**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

**Case number: 51606/21**

(1) REPORTABLE: **YES**
(2) OF INTEREST TO OTHER JUDGES: **YES**
(3) REVISED. **YES**
**16 MARCH 2022**

DATE SIGNATURE

In the ex parte application of:

| | |
|---|---|
| **JCR** | First Applicant |
| **VLR** | Second Applicant |
| **LRV** | Third Applicant |
| **RV** | Fourth Applicant |

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**NEUKIRCHER J:**

1] More than 11 years ago, the decision of **Ex parte WH and Others**[1] (Ex parte WH) was handed down by the Full Bench of this division. The judgment came in response to an overwhelming number of surrogacy applications that had

[1] 2011 (6) SA 514 (GNP); [2011] 4 All SA 630 (GNP)

confronted out courts since section 295 of the Children's Act[2] (the Act) had come into operation. Given these applications, a set of guidelines was necessary in order to provide a framework within which the applications were drafted, and within which the courts could uniformly consider each application. Of course, it goes without saying, that the guidelines were exactly that, and there is no hard and fast rule that provides a concrete formula that can be applied by a court when considering these applications – each must be considered on its own merit and according to the facts placed before the court at the time.

2] In keeping with this principle, there are several Constitutional Court judgments that form the framework of decisions to be taken in matters of this nature and when dealing with the best interests of children the following has been said:

2.1 in **S v M**[3]**,** Sachs J stated

*"A truly principled child-centred approach requires a close and individual examination of the precise real-life situation of the particular child involved. 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 concerned.";* and

2.2 in **AB and Another v Minister of Social Development**[4] the court stated the following in relation to section 295 of the Act:

*"Importantly, section 295(e) of the Children's Act mandates the High*

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[2] No 38 of 2005

[3] 2008 (3) SA 232 (CC) para 24 – although said in the context of imposing a sentence of imprisonment on the primary caregiver of young children

[4] 2017 (3) SA 570 (CC) para 192

*Court to make this very decision when determining whether to confirm a surrogate motherhood agreement. The court must not confirm the agreement unless, putting the best interests of the prospective child at the centre of the inquiry, it is of the view that "generally", the agreement should be confirmed. In other words, the court must, on every occasion it decides whether to confirm an agreement, engage with the value judgement of whether it would be in the best interests of the prospective child to be born."*

3] Of course, it goes without saying that these judgments were founded on the principle set out in section 28(2) of the Constitution which states the following: *"A child's best interests are of paramount importance in every matter concerning the child."*

4] It is this very principle which has woven itself into the fabric of the Act and which stands behind all judgments that relate to section 295. However, every single surrogacy application affects not only the rights and interests of the unborn child but also those of the children that are already part of the family unit of the surrogate and (sometimes) the commissioning parents.

5] A court should never lose sight of the fact that sections 295(c)(vi) and (vii) provide as follows:

*"295 A court may not confirm a surrogate motherhood agreement unless-*

*(c) the surrogate mother –*

*(vi) has a documented history of at least one*

*pregnancy and viable delivery; and*

*(vii) <u>has a living child of her own</u>."*

6] The question is therefore, what of the interests of this child? How does a surrogate pregnancy affect the surrogate mother's own child/children – this bearing in mind that they watch her pregnancy for 9 months, they know she is carrying a child, they see her going to hospital to deliver the baby (and she may be away from them for a period after giving birth) and then she comes back home without a baby in her arms. Is it important that the interests of these children be protected and, if so, how does a court do that?

7] The other issue is, what of any children the commissioning parents may already have? In most of the surrogacy cases, if not all, there is an "at arm's length" between the commissioning parents and the surrogate, and thus the children of the former[5] do not have the advantage of processing the fact that their mother is pregnant and that a baby will join their family in 9 months' time. In many cases, these children may then suddenly be confronted with this "stranger" that now takes up their parents' time and attention.

8] Thus the issue is whether guidelines should be put in place to protect the interests of these children given that the court is the Upper Guardian of all minor children, and given the imperatives stated in the Constitution and the Act.

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[5] In cases where the commissioning parents may already have a child or children

9] In order to place the order I will make in proper context it is necessary to sketch the background facts of the present matter.

## BACKGROUND

### The first and second applicants

10] The first applicant is unable to fall pregnant because she has a history of oestrogen positive breast cancer which is receptive to Herceptin treatment. Prior to her chemotherapy treatment, she underwent artificial fertilisation treatment for the extraction of her eggs/oocytes so that she would be able to use these in future. She had a double mastectomy in 2012 to remove the cancerous breast tissue and presently takes oestrogen suppression medication[6] to prevent the future onset of cancer. Unfortunately, both these medications are contra-indicated for use during pregnancy as their use has been linked to foetal abnormalities. If she stops using her medication, there is an increased risk of metastases. Thus her medical circumstances are permanent and irreversible.

