

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: **8749/22**
9353/22
34190/22

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO
25
Date: **24** October 2022

A handwritten signature in blue ink, appearing to be "C. J. M.", is written over the date.

In the ex parte matters of:

THREE SURROGACY APPLICATIONS

DONRICH THALDAR

BRIGITTE CLARK

WILLENE HOLNESS

SHEETAL SONI

BONGINKOSI SHOZI

NTOKOZO MNYANDU

ALIKI EDGCUMBE

Applicants

First Amicus

Second Amicus

Third Amicus

Fourth Amicus

Fifth Amicus

Sixth Amicus

Seventh Amicus

JUDGMENT

THE COURT

Introduction

[1] This Court is seized with the sole legal question:

“Should it, as a rule, be required that a clinical psychologist assess the existing child(ren) of commissioning and surrogate parents to determine whether they are prepared for the surrogacy and its outcome?”

[2] The legal question arises from the judgment of this Court in *Ex Parte JCR*.¹ The legal question stands on its own, but not in the abstract. The question has been carved out of three pending surrogacy applications. This Court has to determine the question, as a separate legal issue, before the surrogacy applications can be considered.

[3] Surrogate motherhood agreements (‘surrogacy agreements’), entered into by commissioning parents and surrogate mothers, are subject to confirmation by the High Court. If the surrogacy agreement is not confirmed by the High Court, it is unenforceable and invalid.² A Court will only confirm a surrogacy agreement after it has considered the requirements of section 295 of the Children's Act, 38 of 2005.³ The Court's answer to the legal question will impact whether an evaluation of the children of the commissioning parents and/or surrogate mother forms part of the

¹ *Ex Parte JCR and Others* (51606/21) [2022] ZAGPPHC 209; 2022 (5) SA 202 (GP) (16 March 2022).

² S 295(1) of the Children's Act 38 of 2005.

³ The full citations of these three cases are *Ex Parte: LM and Others* (8749/22) *Ex Parte: GP and Others* (9353/22) and *Ex Parte: AN and Others* (34190/22). The parties in the three surrogacy applications are collectively referred to as the applicants in this matter.

requirements in section 295. This will in turn directly impact on the three pending surrogacy applications.

- [4] Of importance in surrogacy applications are the child's best interests. Motivated by the need for certainty and clarity in an issue involving children, this Full Court was constituted and the question was considered as a matter of priority.
- [5] To ensure all interested parties were provided an opportunity to be heard, the Deputy Judge President issued a Directive⁴ in terms of section 14(1)(a) of the Superior Courts Act, 10 of 2013 read with section 173 of the Constitution, setting out the legal question to be considered and the context within which the question arose.⁵ The Directive was sent to all major legal bodies in the province and all interested parties were invited to apply to be admitted as *amici curiae*.
- [6] The invitation was taken up by nine legal scholars, including four professors. The legal scholars have extensive research in health law and/or family law, with a particular interest in surrogacy matters in general. They have a particular interest in the legal question the Court has to consider. The legal scholars were admitted as *amici curiae* and provided an opportunity to make written and oral submissions.
- [7] The applicants in the three surrogacy applications similarly made written and oral submissions on the legal question. They are cited, collectively in this judgment, as the three surrogacy applications and referred to as the applicants in this matter.
- [8] The *amici* and applicants presented a, largely,⁶ unified position in their submissions to this Court. Expert evidence was presented to the Court by the applicants and the *amici*.

⁴ A Full Bench was previously constituted to consider issues arising from surrogacy applications to "ensure consistency and develop a uniform practice in matters of this nature" and also invited the bars and *amici* to make submissions. See *Ex parte: WH and Others* (29936/11) [2011] ZAGPPHC 185; 2011 (6) SA 514 (GNP); [2011] 4 All SA 630 (GNP) (27 September 2011) at para 9 ("*Ex Parte WH*").

