REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NOS: 2011/153
2011/154
2011/679
ALSO CASE NOS: 2011/1314
2011/1315
2011/1316

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

....
DATE SIGNATURE

In the matters between:

THE *EX PARTE* APPLICATIONS FOR THE CONFIRMATION OF THREE SURROGATE MOTHERHOOD AGREEMENTS

J U D G M E N T

WEPENER, J:

[1] On 7 January 2011 three applications to confirm surrogate motherhood agreements in terms of the Children's Act 38 of 2005 (the Act) were brought to the urgent court of this Division. Apart from the fact that no grounds for

urgency were made out at all, the three applications were copied and pasted and thus duplicated to a large extent in each instance. Each application states that it relies on the founding affidavit of one BCB and annexures thereto. BCB made no affidavit in the second and third matters as he has no interest in them. These two applications consequently incorrectly refer to annexures which are not attached to them. All three applications seek an order that "the provisions of section 297 (91) of the Children's Act 38 of 2005 will apply to the agreement…" There is no such section. All three applications seek an order that the "Addendum of the Surrogate Motherhood Agreement…" be confirmed by the court. There are no addenda attached to the surrogate motherhood agreements.

[2] In the first application, the applicant states that he has no children. Yet, in his application he alleges that he is desirous "to have further children" of his own and wishes to "conceive my own further biological child". The contradiction is not explained.

[3] Each of the applicants alleges that he or she resides and is domiciled at an address within the courts' area of jurisdiction. The one applicant in the second application, however, states that he is a non-South African citizen, "although domiciled and residing" at an address within the court's jurisdiction. There are no particulars to support the conclusion that a particular applicant is indeed domiciled within the Republic. The primary facts in support thereof are absent.

[4] In the second application the surrogate mother is identified in the application by a certain name. The supporting affidavit of the surrogate mother is by a person with a different surname and this is not explained.

[5] Applications such as these under consideration have serious implications for all the applicants concerned and also for the children to be born. Practitioners who copy previous applications should take care to draft papers in a proper manner and not to just shoddily copy and paste other applications.

[6] On 7 January 2011 Mr Thinane appeared to move the three applications in the urgent court and I ordered that all three applications were to be postponed to 1 March 2011 as there was no case for urgency made out in any of the matters despite a prayer that the forms and service be dispensed with. The court also wanted to consider the applications properly. It was indicated to Mr Thinane that he could possibly expect further enquiries from the presiding judge prior to the matters being heard on 1 March 2011 as the court files would remain with the judge.

[7] Despite this, the attorney for the applicants again enrolled all three matters on 19 January 2011 before His Lordship Mr Acting Judge Kollapen. This time, the matters had different case numbers and new court files had been opened when they were so placed before the presiding judge. There was again a prayer that the court should dispense with the forms and service provided for in Rule 6(12)(b) and again, there was nothing in the affidavits

dealing with urgency. Kollapen AJ was not prepared to hear the matters in open court and indicated to Mr Thinane that there was no urgency in the matters. The matters were removed from the roll “by agreement”.

[8] The attorneys for the applicants again enrolled all three matters during the week before term commenced. The matters appeared on the motion court roll before His Lordship Mr Justice Meyer. Meyer J advised Mr Thinane that he was aware that three similar matters were postponed and were to be heard on 1 March 2011, and he suggested that they be postponed to that date to the court hearing the three similar matters. Mr Thinane did not disclose to Meyer J that they were the very same three matters that had been postponed to 1 March 2011 and had again been enrolled with different case numbers. Mr Thinane elected to remove the matters from the roll.

[9] On 31 January 2011, the matters were enrolled for a fourth time by the attorneys and handed to Her Ladyship Madam Justice Nicholls in chambers, by Mr Thinane, stating that a person in the Registrar’s office directed him to place the matters before her. On Wednesday 2 February 2011, Her Ladyship granted the orders prayed for at about 9h30. This fact became known at about 10h00 and Mr Thinane was called back to the chambers of Her Ladyship Madam Justice Nicholls. When confronted with his conduct, Mr Thinane could give no explanation and only stated that he agreed that the matters were to be heard on 1 March 2011. Her Ladyship, Madam Justice Nicholls thereupon recalled the orders obtained before her.