11] All four applicants previously entered into a Surrogate Motherhood Agreement – this was during 2018. This agreement was confirmed by Mashidi J on 17 May 2018 but the third applicant failed to fall pregnant and was medically advised to discontinue the in virto fertilization treatment. They then entered into a second agreement during 2020. This was sanctioned by the court on 17 June 2020 and as a result of a successful process, a child was born on 3 May 2021.

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[6] Lucrin and Femara

12] The first and second applicants have one frozen egg left and wish to expand their family. They approached the third applicant again and now they want permission to enter into a further surrogacy agreement with the third applicant.

13] The first and second applicants have been in a stable relationship since 2001 and were married in 2010 - they are still married. They are financially stable and, as stated, they have a 10-month old child born from the previous surrogate arrangement. In all respects they function as a stable family unit and I am satisfied that they are able to care for a second child financially, emotionally, physically and educationally. Any child that will be born of this surrogacy will have his/her best interests catered to in every aspect that is envisaged by section 7 of the Act[7]

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[7] *Section 7* ***: Best interests of child standard***

*(1) Whenever a provision of this Act requires the best interests of the child standard to be applied, the following factors must be taken into consideration where relevant, namely-*

*(a) the nature of the personal relationship between-*

*(i) the child and the parents, or any specific parent; and*

*(ii) the child and any other care-giver or person relevant in those circumstances;*

*(b) the attitude of the parents, or any specific parent, towards-*

*(i) the child; and*

*(ii) the exercise of parental responsibilities and rights in respect of the child;*

*(c) 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 emotional and intellectual needs;*

*(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from-*

*(i) both or either of the parents; or*

*(ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;*

*(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis; the need for the child-*

*(i) to remain in the care of his or her parent, family and extended family; and*

*(ii) to maintain a connection with his or her family, extended family, culture or tradition;*

*(g) the child's-*

*(i) age, maturity and stage of development;*

*(ii) gender;*

*(iii) background; and*

**The third and fourth applicants**

14] The third and fourth applicants are the surrogate parents. They are married and they have two children of their own – their eldest child was born in November 2011 and is now 10 years old, and their youngest was born in December 2014 and is now 7 years old. If the court sanctions this surrogacy, this will be the third applicant's fourth surrogate pregnancy.

15] The previous surrogate pregnancies were the following:

15.1 on 21 February 2018, the first surrogate agreement was sanctioned by Baqwa J. The third applicant miscarried and the surrogate agreement was then cancelled;

15.2 on 10 December 2018, Kollapen J sanctioned the second surrogate agreement. Twins were born from this pregnancy;

15.3 the third surrogate agreement was sanctioned by Yacoob J on 17 June 2018, and as stated, the commissioning parents first child was born on 3 May 2021.

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*(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development;*
*(I) any disability that a child may have;*
*(J) any chronic illness from which a child may suffer;*
*(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;*
*(l) the need to protect the child from any physical or psychological harm that may*
*(i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or*
*(ii) exposing the child to maltreatment, abuse, degradation, ill-treatment,*
*(m) any family violence involving the child or a family member of the child; and*
*(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child.*
*(2) In this section "parent" includes any person who has parental responsibilities and rights in respect of a child."*

16] The third applicant has had four caesarean section deliveries, the last being on 3 May 2021. Thus, when the application was first heard by me in November 2021, the third applicant had delivered the commissioning parents' first child a mere 6 months before. This was of concern to me for several reasons:

16.1 the third applicant has delivered 3 healthy babies and had one miscarriage in a period of 3 years – what was the effect of this on her body? The report from the obstetrician/gynaecologist that was of a generic quality that one is usually confronted with in these applications and, quite frankly, of no assistance in determining whether or not the third applicant was healthy enough to carry another child so soon after her last pregnancy and caesarean section;

16.2 I was also not satisfied with the report of the psychologist who had originally assessed the third applicant for purposes of this application.

17] But what also concerned me is the following: the third applicant has 2 children of her own. At the time of the commissioning of the first surrogacy they were 6 and 3 years old. Each time the third applicant carries a child as a surrogate, they are confronted by their mother's pregnancy which does not end in a child being brought home from the hospital to join their own family. My concern was therefore: how healthy, psychologically, is it for children of surrogates to go

through this process, and what procedures are put in place for preparing them for this process? Should a mechanism be put in place for children of surrogate parents to receive the necessary counselling and therapy to prepare them for the inevitable process that follows?