⁵ The Directive sets out that the Deputy Judge President (in his capacity as Acting Judge President) was approached by a group of law academics that posed a concern regarding the application of a general obligation to subject to children to psychological evaluation as part of a section 295 application.

⁶ The *amici* and applicants diverge on whether there ought to be a general requirement to subject the children of a surrogate whose gamete is used in the fertilisation to an evaluation. There is a

Position of the *amici curiae* and the applicants

- [9] The *amici* and the applicants are for the greatest part collectively referred to, for ease of reference, as the parties. The parties' stance is that there must be no general requirement to subject the children of either the commissioning parents or the surrogate, to a psychological evaluation in the context of section 295. The parties object to a requirement to subject children to an evaluation, as a rule. They submit that if it is a requirement, it would be at odds with the guiding principle in our law that the child's best interests must be examined on a case-by-case basis.
- [10] The parties rely on the tide of jurisprudence that describes child law as "an area that abhors maximalist legal propositions that preclude or diminish the possibilities of looking at and evaluating the specific circumstances of the case".⁷
- [11] The parties invite this Court to adopt a case-by-case approach, rather than an absolutist approach, imposing a general requirement. The parties ground such a nuanced approach in the provisions of section 295(c)(ii) of the Children's Act as interpreted by this Court in *Ex Parte KAF and Others (KAF 2)*.⁸ Section 295(c)(ii) provides that a Court must be satisfied that a surrogate is emotionally available to her children before the Court confirms the surrogacy agreement. This Court, in *KAF 2*,⁹ held that this requirement requires an investigation of whether the surrogate is -
- "emotionally available for her own child or children, including her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension".
- [12] The parties submit that this criterion, focusing on the mother's emotional availability, is clearly motivated by a concern for the well-being of the surrogate mother's child(ren)

point of departure between the *amici* and the applicants contained in the expert reports. The applicant contends that in instances where the surrogate mother's embryo is used there could be a need for an evaluation of the surrogate's existing children. The *amici* disagree with this and points out that there is no basis in the study conducted and reports relied on to draw this distinction. The court is constrained to an assessment of the best evidence available. At present the best evidence available does not provide a basis for the distinction sought to be drawn by the applicants.

⁷ *AD v DW* 2008 (3) SA 183 (CC) para 55.

⁸ *Ex Parte KAF and Others* (2018/5329) [2018] ZAGPJHC 529; 2019 (2) SA 510 (GJ) (28 June 2018) ("*Ex Parte KAF 2*").

⁹ *Supra* at para 29.6.

and that this requirement sufficiently protects the child's best interests. There is no need for a blanket prescription of a psychological assessment, as the emotional availability requirement is already in place and caters to the child's best interests. In short, the existing mechanisms to ensure that parents are suitable can be used to protect the psychological well-being of their children.

- [13] The parties argued that normally parents do not require their children to be evaluated if they want to extend their families. A requirement that the child(ren) of the commissioning parents and/or surrogate mother should be psychologically evaluated before the Court confirms the surrogacy agreement, is not justified. Such a requirement may subject children to emotional turmoil should the surrogacy agreement terminate for any reason provided for in the Children's Act or if there is a miscarriage.
- [14] The parties do not seek an outright ban against the evaluation of children. It is the blanket application of the requirement to all children, that they wish the Court to reject. Their position is that if the particular circumstances of a child necessitate the need for evaluation, then it remains open to the Court to consider the need for such an evaluation, based on the particular facts of the case. Depending on the social and cultural background, as well as other particularised aspects of the child(ren), such a need may well arise. However, the need for such an evaluation will come to the fore after and through an evaluation of the surrogate parent. It however can only arise if there are objective facts presented to the Court to ground the need for such an evaluation.
- [15] Before considering the arguments, the Court first turns to the evidence relied on by the parties.

Evaluation of expert evidence

- [16] The *amici* presented this Court with the affidavit and report of Ms. Rodrigues, a clinical psychologist. She is an expert in the psychology of infertility and the management thereof. She further counsels people and couples who have challenges in having children, deals with psychological assessments of gamete donors and surrogate

mothers, counsels patients during in vitro fertilisation process, counsels donor game recipients and their partners, and counsels surrogacy commissioning parents.