[10] On 15 February 2011, before it was known that the matters were also enrolled before Kollapen AJ, a letter was forwarded to the attorneys calling for an explanation on affidavit of their and Mr Thinane's conduct. On 16 February 2011, the request for an explanation was supplemented with the fact that the matters had also been placed before Kollapen AJ on 19 January 2011.

[11] An affidavit dated 21 February 2011 was received on 22 February 2011. In this affidavit, Mr Thinane makes certain allegations why he thought that the applications had to be treated with a measure of urgency. He supplies no reasons why these allegations were not included in the applications at the first or any subsequent enrolments of the applications. It does not explain why he did not disclose the alleged urgency to any of the other presiding judges. He fails to explain the apparent conflicting allegations regarding urgency when compared to his acknowledgement to Nicholls J that the matters were indeed to be heard on 1 March 2011. He explains that he opened new court files because the original court files were "missing". This explanation cannot be accepted by virtue of the fact that Mr Thinane was advised on 7 January 2011 that court files would remain with the presiding judge who will deal with the matters on 1 March 2011 (and that Mr Thinane could possibly expect enquiries from the judge).

[12] The affidavit centres, in the main, around alleged pressure placed by the applicants on Mr Thinane to obtain relief from court – as if such relief would be granted as a matter of course. Pressure from clients can never justify an officer of the court circumventing a specific court order and ruling

such as the one given on 7 January 2011. The statement that the clients "ordered" the attorney to approach another court is unacceptable.

It appears that the attorney left the approach to obtain the sanction of the court to a very late stage instead of doing so much earlier. He regarded the role which the court has to play purely as a rubber stamp.

The attorney's claim that he was within his rights to place the matter before a different judge, having regard to what was said when it was postponed on 7 January 2011, is also wholly unacceptable.

[13] The conduct of Mr Thinane to re-issue the three matters under different case numbers and then to attempt to obtain the orders before three different judges, whilst knowing that they are pending before another judge, is reprehensible. The Registrar is directed to make copies of the 6 court files and to forward same, together with this judgment, to the Law Society of the Northern Provinces.

[14] The applicant in the first application is a 43 year old single male. The surrogate mother is married to the third applicant, also a female.

The applicants in the second application are a married couple, one male and one female. The surrogate mother is a divorced female.

The applicants in the third application are a married couple, one male and one female. The surrogate mother is a female married to a male.

All the applicants qualify as commissioning parents and surrogate mothers pursuant to the provisions of the Act.

[15] The legal requirements for a valid surrogate motherhood agreement are set out in the following relevant sections of the Act:

> "***292 Surrogate motherhood agreement must be in writing and confirmed by High Court***
>
> *(1) No surrogate motherhood agreement is valid unless –*
> *(a) the agreement is in writing and is signed by all the parties thereto;*
> *(b) the agreement is entered into in the Republic;*
> *(c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic;*
> *(d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and*
> *(e) the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.*
> *(2) A court may, on good cause shown, dispose with the requirement set out in subsection (1)(d).*
>
> ***293 Consent of husband, wife or partner***
>
> *(1) Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.*
> *(2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband or partner has given his or her written consent to the agreement and has become a party to the agreement.*

(3) Where a husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement.

294 Genetic origin of child

No surrogate motherhood agreement is valid unless the conceptions 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.

295 Confirmation by court

A court may not confirm a surrogate motherhood agreement unless –

(a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;

(b) the commissioning parent or parents –

- *(i) are in terms of this Act competent to enter into the agreement;*
- *(ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and*
- *(iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;*

(c) the surrogate mother -

- *(i) is in terms of this Act competent to enter into the agreement;*
- *(ii) is in all respects a suitable person to act as surrogate mother;*
- *(iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof;*
- *(iv) is not using surrogacy as a source of income;*
- *(v) has entered into the agreement for altruistic reasons and not for commercial purposes;*
- *(vi) has a documented history of at least one pregnancy and viable delivery; and*
- *(vii) has a living child of her own;*

(d) the agreement 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 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.

