SURROGACY

AB and Surrogacy Advisory Group v. Minister of Social Development
[2015] ZAGPPHC 580
South Africa, High Court

COURT HOLDING

Section 294 of the Children's Act 38 of 2005, which requires that a genetic link exist between the commissioning parents and prospective child in a surrogacy agreement, is inconsistent with the Constitution for violating the rights to equality, privacy, dignity, bodily and psychological integrity, and to health care for parents who are unable to contribute a gamete or gametes in the surrogacy arrangement.

Summary of Facts

Chapter 19, Sections 292-303, of the Children's Act 38 of 2005 (the "Act") regulate surrogacy in South Africa. The application was to challenge the constitutional validity of Section 294 of the Act that provides as follows:

> Genetic origin of child. —No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.

The effect of Section 294 is to invalidate a surrogacy agreement when a commissioning parent does not have a genetic link with the contemplated child. In other words, a surrogacy agreement requires that the commissioning parent or parents, as the case may be, provide the gametes or gamete, meaning either of the two generative cells necessary for reproduction.

This requirement affected the first applicant because, due to a pre-existing medical condition, she could neither biologically give birth to a child, nor donate a viable gamete. Further, she was single, and could not rely upon a second prospective parent to comply with the genetic link requirement. The only avenue open to her was to get gametes from two donors, but this was barred by the impugned Section 294 of the Act.

The applicants challenged Section 294 on the grounds that the genetic link requirement violated the first applicant's right to equality, dignity, reproductive health care, autonomy and privacy.

The second applicant brought the matter by reference to Section 36(c) and 36(d) of the Constitution, and represented the class of persons whose rights are infringed by the operation of Section 294 of the Act.

The applicants challenged the genetic link requirement for a surrogacy arrangement because it was not required for an In Vitro Fertilisation (IVF) procedure. In fact, the first applicant had previously

tried the IVF procedure using gametes from two donors (double donor gametes), and only when this failed, did she opt for surrogacy, only to realise that the law did not allow double donor gametes for surrogacy. The applicants therefore argued that persons who opt for surrogacy should be accorded the same choice that persons who are using IVF have.

The applicants argued that the regulatory regime on surrogate motherhood must be aligned with constitutional rights and must not be arbitrary, discriminatory, or contrary to human dignity.

The applicants also submitted that genetic lineage should not be a relevant factor in conceptualising families. They argued that families without genetic lineage are just as valuable as families with genetic lineage.

The respondent argued to retain the genetic link requirement because it had rational purposes, including the best interests of the child, prevention of commodification and trafficking of children, prevention of commercial surrogacy, prevention of exploitation of surrogate mothers, and prevention of circumvention of the adoption law.

Issue

The issue for the Court's determination was whether Section 294 of the Act was inconsistent with the Constitution for requiring that there be a genetic link between the commissioning parent or parents and the contemplated child in a surrogacy agreement.

Court's Analysis

The Court first identified the class and subclass of persons affected by Section 294 of the Act. It described the "class" as comprising parents who were medically or biologically unable to carry a child (i.e. *pregnancy-infertile*). Parents of this class could still contribute their gametes or gamete to conception. However, there existed a subclass that was *pregnancy-infertile* but could not contribute their gametes or gamete because they were biologically unable to do so. These were *conception-infertile*. This subclass was affected by the genetic link requirement.

The Court also recognised that some persons who were *pregnancy-infertile* but could provide gametes or a gamete for conception might not want to do so for reasons such as to avoid passing on a genetic trait. These too would be barred by the genetic requirement link if they opted for surrogacy through double donor gametes.

The Court appreciated that the applicants and respondents differed on their point of view regarding surrogacy. The applicants understood surrogacy to mean that persons had an opportunity to have children even if they could not give birth themselves regardless of whether they were genetically linked to the child or not. On the other hand, the respondents regarded surrogacy as an opportunity for persons who could not themselves give birth to have genetically linked children.

