Onlangse regspraak/Recent case law

Ex parte MS 2014 JDR 0102
Case No 48856/2010 (GNP)

Surrogate motherhood agreements, condonation of non-compliance with confirmation requirements and the best interests of the child

1 Introduction

The confirmation of surrogate motherhood agreements has become a focus point of attention since the reporting of the judgment in *Ex parte WH* (2011 6 SA 514 (GNP) (for which see, Carnelley "*Ex parte WH* 2011 6 SA 514 (GNP)" 2012 *De Jure* 179; Pillay & Zaal "Surrogate motherhood confirmation hearings: The advent of a fundamentally flawed process" 2013 *THRHR* 475; Bonthuys & Broeders "Guidelines for the approval of surrogate motherhood agreements: *Ex parte WH*" 2013 *THRHR* 485; Louw "Surrogacy in South Africa: Should we reconsider the current approach? 2013 *THRHR* 564; Nicholson C "Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?" 2013 *De Jure* 510). There seems to be general consensus that the judgment has not provided the anticipated, much needed guidance. The discrepancy between what the court preached and what it practiced (as succinctly phrased by Pillay & Zaal 2013 *THRHR* 483) as far as the enforcement of the surrogacy provisions is concerned, forms a central theme throughout the published comments which, without exception, have been negative to varying degrees. The failure of the court to undertake a rigorous investigation into the court documents and the facts that underlie them, coupled with the inadequacy of the statutory provisions and the evident difficulty implementing them, have elicited a call for legislative amendment. However, none of the authors mentioned, anticipated the possibility of the factual scenario with which the court was faced in *MS*, the case under discussion. The lack of foresight is easy to explain. Since it was generally accepted that the Children's Act requires a surrogate motherhood agreement to be confirmed *before* the artificial fertilisation of the surrogate mother, the possibility of the court considering a request for confirmation after the surrogate had been fertilised, was simply never entertained.

2 The Judgment in *Ex parte MS*

In this case, the commissioning parents applied for the confirmation of a surrogate motherhood agreement which was entered into *after* the artificial fertilisation of the surrogate mother (par 4). In accordance with Practice Directive 5 of 2011, issued by the Deputy Judge President of the Gauteng Division of the High Court (see *In re Confirmation of Three*

Surrogate Motherhood Agreements 2011 6 SA 22 (GSJ) [27]), application was made *ex parte* and was heard in chambers by Keightley AJ. As in the case of *Ex parte WH*, a written judgment was handed down with the express aim of providing some guidance to future applicants faced with the same "novel" issue, which according to Keightley AJ, was "… not expressly dealt with in the [Children's] Act" (par 3).

The court thus had to determine whether it was competent to confirm a surrogate motherhood agreement where the written agreement was only entered into, and confirmation sought, *after* the artificial fertilisation and subsequent pregnancy of the surrogate mother (who was 33 weeks into her pregnancy at the time of the application) (par 4). Notwithstanding the fact that, by her own admission "… one of the central requirements running through this 'highly structured' scheme is that surrogate motherhood agreement must be … confirmed by the High Court *before* any steps are taken that may result in the conception of a child" (own emphasis, par 8), the agreement was validated through confirmation by the court (par 75).

2 1 Legislative Framework

The true significance of the court's decision to confirm the agreement can only be appreciated with reference to the legislative context within which it was made. Only those provisions directly relevant to the questions addressed by the court will be canvassed (for a general discussion of all the provisions regulating the practise of surrogacy, see Louw A "Surrogate motherhood" in Davel & Skelton (eds) *Commentary on Children's Act* (2007) ch 19 last updated in 2012).

In this regard, section 296(1), read with sections 303 and 305 of the Children's Act, is perhaps the most important provision. In terms of this section, the artificial fertilisation of the surrogate mother may not take place before the agreement is confirmed. A person who renders assistance or artificially fertilises a woman without the court having authorised the artificial fertilisation, commits an offence and, if convicted, is punishable with a fine or imprisonment for a period of ten years or both (s305(6)).