296 Artificial fertilisation of surrogate mother

(1) No artificial fertilisation of the surrogate mother may take
place –
(a) before the surrogate motherhood agreement is confirmed by the court;
(b) *after the lapse of 18 months from the date of the confirmation of the agreement in question by the court.*
(2) Any artificial fertilisation of a surrogate mother in the
execution of an agreement contemplated in this Act must be done in accordance with the provisions of the National Health Act, 2003 (Act 61 of 2003).

301 Payments in respect of surrogacy prohibited

(1) Subject to subsections (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 in 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 the confirmation of the surrogate motherhood agreement;
(b) loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or
(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 in the execution of such an agreement, is entitled to reasonable compensation therefore.

303 Prohibition of certain acts

(1) 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.
(2) 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."

[16] Over and above these provisions the court is the upper guardian of all children. See *Vista University, Bloemfontein Campus v SRC, Vista University* 1998 (4) SA 102 (O) at 104E-G. The Constitution of South Africa 108 of 1996 underlines the Court's duty to regard children's interest as paramount. Section 28 thereof reads as follows:

"(1) Every child has the right –
- *(a) to a name and a nationality from birth;*
- *(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;*
- *(c) to basic nutrition, shelter, basic health care services and social services;*
- *(d) to be protected from maltreatment, neglect, abuse or degradation;*
- *(e) to be protected from exploitative labour practices;*
- *(f) not to be required or permitted to perform work or provide services that –*
  - *(i) are inappropriate for a person of that child's age; or*
  - *(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;*
- *(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be -*
  - *(i) kept separately from detained persons over the age of 18 years, and*
  - *(ii) treated in a manner, and kept in conditions, that take account of the child's age;*
- *(h) to have a legal practitioner assigned to the child by the state, and at state expense, if substantial injustice would otherwise result; and*
- *(i) not to be used directly in armed conflict, and to be protected in times of armed conflict;*

> *(2) A child's best interest are of paramount importance in every matter concerning the child.*
> *(3) In this section "child" means a person under the age of 18 years."*

The African Charter on the Rights and Welfare of the Child, to which the Republic of South Africa is a signatory, provides in article 20:

> *'1. Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development of the child and shall have the duty:*
> *a) to ensure that the best interests of the child are their basic concern at all times;*
> *b) to secure, within their abilities and financial capacities, conditions of living necessary to the child's development; and*
> *c) to ensure that domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child.'*

Judges are duty bound to ensure that the interests of the child, once born, are best served by the contents of the agreement, which we are requested to confirm. Much has been written regarding the pros and cons of surrogacy and I do not intend dealing with any of the social or ethical arguments regarding the practice of surrogacy.

[17] As upper guardian one would expect to know in detail who the commissioning parents are, what their financial position is, what support systems, if any, they have in place, what their living conditions are and how the child will be taken care of. A good practice is also found regarding adoptions where expert assessment reports from social workers are required and in practice a police clearance is obtained in order to demonstrate the suitability of the adoptive parents. This can be applied to the commissioning

parents with very good results. An expert report can also address the suitability of the surrogate mother.

[18] As an example, the first applicant merely alleges that he "is a 43 year old single person" who has "reached a stage in my life where I am financially secure and posses the necessary resources to take on the responsibility of a full time parent." Although financial resources may be a factor to be taken into account, the details thereof are lacking and the sufficiency thereof does not necessarily lead to the responsibility of bringing up a child. No facts are supplied in support of the above conclusions.

[19] The second application, save for the matters referred to in very general terms, allege that "we deem our lives suitable and stable enough to undertake the responsibility of parenthood. We are furthermore economically and emotionally stable enough to proceed with the surrogacy …" These are matters that a court has to decide based on facts. The applicants have not supplied the facts to me to come to a proper conclusion that they are indeed "in all respects suitable to accept parenthood…" as is required in section 295 (b) (ii). In addition, a clinical psychologist states that the mother of one of the commissioning parents will be the primary caregiver of the child to be born. If that is so, more information regarding the ability and inability of the commissioning parents to be the primary caregivers needs to be placed before the court.

[20] In an apparent attempt to comply with section 295 (a) of the Act the second applicants attaches a letter from a gynaecologist who advises blandly "Due to medical reasons …Ms M will not be able to carry a baby." Nothing is said about the condition and whether it is permanent and irreversible as required by the section.