[17] Ms. Rodrigues's opinion is that there is no need for a general requirement to evaluate the child(ren) of surrogate and commissioning parents. Her reasons are:

- 18.1 A psychological evaluation, depending on the child,¹⁰ may be harmful to the child. Ms. Rodrigues states that "whilst some children might experience being evaluated by a psychologist as a non-event, or even a pleasant interaction, some children might experience it as a source of discomfort or even anxiety."
- 18.2 A psychological evaluation prior to fertilisation, ie at the stage of confirmation of the surrogacy agreement, is premature. This is particularly so as the evaluation will precede the fertilisation at a time when much is uncertain.¹¹ Ms. Rodrigues states that it would be best for the commissioning parents not to share their intentions to have another child through surrogacy with their existing children until such time that the surrogate mother's pregnancy is confirmed. At this stage, it would be appropriate to share the news with the existing child. Similarly, telling the children of a surrogate mother in advance that their mother may become pregnant to help another woman (or couple) to have a child "would just cause unnecessary expectations of something that is still at that stage a big uncertainty". Children of surrogate mothers are often young and may not have the capacity to understand the concept of reproduction and exposing them to a surrogacy agreement without a

¹⁰ The psychological effect of mandatory psychological evaluation on a child will depend on a variety of factors, such as the child's age, maturity, personality traits, and awareness of parental expectations.

¹¹ Ms. Rodrigues states –

"it is clearly best for pre-teen and even teenage children not to be drawn in to their parents' reproductive plans, as these plans are inherently uncertain, highly emotional, and repeated disappointment can be experienced as traumatic. ...Involving a child with less emotional resources than adults, in the emotionally loaded planning process of a surrogate pregnancy - even before a surrogacy agreement has been approved by the court - does a disservice to a child. As a general rule, I would caution against it."

guarantee of actual pregnancy could generate questions about reproduction before they are ready to grasp the concepts or before it is explained to them.

18.3 There is no basis in psychology to assume that a parent's surrogacy negatively affects the children.¹² Ms. Rodrigues premises this statement on the results of an empirical study conducted by a research group at Cambridge University. The results of the study were published in an article entitled "Children of surrogate mothers: psychological well-being, family relationships and experiences of surrogacy."¹³ In the study, the feelings of children of surrogate mothers were assessed, at the time of handover and currently. At the time of handover, 47% of the children reported that they experienced no difficulties, 50% could not remember and 3% reported some difficulties. Currently, 97% reported no difficulties, and 3% reported some difficulties. The study showed that 86% of the children had a positive view of their mothers' surrogacy, with the remainder being neutral or ambivalent. None of the children had a negative view of their mothers' surrogacy.

[18] Ms. Rodrigues states that the results of the study, conducted over several years and published in 2013, accord with her experience in 25 years in clinical practice, and that she has "never encountered a case where a child of a surrogate mother was negatively affected by the mother's surrogate journey."

[19] The second source of expert evidence is presented by the applicants and is the report of Carryn Ann Du Hecquet de Rauville. Ms. Du Hecquet de Rauville holds a BA in psychology and sociology and a MA in Counselling psychology. Ms. du Hecquet de Rauville is an active member of the Transplant Advisory and Ethics Committee.

[20] In her report she states that –

¹² Ms. Rodrigues states –

"I could find nothing in the psychology literature that suggest that children of a surrogate mother ought to be prepared by a psychologist for their mother's surrogate pregnancy. On the contrary, the literature suggests that children of surrogate mothers are unlikely to be negatively affected by their mother's surrogate journey."

¹³ V Javda and S Imrie "Children of surrogate mothers: psychological well-being, family relationships and experiences of surrogacy" (Human Reproduction, Vol 29, No1, pp 90 2014 (Oxford University Press)).

