and/or any other statute which may be promulgated or has been promulgated dealing with parental rights and responsibilities.


R M KEIGHTLEY AJ
ACTING JUDGE OF THE HIGH COURT

DATE HEARD: 1 NOVEMBER 2013

DATE DELIVERED: 2 DECEMBER 2013

FOR THE APPLICANTS: L A RETIEF

INSTRUCTED BY: ADELE VAN DER WALT ATTORNEYS INC