The Court reviewed the historical background to the development of the law, and found that the rationale for requiring a genetic link, as stated in the 1992 report of the South African Law Commission (the "SALC"), was to promote the bond between parent and child, and it was therefore envisaged to be in the best interests of the child. Further, it would prevent shopping around with the view to creating children with particular characteristics.

A further inquiry revealed that a report of a Parliamentary Ad Hoc Committee of 1999 had recommended that the genetic requirement be retained; otherwise the situation would be similar to adoption.

The Court observed that the Parliamentary Ad Hoc Committee allowed same-sex parents, and to the Court this was a demonstration that legislation takes cognisance of and integrates constantly evolving social norms and practices. It also observed that the SALC recognised the right of persons to make certain decisions about reproduction and that it considered a limitation on these rights as a violation of the person's dignity and privacy.

The Court examined the legislative intent of Chapter 19 of the Act. It referenced the decision in *Ex Parte MS and Others* (2014 (3) SA 415 (High Court of South Africa) to confirm that the overriding legislative intent was to regulate surrogacy and to ensure sufficient protection of the rights and interests of the parties to surrogacy arrangements, and to enable commissioning parents to acquire parental rights without going through an adoption process. The Court then raised the question whether the genetic link requirement infringed on the rights of prospective parents who were *conception-infertile* or could not meet this requirement. Related to this, it also examined the applicants' question on the relevance of genetic lineage to the legal concept of the family.

The Court was persuaded by the applicants' argument that family should not be defined with reference to whether there is a genetic link between the parents and children of families. It took into account the decision in *Satchwell v. President of the Republic of South Africa and Another* (2002 (6) SA 1 CC), in which the South African Constitutional Court questioned the traditional view of family and expressed the opinion that although family meant different things to different people, all of the meanings were equally valid.

The Court examined comparative legislation in other jurisdictions and appreciated various perspectives in regulating surrogacy before turning to the South African constitutional framework. It highlighted that the Constitution promotes open and democratic values, which includes amongst other things, the rule of law. It referenced the South Africa Constitutional Court decision in *New National Party v. Government of the Republic of South Africa and Others* (1999 (3) SA 191 (CC) to restate the principle that there ought to be a rational connection between measures that the government takes, including legislative measures, and a legitimate governmental purpose. If the rational connection did not exist, the measures would be found unconstitutional. It therefore put the requirement of the genetic link to this test. It took into account the purported purposes of the genetic link that the respondents identified, and also the rejection by the applicants that there was any rational connection.

The Court accepted the applicants' argument that autonomy is a value that ought to be taken into account in determining the matter. It examined the applicants' arguments that the genetic link requirement caused a class or sub-class to be treated differentially and excluded them from enjoying equal protection and benefit of the law. The Court pointed out that Section 9(1) of the Constitution provides that everyone is equal before the law and should enjoy equal protection and benefit of the law.

The Court expressed the opinion that the right to equality was important in the determination of the matter, and that equality was a foundational right as confirmed in *S v. Makwanyane and Another* (1995 (3) SA 391 (Constitutional Court of South Africa)). The applicants alleged discrimination on

the ground of infertility because the genetic link excluded infertile persons from parenthood through surrogacy arrangements. The Court had recourse to the decision in *Harksen v. Lane* (1991 (1) SA 300 (Constitutional Court of South Africa)), which laid out a test for determining whether a ground that is not a listed distinction under Section 9(3) of the Constitution could nevertheless be a ground for discrimination. The Court found that infertility objectively has the potential to impair human dignity, and that differential treatment based on infertility would therefore constitute discrimination. The Court held that excluding members of a subclass from surrogacy infringed on their right to dignity as it prohibits them from exercising their autonomy. Further, the differential treatment imposed by the genetic link reinforces the negative effects that infertility has on persons, so that this constituted discrimination prohibited under Section 9 of the Constitution.