Furthermore, the court may not confirm a surrogate motherhood agreement unless, *inter alia*, "the commissioning parent or parents are not able to give birth to a child" (s295(a)) and are in all respects suitable persons to accept the parenthood of the "child that is to be conceived" (s295(b)). The court may, in addition, not confirm the agreement unless it is satisfied "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" (s295(e)). The provisions of section 297 are also important as they describe the effect of a surrogate motherhood agreement on the status of the child. Apart from the fact that the child born of a surrogate, in accordance with the agreement, is for all purposes deemed the child

of the commissioning parent or parents from the moment of the child's birth (s297(1)(a)), the agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place (s297(1)(e)). Section 297(2) states unequivocally:

> [a]ny surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.

2 2 Legal Questions to be Answered

The first question the court concerned itself with was whether it is possible for a court to confirm a *surrogate motherhood* agreement post-fertilisation. As already indicated, the question was entertained, in the first place, because Keightley AJ held that the Act does not provide a clear answer to this question (par 29). Although admitting that the Act prohibited the artificial fertilisation of the surrogate mother without prior authorisation of the court and that the *general* scheme of the Act is to require judicial confirmation *before* any steps are taken to give effect to the arrangement between the parties (par 29), Keightley AJ insisted that:

> … the Act does not say what the consequences of non-compliance with these provisions will be on the validity of a written agreement subsequently entered into between the parties. The Act is also silent on the concomitant question whether the court has the power to validate such an agreement under section 292. (par 30).

In the opinion of the court, the *lacuna* thus created in the Act, provides scope for interpreting the relevant provisions.

The second issue the court deemed necessary to grapple with, was whether an unenforceable agreement to commit a lawful act (the artificial fertilisation of the surrogate mother without prior authorisation of the court), could be validated by retrospective confirmation of the agreement by the court (par 32). Once again, despite admitting to the existence of "… well-established principle[s] of our common law" in this regard (outlined in parr 31 & 33) which "cannot be ignored" (par 34), Keightley AJ found that "… they are not determinative of the issues that arise in this case" (par 34).

2 4 *Ratio Decidendi*

2 4 1 Competency of Court to Confirm Agreement Post-fertilisation

Having found the Children's Act wanting in this particular regard, the court based its departure from the applicable statutory provisions, firstly, on the *sui generis* nature of surrogate agreements (parr 7 & 34) and secondly, the Constitution.

The court first (par 36) referred to section 39(2) of the Constitution which enjoins the courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation. Statutory interpretation should, therefore, in the opinion of the court (*ibid*), positively promote the rights entrenched in the Bill of Rights. However, the courts must ensure that the interpretation adopted is "reasonably possible" or plausible (as pointed out by Currie & De Waal *The Bill of Rights Handbook* 61)(*ibid*). Reaching a plausible, constitutionally compliant interpretation entails reading legislation purposively and contextually (*ibid*). Referring to Currie and de Waal (60, citing as an example, *De Beer NO v North-Central Local Council & South-Central Local Council* 2002 1 SA 429 (CC)), the court found support for a generous interpretation of a statute in order to ensure it is constitutionally compliant (*ibid*). According to the court (*ibid*), the absence of an express grant of a discretion could, for example, call for an interpretation conferring such a discretion.

Applying these considerations to the case at hand, the court held that the prohibition of the artificial fertilisation of the mother prior to the confirmation of the agreement "is aimed largely at ensuring that there is certainty in the legal relationship between the parties involved before the prospect of a child becomes a reality", that the prohibition serves the interests of all the parties involved and it also advances the best interests of the child (par 38). While considering it "ideal" that the legal and parental status of the child be settled before conception, the court is, however, paradoxically of the opinion that "this does not mean that the best interests of the child may not also be served by a subsequent confirmation of the surrogacy agreement" (par 39). Since the best interests of the intended child would thus be served either way, the answer had to be found elsewhere. Seemingly mindful of the example used by Currie and de Waal, the court then proceeded to determine whether "… the Act, properly interpreted, may be read as giving a court the discretion to grant such confirmation" (*ibid*). For this purpose, the court found "some ambiguity" in the wording of section 295. While section 295(b)(ii) requires the court to find the commissioning parents suitable to accept the rights of parenthood of "the child to be conceived", section 295(d) and (e) refer to the need for the court to make sure that provision has been made for the care, upbringing, welfare and interests of "the child to be born". Bolstered by this supposed inconsistency, and the fact that "neither section 292 nor section 295 require the court to be satisfied that the surrogate mother has not yet undergone the process of artificial fertilisation and that she is not already pregnant as a result", the court concluded that the provisions do not preclude the court from confirming the agreement post-fertilisation (par 43).

