REPORTABLE

THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17962/2020

In the matter between:

APP **1st Applicant**

LDP **2nd Applicant**

and

NPK **3rd Applicant**

Coram: Bozalek J

Heard: 11 December 2020

Delivered: 11 March 2021

JUDGMENT

BOZALEK J

[1] The applicants in this matter have entered into a written surrogate motherhood agreement and seek an order confirming its provisions in terms of sec 292 of the Children's Act, 38 of 2005 ('the Act'). Section 292 of the Act provides that any surrogate motherhood agreement must be in writing and confirmed by the High Court which must be satisfied that the requirements of sec 292(1)(a) to (e) are satisfied and, further, that in

terms of sec 293 the written consent of the husband, wife or partner of the commissioning parent and surrogate mother to the agreement have been obtained.

[2] Section 295 sets out further requirements of which the Court must be satisfied before confirming a surrogate motherhood agreement, the first of which, sec 295(a), is that *'the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible'*. When the matter was first called before me on 11 December 2020 it was this requirement which occasioned difficulty.

[3] The first applicant is the second applicant's wife. The couple have two children and have reached an agreement with the third applicant that she will be a surrogate mother for their proposed third child. The surrogacy agreement provides inter alia that the eggs of an anonymous egg donor will be used and the gametes of the second applicant (first applicant's husband) will be used to create embryos for the artificial fertilisation process.

[4] The first and second applicant's first child was born of a surrogacy process in 2013 after the couple were medically advised to make use of the assistance of a surrogate mother. However, their second child, born in 2014, was the result of a natural pregnancy i.e. born without any surrogacy process being undergone. It is now the first and second applicant's case that another natural pregnancy would be too dangerous both for the first applicant and the foetus and therefore the parties wish to use the surrogacy process.

[5] On the face of it the wording of sec 295(a) is unequivocal, namely, that the commissioning parents *'are not able to give birth to a child and that the condition is permanent and irreversible'*. Both the papers in this matter and the submissions made at the first hearing took little account of the fact that, prima facie, the first applicant is able

to give birth to a child, as proved by the birth of her second child, and therefore that the Court might well be disqualified from confirming any surrogate motherhood agreement.

[6] Applicants' counsel was therefore granted an opportunity to file supplementary submissions on the scope or interpretation of sec 295(a), more particularly whether it should be narrowly interpreted or given a more purposive interpretation. In due course written submissions were received which dealt also with surrogacy regimes in other countries.

[7] In summary the applicants' case is that as a result of various medical and psychological conditions any further attempt by the first applicant at pregnancy will be life-threatening. Her medical difficulties are both permanent and irreversible and their cumulative effect is that, for all practical purposes, the first applicant's *'condition'* renders her unable to give birth to a child. The second leg of the applicant's argument is that, properly interpreted, the requirement stipulated by sec 295(a) is not absolute in the sense that it must be a physical impossibility for the commissioning parents to give birth to a child but also covers cases where the pregnancy will endanger the mother's life or that of the foetus.

[8] I shall deal firstly with the first applicant's medical and psychological conditions. The applicant is a 45-year-old professional woman who suffers from post-traumatic stress disorder and a recurrent depressive disorder. She has been taking a range of psycholeptic medications in high doses for these conditions for the past 15 years and has been advised by medical practitioners that there is an increased risk of congenital abnormalities with the usage of these medications during pregnancy. The first applicant also suffers from hypothyroidism and diabetes for which she takes chronic medication. During her natural

pregnancy in 2014 her psycholeptic medication was reduced and altered to allow for medication which was safer to use during pregnancy. The first applicant conceived only after undergoing five in vitro fertilisation treatments and she experienced a complicated and difficult pregnancy which became life-threatening. She suffered from hypertension and gestational diabetes during her pregnancy and also developed placenta previa and was hospitalised from 32 weeks. She underwent an emergency caesarean section and suffered a significant amount of blood loss during the delivery requiring a blood transfusion and a further four surgeries post birth as a result of infection.