"There is no apparent evidence to suggest that the Child Psychological Assessment Requirement **is warranted or reasonable it would add favourably to the purpose of protecting the psychological well-being** of the existing child/children or children of a proposed gestations mother. **In addition, I suggest that such a process may actually serve to undermine the well-being of certain children**, depending on specific variables of the case and that any psychological assessment or provision of psychological services should be decided on a case by case basis."

- [21] These experts state unequivocally that the best interests of the child are not served by a requirement to subject them to psychological evaluation.
- [22] The *amici* also referred this Court to literature on the impact of psychological evaluation on children in family law matters, more broadly. The literature raises serious concerns about the potential adverse effects of assessments on children.¹⁴ In addition, some scholars have questioned the scientific veracity of psychological assessments of children, which must be taken seriously in light of the lack of scientific literature to support that these kinds of evaluations are actually beneficial to children.¹⁵ The *amici* do not submit that psychosocial examination of children is always harmful, this they concede is contested.
- [23] The evidence presented indicates that serious concerns have been raised to illustrate that a risk of harm exists. In addition, all parties have presented evidence that there is little support for an argument that such evaluation is, as a requirement, beneficial to the child(ren).
- [24] Armed with this evidence, the parties propose, instead of a general requirement to subject children to an evaluation, a nuanced approach based on a case-by-case approach, rooted in the existing legislative and jurisprudential framework.

Section 295 and the criteria in *KAF 2*

¹⁴ Turoy-Smith, Powell MB and Brubacher SP "Professionals' views about child interviews for family law assessments" (2018) 56 Family Court Rev 607-622.

¹⁵ Turkat ID "Harmful effects of child-custody evaluations on children" (2016) Court Review: The Journal of the American Judges Association 152 – 158.

[25] Parliament has enacted¹⁶ legislation that regulates surrogacy with stringent safeguards. The safeguards are found in Chapter 19 of the Children's Act.¹⁷ Chapter 19 delineates the procedural and substantive boundaries¹⁸ of surrogate motherhood agreements¹⁹ and "is prescriptive about the content of the issues pertaining to the agreement."²⁰ The procedure created by Chapter 19 is that an agreement is entered into between surrogate parent(s) and a commissioning parent(s) in which it is agreed that the surrogate mother will be artificially fertilised and the surrogate mother undertakes to hand over such a child to the commissioning parent(s) with the intention that the child concerned becomes the legitimate child of the commissioning parent(s).²¹

[26] The entire agreement is then subjected to Court oversight.²² The Court's confirmation of the agreement is sought through an *ex parte* application in which both sets of parents, commissioning and surrogate, are applicants. If the agreement is confirmed by a Court, it is valid with the effect that — for all intents and purposes — the child that is born is the child of the commissioning parents.²³ If not confirmed, the agreement is invalid.²⁴

¹⁶ The enactment is based on recommendations by the South African Law Commission (Review of the Child Care Act (Project 110) 2002 and Report on Surrogate Motherhood (Project 65) 1993 and Parliamentary ad hoc committee on Surrogate Motherhood "Report on the Report by the South African Law Commission on Surrogate Motherhood", 1999.

¹⁷ The Children's Act deals with the question of payments in respect of surrogacy and generally prohibits commercial surrogacy while only permitting payments related to compensation for expenses, loss of earnings and bona fide professional, legal and medical services related to the confirmation of a surrogate motherhood agreement.

¹⁸ The surrogate agreement must be in writing and must set out the effect of a surrogate agreement on the status of a child, the issue of termination of a surrogate agreement, the effect of the termination of the agreement, termination of pregnancy, prohibition of payment in relation to surrogacy and the identity of parties.

¹⁹ *AB v Minister of Social Development* 2017 (3) BCLR 267 (CC) para 39.

²⁰ *Ex Parte WH* para 39. These include consent, genetic origin of the child, when artificial fertilisation could take place, termination of the agreement, and the effect of the termination of the agreement.