18] Although the commissioning parents' child is far too young to understand the process, it raised a question similar to that set out in paragraph 17 supra – if the commissioning parents have a child or children, should there be a process put in place to prepare them for a new addition to their family?

19] Thus, there were a number of issues which I determined required fuller canvassing and, to that end, issued the following order:

> *"2. Ilse Robbertse (clinical psychologist) is requested to conduct an assessment of the third applicant as regards her suitability to act as a surrogate for the fourth time.*[8]
>
> *3. The third applicant is to attend upon an obstetrician/gynaecologist of her choice and a report is requested from the expert as regards the third applicant's physical suitability (and any risks) to carry a child bearing in mind the following:*
>
> *3.1 the third applicant has already had several pregnancies of which one was terminated as a result of a miscarriage;*
>
> *3.2 4 of her pregnancies have resulted in caesarean*

[8] She was the psychologist who had originally assessed the surrogate parents. As she was no longer doing any medico legal work, I gave permission that Karen Adams could conduct this assessment

*sections;*

*3.3 she has acted as a surrogate on several occasions since 2018;*

*3.4 her last caesarean was in May 2021.*

*4. A clinical psychologist nominated by the Office of the Family Advocate, Pretoria, is requested to conduct an assessment of the third and fourth applicant's two minor children with specific attention paid to the effect on them (if any) of the third applicant's pregnancies and the fact that she does not bring home any of the children to which she gives birth…"*[9]

**THE HEALTH OF THE SURROGATE**

20] All too often in these applications, judges are confronted with generic reports by experts which do not really assist in any way in determining whether the surrogate is physically healthy enough to carry a child on, sometimes, multiple occasions. This matter was no exception.

21] In the report filed pursuant to paragraph 3 of my order, Dr van Rensburg conducted the updated medical assessment of the third applicant. Her report is dated 1 February 2022 and, in her affidavit supporting her report, Dr van Rensburg states that she performed a clinical examination as well as took a sonar image of the third applicant's uterus. She states that *"there is no pathology of the uterous which could not have been confirmed with the clinical examination Both the clinical examination as well as the sonar image was*

[9] Originally there was an issue with the surrogacy agreement itself, but that issue was resolved and it was no longer an issue when the matter served before me again – nothing more need then be said on this

*normal."* Importantly, her report states the following:

> *"4. I am not aware of any medical literature / research indicating specific percentage risk to both mother and child after previous caesarean sections. The major contributing neonatal well-being rely on proper antenatal care…*
>
> *6. I am in agreement that there is no set rule when it comes to the number of caesarean sections a person can have. Every woman is different, so doctors need to analyse each woman's health, history, and concerns before deciding on the right path.*
>
> *7. To help prevent any complications, I also recommend (according to literature – waiting at least 6 months after caesarean section before falling pregnant again; other literature suggests delivery of the bay between 18 to 24 months. There is no magical number. By following your doctor's advice, the chances of a healthy pregnancy will rise dramatically.*
>
> *8. I am of the view that the third applicant is physically suitable to carry a child as a surrogate mother for the first and second applicants."*

22] Dr van Niekerk's report is considerably more detailed than the one originally attached to the founding affidavit and one aspect covered by her report is the fact that a pregnancy interval of longer than 6 to 8 months, or a birthing interval longer than 18 months, decreased the risk associated with multiple pregnancies, such as placental previa and placental abruption.[10] She is also of the view that a *"planned caesarean delivery was associated with a lower*

[10] Which are associated with a birth interval shorter than 12 months ie conception within 3 months after caesarean.

*risk for post-partem haemorrhage over women planning a vaginal birth…"*

23] This is the kind of detail that should be placed before a court when the surrogate has had multiple births, as any risk to her health during her pregnancy, brings with it a concomitant risk to the foetus. The report has thus satisfied me as to the health of the third applicant and the extremely low risk associated with this pregnancy and the health of the child to be born.

