REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 14341/17

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED

10 AUGUST 2017
DATE

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SIGNATURE

In the *ex parte* application of:

K A F	First Applicant
C F	Second Applicant
N D	Third Applicant
J D	Fourth Applicant

JUDGMENT

MODIBA, J:

[1] This is an application for the confirmation of a surrogate motherhood agreement (SMA) in terms of section 295 of the Children's Act 38 of 2005 ('the Act').

[2] The application is brought *ex parte* by the parties to the SMA. The parties are:

2.1 KAF, the first applicant.

2.2 KAF's husband, CF is the second applicant. Together with KAF, CF is the commissioning parent to the surrogate child to be conceived, carried and birthed in terms of the SMA.

2.3 The third applicant is ND. She is the surrogate mother.

2.4 The fourth applicant, JD is in a permanent relationship with ND for the past seven years.

[3] The parties have entered into a SMA in terms of which ND would act as a surrogate mother for the commissioning parents. This is the SMA referred to in paragraph 1 of this judgment. Collectively, the parties to the SMA are referred to as the parties. Letters are ascribed to the parties to protect their privacy and identity. KAF and CF are together referred to as the commissioning parents. ND and JD are together referred to as the surrogate parents. Individually, the parties are referred to by the letters ascribed to them KAF, CF, ND and JD respectively.

[4] The intended parents have been married since 20 February 2006. They are desirous to have a child. However, for medical reasons, they are unable to naturally have a child jointly. KAF was diagnosed with a medical condition called uterine septum. In the founding papers, she describes this medical condition as a congenital malformation where the uterus is partitioned by the septum. The septum was removed twice through hysteroscopy procedures. However, it grew back. The commissioning parents have since undergone five in-vitro fertilisation procedures. They were all unsuccessful. In a medical report compiled by Dr Rodrigues and attached to the founding papers, KAF is medically opined to be unable to conceive and to carry a pregnancy to term. Dr Rodrigues has advised the commissioning parents that surrogacy is the only and safest option available to them to have a child who is biologically related to one of them.

[5] It appears from the founding papers that the commissioning parents have a good and stable marriage relationship and that they live a comfortable life. KAF is an attorney. CF is a business executive. A statement of their assets and liabilities attached to the founding affidavit reflects a healthy balance sheet. They live in Sandton in Johannesburg. Adequate arrangements are in place for the care of the child after he or she is born and in the event of the commissioning parents' divorce and/or death. There is no reason on the papers to doubt their suitability to accept parenthood of the surrogate child.

[6] They were introduced to ND by the staff of Medfem Clinic. Medfem Clinic operates what KAF refers to in the founding affidavit as an internal surrogacy programme. ND had contacted Medfem and offered to surrogate for one of their infertile couples. From averments contained in the founding affidavit, it appears that as part of their internal surrogacy programme, Medfem renders a matching service, linking commissioning parents to surrogate mothers.

[7] Section 295 of the Act provides as follows:

"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;"

[8] In *Ex Parte WH and others*[1] the court, per Tolmay J and Kollapen J delivered what appears to be the first reported judgment on SMAs since the promulgation of the Act. The court in *Ex Parte WH* was constituted as a full bench to specifically determine and provide guidelines on how similar applications would be dealt with in the future, with a view to ensuring consistency and to develop a uniform practice in matters of this nature. The judgment gives a detailed overview of South African law on this subject and compares it to the law in other jurisdictions. The judgment also deals with specific issues arising from surrogacy applications and the role of the court in surrogacy applications. No purpose would be served by regurgitating content on these topics so eloquently set out by Tolmay J and Kollapen J in *Ex Parte WH.* I confine my discussion of the law and guidelines developed in that judgment to issues that arise in this application.

[9] The following issues arise in this application:

9.1 Whether ND uses surrogacy as a means of income.

9.2 The wellbeing of the surrogate mother.

9.3 The risk of the commercialisation of surrogacy arrangements.

[10] There is insufficient evidence on the papers to satisfy the court that ND is not using surrogacy as a means of income.

[11] ND is 20 years old. She met JD when she was 13 years old. She fell pregnant with their first child when she was 16 years old. She was in grade 10 at the

[1] 2011 6 SA 514 (GNP).

time. She dropped out of school and moved in with JD and his parents. She has been staying with them since. Two years later, she conceived and later gave birth to their second child. She does not appear to have acquired any skills since she dropped out of school. She is a stay-at-home mom. She personally raises and takes care of her two children. The children are not in nursery school.

[12] According to ND, the only work she has ever undertaken was to assist JD with generating invoices for the steel work he does informally. Currently, she assists JD's mother with making handbags. It is unclear how much time she devotes to this activity on any working day. It is also unclear what income she earns from this activity if any. From the description of her daily routine on the papers, she does not make handbags every day. It appears that when she does make them, she fits this activity into her daily routine as a stay-at-home mom.