²¹ Definition of surrogacy motherhood agreement in Children's Act.

²² Section 292(1)(e) demands that the agreement be confirmed by a High Court.

²³ *Ex Parte MS & Others* (48856/2010) [2014] ZAGPPHC 457 (2 December 2013) para 47.

²⁴ Section 297(2) of the Children's Act.

- [27] The Court will only confirm²⁵ a surrogacy agreement if the requirements of section 295 of the Children's Act are met.²⁶ Section 295(c)(ii) provides that a Court may not confirm a surrogacy agreement unless the surrogate mother "is in all respects a suitable person to act as surrogate mother." It is this section that is at the core of the legal question.
- [28] A body of jurisprudence has been built providing content to section 295. In particular, this Court has given content to section 295(c)(ii) in *KAF 2*. In *KAF 2* the Court was presented with a joint expert opinion by three psychologists who formulated and provided reasons formulating eight criteria for determining whether a proposed surrogate mother meets the requirement of being a "suitable surrogate mother". The Court approved the criteria identified and proposed in the expert opinion. The criteria can be categorised under three headings.
- [29] The *first* is the minimum information obtained through personal clinical assessment of the prospective surrogate mother and her surrounding circumstances (see *Ex Parte WH*). The information must be supported by other collateral information, where necessary, and must include information on whether the surrogate mother:
- a) is physically and medically fit to carry the gamete and in turn the child to be born to full term;

²⁵ *Ex Parte WH* para 71.

²⁶ Section 295 provides -

"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.

- b) has an agreement with the commissioning parents regarding selective reduction and the risks pertaining thereto;
- c) is of sound mind enjoys good mental health, and/ or suffers from any personality disorder, severe psychiatric illness, or has a history of self-harming behavior;
- d) does not have a history of substance abuse, including drugs and/or alcohol and addiction, likely to have similar effects as those referred to in c above.²⁷

[30] *Second*, information regarding the emotional welfare, emotional needs, and resources available to the surrogate mother. These are relevant factors for consideration to determine the likely effects on the child to be born as well as the fulfilment of the agreement. Having regards to section 293(1) which requires the written consent of the spouse if the surrogate mother is married or involved in a permanent relationship, a report on the:

- a) host mother's need for emotional resources, if any;
- b) existing emotional resources;
- c) quality and stability of the existing emotional support structure; and
- d) whether the surrounding relationships are conducive for the fulfilment of the surrogacy agreement and may result in termination of the agreement after artificial fertilization or a breach.²⁸

[31] *Third*, the clarity and emotional readiness of the surrogate mother. Under section 297(1)(a) and section 297(1)(c) of the Children's Act, the surrogate mother will not have any rights of parenthood or care of the child, or contact with the child and neither will her husband, partner, or relatives. The surrogate mother must understand the nature of the surrogacy relationship, and she must understand the nature of surrogate motherhood, that the child to be born will legally not be her child, but the child of the commissioning parents. In this regard, there must be a report on:

- a) the psycho-social support structure of the surrogate mother;
- b) the understanding and influence of the spouse, partner, relatives or extended family in the decision;
- c) the understanding that the child to be born will belong to the commissioning parents;

²⁷ *Ex Parte KAF 2* para 27.

²⁸ *Ex Parte KAF 2* para 28.

- d) how handing the baby over to the commissioning parents will affect her;
- e) that the psychosocial support structure is not likely to result in the termination of the agreement after fertilization or in a breach; and
- f) whether she is emotionally available for her own child or children, including her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension.²⁹