24] The updated report on the third applicant by Karen Adams[11] also confirms that the third applicant is an emotionally well adjusted, compassionate and reliable individual who is doing this for altruistic reasons. She also confirmed that in the event that this surrogacy is sanctioned, the fourth applicant would not be in favour of any further surrogate pregnancies[12]

**The third applicant's children**

25] As stated, the third and fourth applicants have 2 children of their own. The assessment of the children by Dr Roux was informative:

25.1 it revealed that both children jealously guard the third applicant's attention and neither want her to have any more children of her own. However both were very proud of the fact that she was helping others to have a family of their own and it seems that both

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11 the Clinical Psychologist appointed under my court order

12 See section 293 of the Act which states:
*"(2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her husband or partner has given his or her written consent to the agreement and has become a party to the agreement.*
*(3) Where a husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement."*

children have adjusted to the fact that the third applicant acts as a surrogate;

25.2 the third applicant's youngest child told Dr Roux that when the third applicant acted as surrogate in 2019

*"…when her mother went to hospital to have the twins, she was younger then and she did not understand as she does now…"*

It appears that Z was 4 years old at the time and she struggled with the third applicant being in hospital and not home for the 3 weeks at the end of her pregnancy because she had to be on bed rest;

25.3 however, according to Dr Roux, both children are well informed about the surrogacies and they are proud of the fact that their mother assists other couples in becoming families and they do not ask to see the babies as they become older, nor do they see them as being part of their own family;

25.4 Dr Roux concludes:

*"11.* ***Conclusions***

*S and Z appear to have a good understanding of the process of surrogacy and the fact that whilst their mother may go through a pregnancy, that the baby is not their family's baby and that the baby belongs to a different mother and father. Neither S and Z wants their mother to bring the baby home. Furthermore, S and Z*

*are supportive of their mother assisting other couples to have a family and they have even gone so far as to explain this to their peers."*

26] The outcome of the further report has been invaluable. What it did was highlight the importance of the fact that the children of the surrogate need to be prepared for her pregnancy. This would go a long way to alleviating any possible anxiety that may come with the process and prepare the child/children for the pregnancy, confinement of their mother and the fact that the child that is born will not be part of their own family. Of course, what needs also to be considered is the age of these children, as some may simply be too young for this process, but that should be guided by the expert conducting any interview.

27] Ms Ozah has submitted that the report sought in respect of the third and fourth applicant's children has advanced the best interests of these children, and that the assessment is indicative of the importance of considering the impact of the surrogate motherhood agreement on the child(ren) of the surrogate. She has submitted that it was an oversight that the legislature did not specifically provide for the best interests of these children as one of the factors that should be addressed when the agreement is brought before court and that, as Upper Guardian of all children, the court has the authority to request the relevant information in the best interests of all the children that will be affected by the agreement.

28] Ms Ozah therefore submits that, when confirming these agreements, a High Court should request that information be placed before it regarding the effect of the agreement on the children of the surrogate.

29] Mr Bothma echoes the sentiments of Ms Ozen. He has submitted that, over the years, several requirements for confirmation of these agreements have been laid down by our courts, starting with **Ex parte WH**, these being *inter alia*:

29.1 all factors set out in the Act, together with any documentary proof, where required;

29.2 full particulars of how the commissioning parents came to the know the surrogate mother and why she is willing to act as a surrogate for them;

29.3 the surrogate mother's background as well as her financial position;

29.4 whether there have been any previous applications for surrogacy, the division in which the application was brought and a copy of the application and the order granted;

29.5 a report by a clinical psychologist in respect of the commissioning parents and a separate report in respect of the surrogate and her partner (if any) particularly in respect of the commissioning parents and surrogate's ability to comprehend the import of the undertaking;

29.6 a medical report in respect of the commissioning parents and the surrogate;

29.7 the origin of the gametes – without identifying the donor, unless this is relevant to the application;

29.8 the applicants' financial position;

29.9 details and proof of payment of any compensation for services rendered, either to the surrogate herself or to the intermediary donor, the clinic or any third party involved in the process;

29.10 all agreements between the surrogate and any intermediary or any other person who is involved in the process;

29.11 full particulars of any agency that is involved, any payment to this agency as well as an affidavit by the agency containing certain relevant information;

29.12 whether the commissioning parents have been charged with or convicted of a violent crime or a crime of a sexual nature.[13]

30] In **Ex parte Applications for the confirmation of three surrogate motherhood agreements**[14], the court confirmed that it is not there to rubber stamp agreements – as upper guardian, the court is duty bound to ensure that the interests of the child, once born, are best served by the agreement.