The Court was not persuaded by the respondent's argument that there was a rational connection between the differentiation and a legitimate governmental purpose. The Court was of the opinion that the purpose of regulating surrogacy is for commissioning parents to have a child, which is also the purpose of legislation for IVF. Requiring that a genetic link should exist between a commissioning parent and the child in the context of surrogacy but not for IVF defeated the purpose. In the absence of governmental purpose, the Court was of the view that the offending legislation should be struck down.

The Court agreed with the applicants that the decision to have a child through a surrogacy arrangement fell under the constitutional right to bodily and psychological integrity recognised under Section 12(2) of the Constitution. The Court held that the genetic link requirement infringed on the right of individuals to make decisions about reproduction.

The Court also agreed with the applicants that the genetic link requirement infringed on the right to privacy as it interfered with the commissioning parent's or parents' decision to use gametes for conception of their prospective child.

The Court also found that the genetic link requirement infringed the right to health care protected under Section 27 of the Constitution. It affirmed that surrogacy is recognised as a form of reproductive health care in South Africa.

The Court therefore held that Section 294 was inconsistent with the Constitution because it violates the constitutional rights to non-discrimination, dignity, privacy, health care, and bodily and psychological integrity.

Conclusion

The Court concluded that the only way to align Chapter 19 of the Act with the Constitution was to strike down the genetic link requirement. It therefore declared Section 294 invalid to the extent of its inconsistency with the Constitution.

Significance

South Africa is one of the few countries in Africa that regulates surrogacy. Other countries do not have a clear regulatory framework on surrogacy. Indeed, when the Court explored comparable regulatory frameworks in other jurisdictions, no African country featured. In *J.L.N. and Two Others v. Director of Children's Services and Four Others* [2014] eKLR, Petition No. 78 of 2014, the High Court of Kenya

recognised that surrogacy was not regulated by any specific provisions in Kenyan law, and therefore surrogacy-related issues had to be decided on a case-by-case basis.

The South African case's views on the concept of the family is potentially notable for other jurisdictions. Genetic lineage is one of the important defining features of the family for many in Africa, and it is no wonder the SALC and the Parliamentary Committee that reviewed the law also considered it necessary to retain the genetic link. However, when the Court tested this requirement against constitutional rights, it found that this could not hold. Families should not be valued because of genetic links, though for some, it would be an important consideration. Rather, family should be based on intention of the parties and not physical attributes of the individuals as envisaged by the genetic link.

Despite most of Africa not having regulatory frameworks on surrogacy, the South African decision is still a beacon on how to think through issues of surrogacy in relation to human rights.

Ex Parte: MS and Others
[2014] ZAGPPHC 457
South Africa, High Court

COURT HOLDING

The Court could confirm a surrogacy agreement after the surrogate mother was already fertilised, because such an interpretation of the provisions of chapter 19 of the Children's Act, 38 of 2005 accorded with the Constitution of the Republic of South Africa, 1996, and promoted constitutional rights of the parties to the agreement.

Summary of Facts

The applicants were parties to a surrogacy agreement, namely the commissioning parents and the surrogate mother. They made the application to confirm a surrogacy agreement as required under Section 292 as read with Section 295 of the Children's Act, 38 of 2005 (the Act). According to Section 292, in order for a surrogacy agreement to be valid, it must be written and signed by all parties and confirmed by the High Court. The Act therefore envisages entering into a valid agreement before implementing its requirements. Section 296(1)(a) of the Act provides that no artificial insemination may take place before the surrogate agreement in confirmed by the Court. Section 303(1) renders it an offence to fertilise or assist in fertilising a woman before a surrogacy agreement is confirmed by the Court.

In this case, however, the parties entered into a verbal surrogacy agreement and proceeded to implement artificial fertilisation before the agreement was confirmed by the High Court. At the time of the application, the surrogate mother was 33 weeks into the pregnancy.

This case therefore raised a novel issue, as the Court had never addressed a situation where parties applied to confirm a surrogacy agreement when it had already been implemented.