[9] Dr Laura Graves, the first applicant's obstetrician and gynaecologist, filed a report confirming the above facts and stating that some of the known adverse pregnancy outcomes of the medication which the first applicant takes are pre-term labour, low birth weight, poor neo-natal adaptation and increased risk of congenital abnormalities. Efforts to stop the first applicant's medication has resulted in acute deterioration in her condition. Dr Graves regards the first applicant's psychological condition as a permanent, irreversible one which necessitates the use of a surrogate. She also confirmed the difficult pregnancy which the first applicant experienced in 2014 following an assisted conception. Dr Graves has advised the first applicant not to attempt to carry another pregnancy as this will be life-threatening. The first applicant is now older and is more at risk of gestational diabetes recurring and early onset pre-eclampsia which will threaten both foetal and maternal life, and of the life-threatening complication of a repeat placenta previa with possible morbid adherence.

[10] The first applicant's condition was also reviewed by Dr Siegfried Heylen, a reproductive medicine specialist, whose patient the first applicant is. In his opinion the

first applicant's physical and psychological ailments represents a permanent and irreversible condition and surrogacy is the only way for the first and second applicants to have a child biologically related to at least one of them.

[11] Turning to the legal position, it would appear that the ambit of sec 295(a) has not been the subject of a considered judgment by our Courts. In *Ex parte: WH and Others*[1] a full bench of the North Gauteng High Court delivered a judgment to determine and provide guidelines on how applications for the confirmation of a surrogacy application in terms of sec 292 of the Act should be dealt with and, in so doing, dealt with certain constitutional and legal issues. Although not required to interpret the scope of sec 295(a), certain of the Court's comments suggested that a narrow interpretation of that section would be inappropriate. Inter alia the Court stated as follows:

> *'Most people opt for surrogacy because they cannot conceive or carry a baby to full term or on account of the risk that the mother's life will be endangered by pregnancy'*[2].

[12] It is of some value to have regard to legislative approaches to this question in other parts of the world.

Greece

[13] Greece is the only EU Member State with a legislative framework governing surrogacy similar in its provisions to that contained in the Children's Act[3]. The Greek Civil Code provides that a woman is entitled to resort to surrogacy only if she is unable to conceive a child or bring a pregnancy to term, evidence of which must be presented to

[1] 2011 (6) SA 514 (GNP)
[2] At page 522 at para 36
[3] Greek Civil Code: Articles 1455/1460 Article 455 para.

authorise the surrogacy. An EU study published under the title 'A Comparative Study on the Regime of Surrogacy and EU Member States'[4] sets out what the acceptable reasons for a surrogacy would be in terms of Greek law. Amongst such reasons are certain medical diseases rendering pregnancy dangerous to or for a woman's life.

[14] The report also dealt with the scenario, acceptable in Greek law, where surrogacy might be authorised where a woman was able to reproduce in the past, and even may have given birth to one or more children, but at the time of the application and its hearing in Court, she is biologically unable to carry a pregnancy to full term.

The Netherlands

[15] The provisions of the Act on In Vitro Fertilisation of 1 April 1998[5] set out that gestational or high technology surrogacy should comply with the directives adopted by the Dutch Society for Obstetrics and Gynaecology. These directives include a provision that requires a medical certificate establishing a surrogacy as the only option for the intended mother to have a child to which she would be genetically related, because a pregnancy would be impossible or dangerous for her.

Israel

[16] Gestational surrogacy is regulated by way of the Agreements for the Carriage of Foetuses (Approval of Agreement and Status of the New Born) Law, 5756 of 1996, which inter alia provides that a commissioning mother must have a medical condition which prevents her from carrying a child or a condition which would put the mother or the child at risk during the pregnancy.