[32] The *amici*, applicants, and experts in this matter all endorse and rely on these criteria. The parties hinge their argument in this Court on the emotional availability of the mother as provided in the last aspect in *KAF 2* particularly, whether the surrogate mother is emotionally available for her own child or children, including her readiness to discuss the surrogate pregnancy with her child or children, depending on their ages and levels of comprehension". They contend this requirement is adequate and more appropriate to ensure the best interests of the children are protected. The approach suggested by the parties finds support in the evidence of the experts, particularly in that of Ms. Rodrigues. Ms. Rodrigues was one of the three psychologists who authored the joined expert opinion in 2018 on the topic of how to clinically evaluate an intended surrogate mother to ensure that she is, as identified by the Children's Act, "suitable". It is this joined expert opinion that formed the backbone of the principles identified in *KAF 2*. She concludes that "if an intended surrogate mother complies with the eight criteria" in *KAF 2* - "in particular that she is emotionally available for her children - there should be no reason for concern about her children". Ms. Rodrigues states –

"If a court finds, based on a psychologist's report, that an intended surrogate mother complies with the eight criteria for suitability, she has passed through a rigorous evaluation process and accordingly there should be no cause for concern about the physiological well-being of her children. In addition, relying on the parents involved to take care of their child(ren)'s psychological well-being – rather than psychologists as part of a legal process – accords with legal policy and with psychological expert opinion."

[33] Part of the requirement that a suitable surrogate mother must be emotionally available to her children will include providing them with security so that they do not fear abandonment. In this way, the child's best interests are protected.

²⁹ *Ex Parte KAF 2* para 29.

- [34] Ms. Rodrigues's evidence is that "the appropriate way to protect the emotional welfare of the surrogate mother's own children, is to ensure that the surrogate mother herself is emotionally available for her children." The reason for this is that a mother spends far more time with her child, and has a close emotional relationship with her child. "As such relying on the mother to discuss her surrogacy journey with her children at a stage and in a way that she judges best appears to me to be most practical and sustainable way to protect the psychological well-being of her children."
- [35] The expert evidence before the Court indicates that the child's best interests are provided for appropriately through establishing the emotional availability of the parents.

Child's best interests

- [36] The child's best interests are provided for in section 28 of the Constitution. It is a self-standing right; a guiding principle which must be at the fore of any decision involving a particular child as well as a standard against which to test provisions or conduct that affect children in general. Section 28 demands that the child's best interests must be determined with reference to the concrete facts before a court, on a case-by-case basis and a court must consider the particular circumstances of the child before the court. A truly principled child-centred approach requires a "close and individual examination of the precise real-life situation of the particular child involved."³⁰
- [37] The general principle, requiring a case-by-case analysis, has been echoed in the context of section 295 applications. Section 295 applications have been approached from the premise that the "best interest principle has not been given an exhaustive content, but the standard should be flexible as individual circumstances will determine the best interest of the child".³¹ In the context of section 295 applications, a Court is

³⁰ 2008 (3) SA 232 (CC) para 24.

³¹ *Ex Parte WH* para 61 quoting *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC) ("*Fitzpatrick*").

mandated to apply a "value judgment" by "taking into consideration the circumstances of the particular case".³²

- [38] To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child(ren) concerned.³³ Determining the best interests of a child is a fact-based enquiry. The particular factual scenario must be assessed to determine if it meets the standards of the best interests of the child principle. The freedom of the court to make decisions that are individualised and speak to the particular child(ren) before it, is one that our courts have guarded jealously.
- [39] The Constitutional Court has struck down legislation that impedes the Court in considering the circumstances of a particular case. In *Fitzpatrick*³⁴ the Constitutional Court invalidated provisions of the Child Care Act³⁵ for "being too blunt and all-embracing". As these provisions constrained the Court's decision-making, the Constitutional Court held they did not provide paramountcy to the best interests of children and were inconsistent with the provisions of section 28(2) of the Constitution.
- [40] A general requirement that children be assessed before a surrogate motherhood agreement is confirmed, is not aligned with the established position in our law that the child's best interests should be determined by the facts of individual circumstances rather than through the application of general rules. Whilst it may well be that the best interests of a particular child may be served by psychological evaluation, it is not the case that the best interests of children, generally, are served by mandatory psychological evaluation.
- [41] It follows from this that we cannot endorse an approach³⁶ that requires the children of prospective surrogate mothers, or commissioning parents, to be assessed, always, as a condition for the exercise of the Court's powers to endorse the surrogacy agreement. Such a requirement, will not adequately give effect to the child's best

³² *Ex Parte WH* para 63.