[13] JD works for his stepfather as a site manager in his maintenance company. They live on a large property in Onderstepoort, Pretoria. The property has four dwellings. JD's paternal grandmother; JD's sister, husband and two children; JD's mother, stepfather and brother and JD, ND and their children occupy each of the dwellings. A municipality rates and utility bill for this property is attached to the application as their proof of address. It reflects arrears in the amount of R14 967 of which R12 936, 58 is more than 90 days overdue. It has an opening balance of R14 446, 56 and a closing balance of R14 967. The bill for the relevant month is R520, 82. No payment is reflected on the bill, indicating that in the preceding month, no payment was made in respect of the bill. The four families are probably unable to pay such an insubstantial utility bill. This raises a serious question regarding the economic circumstances of not only ND and JD but of JD's entire extended family.

[14] Unlike the commissioning parents, the surrogate parents have not taken the court into their confidence by providing a full disclosure of their income and expenses. They have also not disclosed a statement of their assets and liabilities. This omission brings their *bona fides* into question particularly because there are factors on the papers that point to their probable indigence and a financial incentive on ND's part for getting involved in the surrogacy process. The court in *Ex parte WH* has alluded to surrogacy agreements being open to abuse and the importance of full disclosure. This is what the court said on the duty of the parties to display utmost good faith by disclosing all the pertinent facts in an application of this nature:

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

[15] As already mentioned it does not appear that ND is meaningfully and gainfully economically active.

[16] On granting this order, R4 000 per month will be payable to ND by the commissioning parents to compensate her for expenses relating to the implementation of the agreement. This amount will escalate to R6 000 per month after she conceives the surrogate child. It is envisaged that at that point she will need to retain a domestic worker to ease the burden of house chores and child care upon ND and to allow her to cope with the pregnancy. It is for that reason that her allowance would increase by R2, 000. A breakdown of expenses to be covered by these payments is not set out in the papers.

[17] In *Ex parte WH,* the court discouraged generic payments where the details of the expenditure of the surrogate mother are not disclosed. On this issue the court stated as follows:

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

[30] *While we accept the bona fides of the agency Baby-2-Mom as well as the assertion that no payment other than for expenses allowed in terms of the Act will be paid, we are of the view that as a general proposition and in the main to avoid commercial surrogacy (either directly or indirectly) the court should, in all instances where an agency is involved, be fully apprised of all the facts and circumstances relating to the modus operandi of the agency, the relationship between the agency and the commissioning parents, as well as the agency and the surrogate mother.*"

[18] According to ND, she does not have a domestic worker. She personally takes care of her children. She is also responsible for domestic chores while JD is at work. When she was pregnant, she attended a district clinic. This is where she gave birth to her children. She is silent on the additional expenses she incurred when she was pregnant with her children. She is also silent on whether she retained a domestic worker when she was pregnant to assist her with house chores. These non-disclosures leave the court with insufficient information to satisfy itself that the allowances payable to ND in terms of the SMA are justified and that ND is not using surrogacy as a means of income. Since the court lacks sufficient information to make a definite finding on this issue, a prudent approach on this issue is appropriate in the circumstances.

[19] The court is also concerned about ND's psychological wellbeing. The psychological wellbeing of the surrogate mother is one of the critical factors that a court seized with an application of this nature ought to be satisfied of. Of this requirement, the court in *Ex parte WH* stated that:

"*[72]* *What is often at stake is not only the physical wellbeing of the surrogate mother and the child to be born, but also the psychological consequences that may follow upon the birth of the child and the process of the handing over by the surrogate mother to the commissioning parents of the child born out of the arrangement. That being so a court has a vital role to play in the confirmation of the agreement. While on the one hand it is enjoined to*

> *advance the spirit and the objectives of the Act without creating or placing additional obstacles in the path of litigants who seek relief, on the other as the upper guardian of all minor children it cannot simply be a rubber stamp validating the private arrangements between contracting parties.*[2]"

[20] In the assessment report on ND appended to the founding papers, ND is held out as an emotionally strong and mature person who intends to engage in the surrogacy process for altruistic reasons. The report also states that she will have no difficulty with handing over the surrogate child to the commissioning parents after the child is born. This court finds that this conclusion is not supported by the disclosed facts.

[21] ND's personal circumstances set out in paragraphs 11 and 12 above do not paint a picture of a person who was able to make decisions in her best interests as a teenager. It is unclear from the assessment report what transformation she underwent to satisfy the court that she has the maturity to appreciate the implications of her decisions. The report does not give the court an objective analysis of ND's psychological well-being in the light of these disconcerting facts. It is probable from the facts before this court that ND continues to have a limited perspective of life as an adult and may not fully appreciate the implications of her decisions.