[21] The second applicant also attaches a report from a clinical psychologist. The report candidly discloses that the psychologist interviewed the commissioning mother via the internet. I find it highly unsatisfactory for such an assessment to be relied upon. It creates an impression of babies for sale on order – a situation certainly not envisaged by the Act and which is highly undesirable. The reports prepared by the psychologists are superficial and unreliable, characterised by a wholly inadequate reference to facts in support of their psycho social recommendations that the commissioning parents "are in all respects suitable persons to accept parenthood of the child that is to be conceived" (section 295 (b) (ii)).

In addition, no reference is made in the psycho social analysis of the suitability of the person designated by the commissioning parent in the event of his or her death (section 295 (d)).

[22] There are numerous unconfirmed reports in the media indicating that monetary considerations are indeed a factor in many cases contrary to the provisions of section 301 of the Act. In order to address any abuse the parties are required to set out full facts regarding how any compensation for

expenses pursuant to the provisions of section 301(2)(a) and the loss of earnings pursuant to section 301(2)(b) will be made and precisely what amounts are to be paid pursuant to section 301(2)(c) of the Act. Full details of all payments pursuant to section 301(3) are to be disclosed to the court as these aspects affect the validity of the surrogacy agreement.

[23] Particulars pursuant to the provisions of section 303 of the Act are to be disclosed to enable the court to assess compliance with the section.

[24] In matters where the interests of children are paramount I am of the view that the applicants must supply proper and full details regarding themselves. Unless this is done I am not in a position to determine whether the commissioning parents are indeed fit and proper to be entrusted with full parental responsibilities.

[25] Save for the fact that the applications are shoddily drawn, they do not contain full and reliable facts which a court is required to consider prior surrogate motherhood agreements being confirmed. A court is not a rubber stamp for this purpose.

> *"The Law Commission recommendations to the effect that every surrogacy agreement should be confirmed in advance by a court, that surrogacy for financial gain should not be permitted and that all the parties to the agreement should be to a strict screening process before the agreement is implemented, appear to have been accepted by the select committee."*
>
> Boberg's Law of Persons and Family 2nd ed p 353.

[26] In order to perform the duty pursuant to the Act and the Constitution, I require complete and full compliance with all the provisions of the Act as well as compliance with the requirements raised in this judgment.

[27] The Deputy Judge President of this Division issued a practice directive no 5 of 2011 regarding all applications for confirmation of surrogate motherhood agreements in terms of section 295 of the Act as follows:

> *"2. In terms of Section 295;*
>
> *2.1 the identity of the parties to court proceedings with regard to a surrogate motherhood agreement may not be published without the written consent of the parties concerned; and*
>
> *2.2 no person may publish any facts that reveal the identity of a person born as a result of surrogate motherhood agreement.*
>
> *3. In light of these provisions, prospective applicants have from time to time sought directives from this office as to whether such applications are to be placed for hearing on the ordinary roll, or whether they are to be placed for hearing in chambers.*
>
> *4. A directive is accordingly issued that;*
>
> *4.1 A party who seeks to bring an application in terms of the section must first have the application issued by the Registrar in the ordinary course;*
>
> *4.2 The court file with all its contents must however, be brought to this office, immediately after issue;*

4.3 This office will upon receipt of the court file and the application, allocate the matter for hearing to a particular Judge, who shall give further directives as to how the matter is to be heard;

4.4 The applicant's attorneys must specifically refer this office and the court hearing the application to the provisions of Section 295 of the Act when the court file is delivered to this office and when the application is heard.

4.5 The parties must comply in all respects with such further directives and requirements as may be stipulated by the Judge to whom the file has been allocated."

[28] In the circumstances the applications are postponed *sine die* in order for the applicants to correct and supplement their applications to properly comply with the provisions of the Act and to place sufficient information before the Court to enable it to consider the matters on their merits. The practice directive is also to be adhered to.

_____

W L WEPENER
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

_____

I agree, **M VICTOR**

JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

APPLICANTS' ATTORNEYS
Anthony Wilton Thinane Inc