The logic of the argument used by the court is unconvincing, if not outright misguided. Firstly, if the provisions in this regard are in general, as admitted by the court (par 38), constitutionally compliant (because they protect the parties and are in the best interests of the child), what justification is there for the court to interpret the provisions in the first place? The *De Beer* case (*op cit*) used by the court (par 36) as an example

of a case where a generous interpretation was justified, would also seem to be inapplicable in the present case. The *De Beer* case (at par 24) merely sanctions a "constitutional construction in cases where a statutory provision is capable of more than one reasonable construction, one which would lead to constitutional invalidity and the other not". Clearly not the case *in casu*. Secondly, the supposed ambiguity in the wording of section 295 is intentional and accords with the context in which the impugned phrases are used. Section 295 outlines the requirements which must be satisfied before the court may confirm the agreement. As far as the commissioning parents (addressed in s295(b)) are concerned, the court must be satisfied as to their suitability at the time of the confirmation proceedings, that is, before the child has been conceived. It is for this reason that section 295(b)(ii) uses the phrase "child that is to be *conceived*" (own emphasis). Section 295(d) deals with the agreement itself. In terms of this section the agreement must make provision for the care and welfare of the child "that is to be born" simply because the agreement cannot make provision for the care of the child before it is born! The care and welfare of a child before its birth is exclusively in the hands of the surrogate mother. In the same way, section 295(e) confers a discretion on the court to confirm the agreement if, in general, having regard to the considerations mentioned in the section, the court is satisfied that the agreement should be confirmed. These considerations refer to anticipated circumstances and family situations of all the parties concerned and the best interests of the child, specifically *after* the child is born. The fact that sections 292 and 295 do not require the court to be satisfied that the surrogate has not yet been artificially fertilised, in no way lends credence to the court's argument. The artificial fertilisation of the surrogate mother is dealt with in a separate section (s296) wherein the Act prohibits the fertilisation of the surrogate mother before confirmation. Why then, should any other section deal with the issue? The selective reading of only two provisions of the Act contradicts every rule of statutory interpretation and is therefore inexcusable (see discussion of interpretation *ex visceribus actus* in Du Plessis *Re-interpretation of Statutes* (2002) 112 and observation by the same author (at 115) that "[p]urposiveness nowadays seems to be becoming the substitute for *clear language* as the key to constitutional interpretation"). Lastly, but by no means least of all, the court's assumption at the outset, that the Act does not provide a clear answer to the issues under discussion is simply untrue. Section 297(2) clearly states that a surrogate motherhood agreement that does not comply with the Act (in its entirety) is invalid and a child born of such an agreement is deemed to be the child of the surrogate mother. The court should consequently have refused confirmation unless it could prove the possession of a residuary discretion to confirm the agreement, notwithstanding the fact that the agreement did not comply with the requirements in terms of the Act (in terms of s295(e), as argued below).