31] Over the years, the courts have expanded even more on these issues, and, for example, in 2017 Tolmay J in **Ex parte CJD and Others**[15] included the following criteria to be set out in the affidavits:

*"[15]…*

*(a) If and how the Applicants will function as a family unit and whether they are comfortable with society regarding them as such;*

*(b) Whether they are living together or not, and if not, why this states of*

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13 Also: High Court Motion Procedure: A Practical Guide; Neukircher, Fourie and Haupt; at 3-75 to 3-78

14 2011 (6) SA 22 (GSJ)

15 (53101/2017) [2017]ZAGPPHC 717; 2018 (3) SA 197 (GP) (17 November 2017) – in this matter a homosexual couple, who were not residing together, and where the one commissioning parent was hesitant not only about the surrogacy itself, but about being open about his sexual orientation had brought the

*affairs will not impact on the interests of the child and them functioning as a family unit…"*

32] From 2013, the International Social Service (ISS) called for urgent international regulation of international surrogacy agreements. In 2016 they launched an initiative to draw up a set of Principles that could be agreed on globally to guide policy and legislation. The first draft of the Principles was published in 2021 and what they seek to do is provide guidance on legislative, policy and practical reforms on the upholding of children's rights born through surrogacy.[16] What these Principles seek to do is provide some sort of uniformity of principle as regards surrogacy throughout the world. However, they do not address the issues facing children of either the commissioning or surrogate parents.

33] There is thus a lacuna in this both internationally and in the Children's Act.

**CONCLUSION**

34] Section 295 of the Act specifically lays out its own factors for compliance of which one is set out in section 295(e) which provides that a court must have regard to the personal circumstances and family situation of all the parties concerned. In my view, this imperative is extended to the issues highlighted in this judgment as are the imperatives contained in section 28(2) of the Constitution and section 7 of the Act.

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[16] Www.iss-ssi.org

35] I am therefore of the view that, where there are children born to the surrogate it is in the best interests of that child(ren) for purposes of confirmation of the agreement that they be assessed. Were it to be found that the surrogacy may have a harmful effect on their psychological well-being, this, in my view, would be a factor that a court would be able to weigh up in the consideration of whether the agreement should be confirmed or not.

36] As a result of the issues that were relevant in this application, I am of the view the following information should be placed before a court to safeguard the interests of the surrogate as well as any existing child(ren) of the commissioning parents and the surrogate:

36.1 that a clinical psychologist has consulted with the child(ren) of the commissioning parents to:

36.1.1 prepare the child(ren) for the surrogacy and the outcome;

36.1.2 to make any recommendation that is in the interests of the child(ren) including whether they may need further therapy;

36.1.3 report on the effect that any previous surrogacy has had on the children;

36.2 that a clinical psychologist has consulted with the child(ren) of the surrogate parents to:

36.2.1 prepare the child(ren) for the surrogate's pregnancy and the outcome;

36.2.2 to make any recommendation that is in the interests of the child(ren) including whether they may need further therapy;

36.2.3 report on the effect that any previous surrogacy has had on the children;

36.3 that a full medical assessment of the surrogate must be presented to court including information on her previous pregnancies, previous caesarean sections, whether any complications arose during any of her pregnancies and if so, what; whether any of her pregnancies resulted in the child not being born alive or whether she miscarried.

**THE ORDER**

37] Given that I am satisfied that the order in this matter should be granted, the following order is granted:

1. The Surrogate Motherhood Agreement marked annexure **"A"** annexed to the First Applicant's founding affidavit is hereby confirmed.
2. The artificial fertilisation procedure, as contained in Section 303 of the Children's Act, 38 of 2005 is hereby authorised.
3. Any child or children born of the Third Applicant, as a result of the Surrogacy Motherhood Agreement shall be regarded, for all intents and purposes, as the child or children of First and Second Applicants from the moment of such child or children's birth.
4. Both the First and Second Applicants shall possess full parental rights and responsibilities in respect of such child or children born as a result of the surrogacy motherhood agreement, whether in terms of the common law or the Children's Act 38 of 2005 (including any amendments thereto) and/or any other statute which may be

promulgated or has been promulgated dealing with parental rights and responsibilities.

5. The registration of the birth of the child/children as required in terms of Chapter II of the Births and Deaths Registration Act, 51 of 1992, shall be effected such that the First and Second Applicants shall be registered as the parents of the child/children respectively as from the date of birth.

6. No artificial fertilisation on the Third Applicant may take place after the lapse of 18 (eighteen) months from the date of this order.

**NEUKIRCHER J**
**JUDGE OF THE HIGH COURT**
**GAUTENG DIVISION, PRETORIA**

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 16 MARCH 2022.

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| For the Plaintiff | : Adv H Bothma |
| Instructed by | : Adele van der Walt Inc |
| Amicus | : Centre for Child Law |
| | |
| Matter heard on | : 4 March 2022 |