³³ *S v M* 2008 (3) SA 232 (CC) para 24.

³⁴ *Fitzpatrick* para 20.

³⁵ Act 74 of 1983.

³⁶ See *Ex Parte JCR and Others* (51606/21) [2022] ZAGPPHC 209; 2022 (5) SA 202 (GP) (16 March 2022).

interests. It will not be appropriate for children of prospective surrogate mothers, or commissioning parents, to be assessed unless the circumstances of a particular case render an assessment necessary.

- [42] Our view is that the case-by-case approach aligns with the general approach to the child's best interests. Such an approach is in harmony with the criteria adopted in *Ex Parte KAF 2*, particularly, the criterion in *KAF 2* that focuses on the surrogate mother's emotional availability as the appropriate avenue to safeguard the child's best interests. The focus on the parents' emotional availability also aligns with the provisions of section 7 of the Children's Act. Section 7 provides that whenever a provision of the Children's Act requires the best interests of the child standard to be applied the Court must have regard to the "capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including the emotional and intellectual needs".
- [43] The Court can only consider the parents' emotional availability if it is provided with an adequate psychological report. The report must inform the Court that specific inquiries were made regarding the parents' emotional availability and ability to explain the situation to the children. The report must set out sufficient facts to place the Court in a position to determine whether there is a factual circumstance that may render it appropriate to require an evaluation of the existing child(ren). Where the report falls short of this requirement, our courts have a discretion how to ensure it has the necessary information. Our courts have, when dissatisfied with the report, dealt with the report by rejecting³⁷ the application or requesting an improved report.³⁸
- [44] A psychologist must inform the Court if an evaluation of the commissioning parents or surrogate mother indicate a lack of the necessary skills, knowledge and ability to handle the situation with care. The psychologist must bring this to the Court's attention. In such circumstances, the psychologist may indicate the need to conduct an evaluation of the children and the Court will consider ordering such an evaluation.

³⁷ *Ex Parte KAF and Others* (14341/17) [2017] ZAGPJHC 227 (10 August 2017).

³⁸ *Ex Parte JCR*, above.

[45] The Court, as the upper guardian of all minor children, must advance the spirit and the objectives of the Children's Act. It cannot simply rubber-stamp a surrogacy agreement.³⁹ Simultaneously, the Court must guard against creating or placing additional obstacles in the path of litigants who seek to expand their families. This Court holds that permitting an evaluation where the circumstances require, without demanding it as a requirement, strikes the balance between these interests.

[46] The Court expresses its gratitude to the parties and experts. Their contribution has been invaluable in addressing the legal question. The parties have assisted the Court in its determination of a matter that involves the child's best interests as well as an issue of dignity in the formation of families. The parties have acted with expedience in order for the matter to be addressed with the due care and attention it required.

ORDER

It is declared that:

1. It is not a requirement of general application in applications for the confirmation of surrogate motherhood agreements that existing children of commissioning parents and surrogate mothers are assessed by a clinical psychologist to determine whether the children are prepared for the surrogacy and its outcome;
2. Courts, considering applications for the confirmation of surrogate motherhood agreements, have a discretion to require that existing children of commissioning parents and surrogate mothers are assessed by a clinical psychologist to determine whether the children are prepared for the surrogacy and its outcome;
3. No order as to costs.

THE COURT

Per



AP Ledwaba

Deputy Judge President

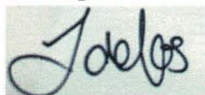
³⁹ *Ex Parte WH* para 72.

Elmarie van
der Schyff

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E van der Schyff

Judge of the High Court



I de Vos

Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

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Prof. D. Thaldar

Dr. B. Shozi

Date of the hearing:

12 September 2022

Date of judgment:

²⁵
~~24~~ October 2022