[4] Available on www.europarl.europa.eu/studies
[5] Staatscourant 1998/95 pp 14 to 18

New Zealand

[17] New Zealand has no specific surrogacy legislation, but provisions relevant thereto are included in The Human Assisted Reproductive Technology Act of 2004 (HART). Surrogacy is defined in this Act as a *'regulated procedure'*, which means that a fertility clinic cannot carry out the IVF process in relation to surrogacy without approval from a specified ethics committee. In terms of the guidelines in New Zealand the commissioning mother may only qualify for surrogacy if the proposed surrogacy is the *'best or only opportunity for her to become a genetic parent'*, although *'best or only'* is not defined in the Act.

Australia

[18] In Australia all jurisdictions except the Northern Territory allow altruistic surrogacy. All the territories have their own legislation governing surrogacy[6]. The commissioning mother must have a medical condition which prevents her from conceiving or where the pregnancy itself or giving birth would significantly negatively affect her health. This legislation includes the scenario where a child would suffer from an inherited genetic condition from the mother.

United States of America

[19] Surrogacy legislative provisions would appear to vary from state to state. In the most recent recommendations published by the American Society for Reproductive Medicines for practices utilising gestational carriers, guidance is provided for when it is appropriate to consider using a gestational carrier and for screening and testing of genetic

[6] Queensland Surrogacy Act, 210 No 5; New South Wales Surrogacy Act, 2010 No 102; Tasmania Surrogacy Act 32 of 2012; Victoria Assisted Reproductive Treatment Act 76 of 2008; Australian Central Territory Parentage Act 2004; Western Australia Surrogacy Act, 2008; South Australia Statutes Amendment (Surrogacy) 64 of 2009.

parents and gestational carriers to reduce the possibility of complications. They propose *inter alia* that the use of a gestational carrier is indicated when a true medical condition precludes the intended parent from carrying a pregnancy or would pose a significant risk of death or harm to the woman or the foetus. The indication must be clearly documented in the patient's medical history.

[20] Although this review of international practice is not comprehensive it would appear that many foreign countries require the existence of a medical reason for surrogacy and that the reason need not constitute a complete bar to conception or a successful pregnancy but can extend to pregnancies which would pose a significant risk of death or harm to the woman or the foetus.

The interpretation of section 295(a)

[21] The provision in sec 295(a) of the Act that a court may not confirm a surrogate motherhood agreement unless *'the commissioning parent or parents are not able to give birth to a child and (that) the condition is permanent and irreversible'* is couched in broad terms and requires interpretation. The use of the word *'condition'* is not qualified or prefaced by anything to limit the meaning thereof to only a physical medical condition which leaves room for the argument that such condition could include both physical and psychological conditions. A similar question arises in regard to the meaning *'not able to give birth'* and in particular whether that entails absolute physical incapacity or something less, such as a condition which would entail significant risk to the life or health of the mother or foetus in the event of a natural pregnancy being attempted.

[22] The Act provides no further direct or indirect clarification of sec 295(a) leaving it subject to the ordinary rules of interpretation. In *Natal Joint Pension Fund v Endumeni*

Municipality the following was stated regarding the exercise of interpretation:

> *'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances intended upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. The sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document'*.

[23] There is in addition much authority for the proposition that when embarking upon legislative interpretation it is presumed that the legislature did not intend unfair, unjust, unreasonable or anomalous results from its enactments[7].