[22] To the extent the assessment report fails to provide an objective analysis of ND's personal circumstances, particularly in respect of the concerns this court raises above, this court does not accept the conclusion that ND is suitable to participate in the SMA as a surrogate mother. The conclusion made in the assessment report in respect of ND falls short of what is required of an expert witness as stated by the

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[2] (See judgment of Wepener J in *Ex Parte Applications for the confirmation of Three Motherhood Agreements South Gauteng High Court 2011 (6) SA 22 (GSJ).*

court in *Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another*[3] where the court stated that expert evidence is admissible when founded on logical reasoning. Although in that case, the court made this statement with reference to the conflicting evidence of medico-legal experts, where the court is dealing with the uncontested evidence of one expert in an *ex parte* application as in this case, the court does not have to accept such evidence simply because it is uncontested. There is no reason why such evidence should not be subject to logical reasoning as in the case of conflicting expert evidence. In *ex parte* applications, given the stringent requirements of the *bona fides* of the parties, rationality requires that the evidence of experts be strictly construed and if found not to be supported by the facts of the case, the court should be justified in rejecting it.

[23] For the reasons set out above, the court is not satisfied that ND's psychological wellbeing renders her suitable to be a surrogate mother. Specifically, the court is concerned that she may not have the ability to deal with the psychological consequences that may follow upon the birth of the child, the handing over of the child to the surrogate parents and the termination of the surrogacy financial allowance.

[24] In the premises, the conclusion in the assessment report, that ND is suitable to participate in the SMA is rejected.

[25] The risk of commercialization of the surrogacy process also arises from the papers. As already mentioned, Medfem operates an internal surrogacy programme. In addition to the matching service alluded to earlier, it appears that they provide several other services related to the surrogacy process. The assessment report reflects that the psychologist who compiled it has an office address at Medfem Clinic.

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[3] [2002] 1 All SA 384 (A) (13 March 2001).

The same psychologist conducted assessments on both KAF and CF and ND and JD and compiled a commissioning parents report and a surrogate assessment report. A reproductive medical specialist compiled medical letters regarding KAF's medical condition as well as the artificial fertilisation treatment to be conducted on ND in terms of the SMA. From these letters, it appears the same medical specialist who conducted the medical assessment of the parties will be administering the artificial fertilisation treatment on ND. His reports also reflect an address at Medfem Clinic.

[26] The nature of the relationship between Medfem and the medical professionals referred to in paragraph 25 above has not been disclosed to the court as required by the court in *Ex parte WH*.[4] Although the Medfem Clinic may not require a direct payment in respect of the surrogacy as stated in the papers, other services offered by medical professions involved in the surrogacy process may require payment. From what is stated in the founding papers, these services are complementary to the surrogacy matching service that Medfem provides. No information is provided regarding whether these complementary services are paid for by any of the parties or not. If they are paid for, this may tamper with the objectivity of the professionals involved, given that upon the granting of a court order approving the SMA, complementary services will be provided to the parties for payment.

[27] The finding made above in respect of the conclusion in the assessment report in respect of ND and the reasons therefore, point to the need for medico-legal experts involved in the surrogacy process to be impartial in perception and in fact, given the assistance they offer to the court in this regard. They owe their allegiance to the court and not to the parties to the SMA. If they are associated to other service

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[4] See also *Schlesiner v Schlesiner* 1979 (4) SA 342 (W), cited with approval in *Cometal-Mometal SARL v Corlana Enterprises (Pty) Ltd* 1981 (2) SA 412 (W) - regarding the disclosure requirement in *ex parte* applications.

providers in the surrogacy process, a commercial motive may interfere with their objectivity.

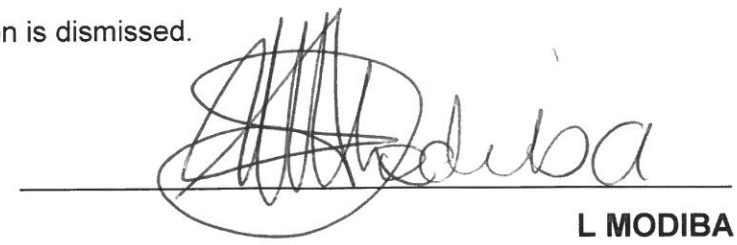
[28] To diffuse any risk of a commercial motive in surrogacy arrangements, it is desirable that medico-legal professionals who function independently are involved in the process. Insufficient information is set out in the papers to enable the court to satisfy itself of this fact in respect of Medfem and the medical professionals referred to in paragraph 25 above.

[29] In the premises, the court is not satisfied about the non-disclosure of the nature of the relationship between Medfem and the medical professionals involved in the surrogacy process. The court lacks information to satisfy itself of the absence of the risk of commercialization of the surrogacy process in this matter.

[30] For the reasons set out above, the parties have failed to satisfy the court that the SMA meets the requirements set out in the Act. Therefore the application stands to be dismissed.

[31] The following order is made:

31.1 The application is dismissed.



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JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

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Date of hearing: 29 June 2017

Date order was granted: 29 June 2017

Date reasons given: 10 August 2017