



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No: 82202/2014

8/12/2014

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES/NO
(3)	REVISED.
08-12-2014	
DATE	SIGNATURE

In the *ex parte* application of:

SA

1ST APPLICANT

SYS

2ND APPLICANT

and

IO

3RD APPLICANT

MAO

4TH APPLICANT

DATE OF HEARING

:

27 NOVEMBER 2014

DATE OF HEARING

:

08 DECEMBER 2014

JUDGMENT

MANAMELA AJ

Introduction

[1] The applicants, whose identities may only be published at their discretion¹, entered into a written surrogate motherhood agreement on 28 October 2014.² They submit that this is an agreement contemplated by the provisions of Chapter 19 of the Children's Act 38 of 2005 (the Act).

[2] The application³ seeks confirmation of the agreement in terms of section 295 of the Act; authorisation of artificial fertilisation of procedures in the execution of the agreement, in terms of section 303 of the Act and other ancillary factors. In terms of the prevailing practice of this court, the matter was allocated to me by the Deputy Judge President, Honourable AP Ledwaba. I heard the matter in chambers on Thursday, 27 November 2014 and Ms Retief appeared before me as counsel for the applicants. I could not finalise the matter on that day, as I required supplementary information on suitability of the applicants. This information was furnished on Thursday, 04 December 2014.

[3] I am grateful to counsel for the oral submissions made in chambers and to the attorneys for the supplementary papers. Further, I enjoyed – in the main - the dependable wisdom or authority of Tolmay J and Kollapen J of this division contained in ***Ex Parte WH and Others 2011 6 SA 514 (GNP)*** and Victor J and

¹ Written consent of the parties to this type of proceedings is required in terms of section 302 of the Children's Act 38 of 2005 for the publication of their identities.

² The surrogate motherhood agreement is marked Annexure "A" and is signed by first and second applicants, as well as, an unidentified witness on 27 October 2014 and third and fourth applicants on 28 October 2014.

³ The application comprises of indexed bundle of 103 pages made up of Notice of Motion (date stamped 18 November 2014 by the registrar and 17 November 2014 by the applicants' attorneys); Founding Affidavit deposited to by the first applicant on 27 October 2014; agreement (annexure "A") and other supporting documents (Annexures "B"; "B1", "C" – "O"). Further, on request from the court, supplementary papers were filed.

Wepener J of the local division in *In Re Confirmation Of Three Surrogate Motherhood Agreements* 2011 6 SA 22 (GSJ), as well as, the views of the learned authors *Nicholson, C.* and *Bauling, A. Surrogate Motherhood Agreements And Their Confirmation: A New Challenge For Practitioners?* 2013 *De Jure* 510. These authorities were of general assistance and guidance. However, as always, each matter depends on its own circumstances, especially when dealing with issues of a very personal nature, like surrogacy.

[4] Although, the issues in this application are in no way near complicated, I still deemed it warranted to prepare and hand down a written short judgment. In my view, this will record my general views on the issues and put context to the order made at the end hereof. Next I deal with the submissions made and in doing so I will use – in their general sense - the applicable sections in Chapter 19 of the Act, as headings to facilitate presentation.

Validity of the agreement

[5] As already stated above⁴ the parties have entered into a written surrogacy motherhood agreement. The original agreement reflects what appear to be signatures of the respective parties and an unnamed witness.⁵ The agreement was entered into in Randburg, Johannesburg and therefore in the Republic of South

⁴ See paragraph [1] above.

⁵ See page 23 of the papers.

Africa.⁶ Also, all parties to the agreement, being the applicants herein, are stated as being domiciled within the Republic of South Africa.⁷

[6] Further, both commissioning parents submit that they are residing in Johannesburg and therefore within the area of jurisdiction of this court, whose confirmation of the agreement is sought.⁸

[7] Although this may seem rather piecemeal-adjudication of the issues or even premature, I hasten to state that I am satisfied that the agreement appears to comply with the provisions of section 292 of the Act. I proceed to look at other issues.

Consent of husband, wife or partner

[8] The commissioning parents are married to each other and have been married since 25 March 1995. Both of them are parties to the agreement and although this is self-manifesting, the requisite consent is also evident in the papers. The same applies to the fourth applicant, being the husband of the surrogate mother.

Genetic Origin of the Child

[9] It is submitted that the first and second applicants' wish to have a child will not be achieved without the assistance of a surrogate, hence the agreement. Medical reports compiled by appropriately qualified professionals are included as annexures

⁶ See section 292(1) (b) of the Act.

⁷ See section 292 (1)(c) of the Act.

⁸ See sections 292 (1)(d) and (e) of the Act.

to the application.⁹ In a letter attached to the papers, Dr FA Rodrigues confirmed that the first applicant has a condition called "*Adenomyotic Fibroid Uterus*" and that her condition is permanent and irreversible.¹⁰

[10] Dr Rodrigues further confirmed that the first applicant's eggs or donor eggs and second applicant's sperm will be used in the surrogacy process.¹¹ This genetic material will be combined in a laboratory by IVF process, and the embryos will then be transferred into the uterus of third applicant. Therefore, the conception of the child or children contemplated in the agreement will be effected by the use of a gamete of at least one of the commissioning parent.¹²

Confirmation of the Agreement

[11] Section 295 of the Act list some requirements for an agreement to meet before confirmation by a court. It is provided there, that the court may not confirm a surrogate motherhood agreement which does not meet the requirements or comply with the stated statutory provisions. I deal with the pertinent aspects of this statutory provision below, with a measure of self-taken liberty in the sequence or order of the provisions.