[24] Having regard to these guidelines I consider that a narrow interpretation of sec 295(a), one which only permits surrogacy arrangements where the female partner or partners are physically incapable of a pregnancy or carrying a pregnancy to term, and irrespective of the health risks attached thereto, is inappropriate. Such an interpretation would lead to an insensible result, compelling a woman who wishes to have a genetic link to a child to undergo a pregnancy which may result in significant, even life-threatening, medical harm to herself. Furthermore, such an interpretation would be at odds with the apparent purpose of the surrogacy provisions in Chapter 19 of the Act which are designed to afford an opportunity to persons who would not otherwise be able

[7] *Principal Emigration Officer v Bhoola* 1931 AD 323 at page 336 and see also in this regards De Ville, Constitutional Statutory Interpretation, 1st ed, at page 193 and 203.

to raise a child genetically linked to them to do so by means of surrogate motherhood. In enacting these provisions the legislature would presumably have been aware that would-be parents interested in surrogacy motherhood include persons for whom carrying a pregnancy to full term might not be physically impossible but would be associated with significant medical risks to the life or health of the mother. It is unlikely that the legislature intended that surrogate motherhood would not be available to such persons who, although not pregnancy infertile, would be at significant medical risk were they to attempt to carry a child to term.

[25] Taking these factors into account I consider that the term *'not able to give birth'* must be interpreted as meaning unable to give birth without significant medical risk to the health or life of the mother.

[26] A further question which arises is whether significant medical risk to the foetus or child born of a natural pregnancy would be sufficient for a commissioning parent to conclude a surrogate motherhood agreement. This would require an extended interpretation of sec 295(a), one which would in effect read in the words *'without significant medical risk to its heath or life'* after the words *'a child'*. For the reasons which follow it is not necessary, in the circumstances of this matter, to answer this question. Moreover, given the sensitivity and far-reaching implications of the issue it is, in my view, one best clarified by the legislature.

[27] The remaining question is whether, on the interpretation of sec 295(a) set out above, the first applicant is unable to give birth to a child as a result of a condition which is permanent and irreversible.

[28] In my view the evidence tendered by the first applicant establishes that any further

attempt by her at pregnancy will risk significant and even life-threatening medical harm to both her and, as it happens, the foetus. The first applicant suffers from a condition which firstly has a psychological component, namely, the chronic post-traumatic stress disorder and the recurrent major depressive disorder. As explained by Dr Graves the medication which the first applicant takes for these conditions can have adverse pregnancy outcomes including increased risk of congenital abnormalities in the child. Stopping the medication in the past has resulted in acute deterioration of the first applicant's condition. Dr Graves rightfully regards this as a permanent, irreversible condition which in itself necessitates the use of a surrogate.

[29] Quite apart from the psychological component, the first applicant's history of pregnancy indicates that a further attempt to carry another pregnancy will be life threatening given that she suffers from hypothyroidism and diabetes. Pregnancy will expose her to the risk of gestational diabetes recurring, of early onset pre-eclampsia which will threaten both foetal and maternal life as well as the life-threatening complication of a repeat placenta previa. This condition alone would pose a significant risk to the first applicant in the event of her attempting a natural pregnancy and is also permanent and irreversible.

[30] In the circumstances I consider that the first applicant has established that, within the meaning of sec 295(a) of the Children's Act which I consider appropriate, she is not able to give birth to a child and that the condition is permanent and irreversible. This the first applicant has established on the basis of the risk to her own health and life which a further pregnancy will entail, irrespective of the risk to the foetus.

[31] As far as the balance of the requirements necessary to be fulfilled for the Court to

confirm the surrogacy agreement, the applicants have made out a good case. All the applicants are domiciled in the Republic of South Africa, the gametes of the second applicant are to be used in the artificial fertilisation procedure referred to in sec 303 of the Act and the commissioning parents are suitable potential parents as confirmed by the reports of professional persons. The surrogate mother is moreover a suitable person, both medically and psychologically, to carry the pregnancy and this has been vouched for by a psychologist. The surrogacy agreement itself meets all the requirements of sec 292(1)(i)(a) – (d) and sec 295 (b) – (e) of the Act.

[32] In the circumstances the applicants are granted an order as per annexure X confirming the surrogate motherhood agreement and granting the ancillary relief necessary for the surrogate pregnancy to proceed.

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BOZALEK J

For the Applicant — Adv G Rüther and Adv B Gradidge
As Instructed by — Robynne Friedman Attorneys