2 4 2 Effect of Post-fertilisation Agreement and the Possibility of Ratification

Despite the prohibition against the artificial fertilisation (not "insemination" as used by the court in par 45) of the surrogate mother without a pre-existing authorised surrogate agreement (referred to in par 45), the court concluded that the Act does not make it unlawful for the parties involved in the prohibited act to subsequently enter into a valid surrogacy agreement with the sanction of the court (par 46). The court found support for this conclusion in the fact that the Act does not expressly state that an agreement based on the prohibited act (the unlawful fertilisation) is unlawful (par 46). Had the legislature wanted to rule out such a possibility, in the court's opinion "… it would have made it clear, in section 292 or 295, that a court is precluded from confirming a post-fertilisation surrogacy agreement in those circumstances" (par 46). The court seems to hold the view that since section 295, which lists the requirements for confirmation, does not specifically require the court to be satisfied that the surrogate mother has not yet undergone the process of artificial fertilisation, a court may also confirm the agreement afterwards (pars 42 and 47). The Act thus "… prescribes an express criminal penalty for the commission of a prohibited act …; it does not provide for the invalidity of the surrogacy agreement as a penalty" (par 48).

The court (par 49) held that interpreting the Act in this way was consistent with the constitutional injunction on courts to positively promote constitutional rights in their interpretation of statutes. Despite the fact that, by the court's own admission (*ibid*), the Act requires a judicially sanctioned surrogacy agreement "as a first step in the process" to ensure sufficient protection of the parties' constitutional rights, the court must retain a discretion to confirm a surrogacy agreement even in circumstances where the parties have "missed out on this first step". Any other interpretation would render the agreement invalid, vest legal parentage in the surrogate mother and thus undermine the constitutional rights of the parties, contrary to the broad objective of the Act (par 50). The lack of parental status would impinge, firstly, on the dignity of the commissioning parents, who would be denied the opportunity to experience family life of their own and, secondly, on their right to make reproductive choices (par 51). The constitutional right of the surrogate mother to make her own decisions regarding reproduction would also be infringed if full parental responsibilities and rights are imposed on her (par 52). Most importantly however, in the court's opinion, would be the violation of the child's constitutional rights (parr 53 & 54). The child would have to rely on the parental care of the surrogate mother who had deliberately chosen not to take responsibility for the child (par 54). As such, it would violate the child's constitutional right to family and parental care (in terms of s28(1)(b) of the Constitution) and would be contrary to the best interests of the child (s28(2) of the Constitution) to be denied "… the family life that was planned for him or her" (parr 54 &

55). Ultimately therefore, the court came to the conclusion "… that the Act does not preclude a court from confirming a surrogacy agreement subsequent to the artificial fertilisation of the surrogate mother, and in circumstances where she is already pregnant with the child to be born under the agreement" (par 56).

The generalised nature of the conclusion reached by the court is a cause for serious concern. Once again, it effectively sanctions, on constitutional grounds, a departure from statutory provisions which are, by the court's own admission, constitutionally compliant. While admitting that the broad objective of the Act is to ensure sufficient protection for the rights and interests of all the parties (par 49), the court nonetheless concluded that the enforcement of the provisions would infringe on the constitutional rights of the parties, especially those of the intended child (parr 51-54). What the court was thus in fact saying, was that the provisions of the Children's Act are unconstitutional in this regard and can, as such, be ignored. The admonition by the court (in par 57) that "… this does not mean that parties are free to ignore the general requirement that surrogacy agreements must be confirmed by a court before the artificial fertilisation of the surrogate mother takes place" and that the discretion of the court is "not open-ended", "can only be exercised in exceptional circumstances", "when it is in the best interests of the child" does little to assuage the effect of its judgment on the enforcement of the Act. The immediate question that arises is when would it *not* be in the best interests of a child to confirm a surrogacy agreement once the child has been conceived? Given the negative effect of imposing legal parenthood on the surrogate mother, indicated by the court, it is difficult to conceive of circumstances that would convince a court to deny confirmation under such circumstances. In terms of the enacted legislation, the way in which the best interests of the intended child can best be protected is by assessing the suitability of the commissioning parents and surrogate mother *before* the child in question is conceived. If the judiciary finds the approach adopted in the Children's Act to be in conflict with the Constitution, the necessary steps should be taken to invalidate the provisions. The solution is not to introduce a loop-hole which, in effect, makes a mockery of the requirement and prohibition of pre-confirmation artificial fertilisation (see Louw 2013 *THRHR* 583 for a discussion of a similar situation in the UK with regard to the ban on commercial surrogacy). That health professionals, acting in contravention of the prohibition (to fertilise a surrogate mother without an agreement authorising the procedure), remain open to criminal prosecution (par 58) provides no assurance of future compliance with the requirement. It is important to note in this regard, that neither the National Health Act (61 of 2003, in accordance with s296(2) of which the fertilisation must have been done), nor the Regulations in terms of the National Health Act specifically address the artificial fertilisation of a surrogate mother in the execution of a surrogate motherhood agreement. The health professional can therefore simply deny any