⁹ Dr FA Rodrigues, a reproductive medicine specialist; a report dated 26 May 2014 by Mandy Rodrigues (a clinical psychologist) on psychological screening of first and second applicants; a report dated 03 July 2014 (in respect of the third applicant's medical condition) and letter dated 26 August 2014 (in respect of the general health status of the third and fourth applicants) by Dr Peter de Jong (Obstetrician and Gynaecologist), as well as, a report dated 29 May 2014 by Dr Karin Barkema, a clinical psychologist (on the screening of the third and fourth applicants as a surrogate couple) .

¹⁰ See page 24 of the papers.

¹¹ *Ibid.*

¹² Section 294 of the Act.

[12] Again, the applicants or their legal advisors deserve my appreciation for the detailed submissions. The submissions regarding compliance with the provisions of section 295 of the Act are contained in paragraphs 18.5 to 18.11 of the founding affidavit to the application. The paragraphs are supplemented or amplified in other annexures to the application and the additional or supplementary information referred to above. I initially had concerns regarding the omitted confirmation of financial ability or suitability of the first and second applicants, as commissioning parents.¹³ My concerns have been satisfactorily addressed with the filing of a letter from the auditors of the first and second applicants.

[13] I am therefore satisfied that the provisions of section 295 of the Act are met in particular regarding the contractual capacity of the applicants to enter into the agreement; their appreciation of the the legal consequences of the agreement; the suitability of first and second applicants, to act as commissioning parents, and of the third applicant as a surrogate mother.

[14] Further, there is evidence to confirm that, the surrogate mother has had at more than one pregnancy and one viable delivery, as she has two living children of her own. As indicated above, medical reports compiled by appropriately qualified professionals and confirming the surrogate mother's general health condition, are included as annexures to the application.¹⁴ They do not appear to raise anything of concern to the medical experts with regard to the health of the surrogate mother and the prospective child or children.

¹³ See paragraph [70] on page 530D-E of *Ex Parte WH*.

¹⁴ See paragraph [9] above.

[15] There is also proof or confirmation by the second applicant's youngest brother and his wife evidencing their agreement to be appointed as guardians for the minor child or children, in the event of death of the commission parents.¹⁵ Also, there is satisfactory evidence regarding the financial welfare of the child or children to be born in case of death of one or both of the commissioning parents or their divorce or separation before the birth or the child or children.

Prohibition of Payments in respect of Surrogacy

[16] Although this is also a provision contained in section 295 of the Act, in my view, it deserves very special attention¹⁶ due to its implications beyond the contractual and/or personal relationships of the applicants. For, commercial surrogacy is a real possibility of our current times¹⁷ and the court is entrusted with a critical responsibility in this regard. This is obviously said with optimum deference to the applicants and without casting aspersions on them. From the submissions and confirmations in the papers, it appears that the surrogate mother is not using surrogacy as a source of income, but has entered into the agreement for altruistic purposes. It has also been confirmed – on request from the court as stated above – that no payments other than compensation for her exact loss of income due to surrogacy motherhood and reimbursement for actual expenses will be made to the third applicant.¹⁸

¹⁵ See paragraph 7.4 of the agreement on page 18 of the papers and further page 62 of the papers.

¹⁶ See *Ex Parte WH* at paragraphs [64] – [68] on pages 528 and 529.

¹⁷ *Ibid.*

¹⁸ See paragraphs 2 and 3 of the first applicant's supplementary affidavit of 03 December 2014 and the annexures thereto.

Identity of Parties

[17] As stated at the beginning of this, the Act reserves the right of privacy or confidentiality to the parties in court proceedings in respect of surrogate motherhood agreement.¹⁹ Publication of their identities without their written consent is proscribed.

[18] Against the background of all what appears above, I will grant the order sought in terms of prayers 1 and 2 of the notice of motion²⁰ which is for confirmation of the agreement and authorisation of artificial fertilisation. I consider what is sought under prayers 3 and 4 to follow *ex lege* from the order to be granted in terms of 1 and 2. However, I will accommodate those prayers by making a general order as preceded in *Ex Parte WH*.²¹

Order

[19] Therefore, I make an order in the following terms:

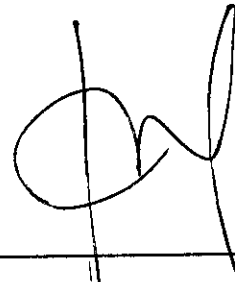
1. the surrogate motherhood agreement signed by first and second applicants on 27 October 2014 and third and fourth applicants on 28 October 2014, and annexed to the founding affidavit of the first applicant as "A" is confirmed, as contemplated by the provisions of chapter 19 of the Children's Act 38 of 2005;

¹⁹ See paragraph [1] above and further section 302 of the Act.

²⁰ Court dated 18 November 2014.

²¹ See paragraph [80.2] on page 532 of *Ex Parte WH*.

2. artificial fertilisation procedure contemplated in section 303 of the Children's Act 38 of 2005 and in the execution of the surrogate motherhood agreement confirmed in terms of 1 above, is authorised;
3. the provisions of section 297(1) of the Children's Act 38 of 2005 will apply to the agreement for all purposes.

A handwritten signature in black ink, consisting of a large, stylized 'M' and 'A' followed by a vertical line and a small flourish.

K.L.A.M MANAMELA

**Acting Judge of the High Court of
SA: Gauteng Division, Pretoria**