knowledge of the surrogacy arrangement at the time of performing the procedure, thereby escaping prosecution.

The court's conclusion that the Act empowers a court to confirm an agreement post-fertilisation (par 46) is also at odds with its indication that the Act requires the confirmation of the agreement to be "… the first step in the process" (par 49). If the court requires confirmation prior to fertilisation then it cannot also allow the court to confirm the agreement post-fertilisation. The better approach would have been to acknowledge the fact that the Act does not sanction post-fertilisation confirmation. Once that is accepted as the point of departure, it is no longer a question of deciding whether the Act allows for post-fertilisation confirmation of the agreement, but rather, whether the court should be able to override such a requirement should the Act *not* allow for such a possibility. The extent to which the Act confers such a residuary discretion on a court during confirmation proceedings has been the subject of some speculation on a previous occasion (see Louw 2013 *THRHR* 573 n96). As indicated in that discussion, section 295(e) could be used to prove the existence of such a residuary discretion. In terms of this subsection the court has the power to confirm a surrogate agreement if "… 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" it is satisfied that the agreement should be confirmed. The personal circumstances and family situation in this case could easily have justified a post-fertilisation confirmation of the agreement, including not one, but two previously failed surrogacy agreements which were confirmed prior to the artificial fertilisation of the surrogate mothers in question (parr 11-17 & 74). As such, the judgment of the court could have been justified based on the exceptional circumstances in this particular case and not, as indicated earlier, on the implied unconstitutionality of the requirement as a whole.

2 5 The Way Forward?

The multifaceted nature of surrogacy arrangements, coupled with the potentially dire legal consequences which may ensue in the absence of clear regulation, initially prompted the enactment of Chapter 19 of the Children's Act. The provisions regulating surrogacy were introduced only after extensive research and careful consideration of its effects (See Louw in *Commentary on the Children's Act* 6 as confirmed in *Ex parte WH and Others* 2011 6 SA 514 (GNP) par 31 and *Ex parte MS* 2014 JDR 0102 (GNP) par 7). Apart from protecting the rights of all parties concerned, the objective was to create certainty in a context in which uncertainty abounds. Of course, that does not by any means make the provisions inviolate to judicial scrutiny based on the Constitution. However, the ease with which the court justified its departure from the "carefully" and "highly" structured scheme (par 8) is troubling to say the least. Using the best interest criterion as a *deus ex machina* only reinforces claims of its manipulative character (See e.g., Bonthuys "Of biological bonds, new fathers and the best interests of children" 1997 *SAJHR* 622 637 and

Heaton "An individualised, contextualised and child-centred determination of the child's best interests, and the implications of such an approach in the South African context" 2009 *Journal for Juridical Science* 8). The best interests of the child may be of paramount importance but is not the only consideration (*S v M (Centre for Child Law as Amicus Curiae*) 2007 2 SACR 539 (CC) (also reported as 2008 3 SA 232 (CC) [26])). Moreover, as indicated before (Louw 2013 *THRHR* 573) its application in the context of surrogacy should be considered with caution. Rather than serving as a guideline for future applicants, the judgment should be used as another example of hard cases making bad law. While the applicants in this case may have been accommodated not entirely without good cause, the arguments justifying the intervention of the court have undermined the value of the legislation in question and created uncertainty in the fragile context of surrogacy where it can be ill afforded. The courts should definitely do better.

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