

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 28084/22

- (1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED: NO

Date: 26 September 2022

E van der Schyff

In the *Ex Parte* application of

MCM

First applicant

and

D

Second applicant

Professor D Thaldar

amicus curiae

JUDGMENT

Van der Schyff J

Introduction

- [1] The first applicant, MCM, and the second applicant, D, are both South African citizens, married and residing in Gauteng. They intend to have children of their own but require the assistance of a surrogate mother due to MCM suffering from a permanent and irreversible uterus condition. They have, however, not yet identified a suitable surrogate mother. To preserve MCM's current health and fertility, the applicants would like to proceed with artificial fertilisation at this stage. Although they intend to utilise MCM and D's gametes, they will use the gametes of an anonymous egg donor should MCM not be able to produce sufficient gametes.

The applicants' submissions

- [2] The applicants explained that the gametes (oocytes) of either the first applicant or the anonymous donor would then be combined with the gametes of the second applicant in a laboratory by *in vitro* fertilisation (IVF) process. The embryo(s) will be cryopreserved and only transferred to the uterus of a surrogate mother after the court confirms a surrogacy motherhood agreement.

- [3] The applicants surmised that they would not be able to proceed with oocyte retrieval and the fertilisation of the retrieved oocytes without first obtaining the court's approval due to the restricted wording of the provisions of Chapter 19 of the Children's Act 38 of 2005 (the CA). Section 303(1) of the CA provides as follows:

'No person may artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act.'

- [4] Section 296 of the CA also speaks to the 'artificial fertilisation' of a surrogate mother, and the section provides as follows:

'(1) No artificial fertilisation of the surrogate mother may take place –

- (a) before the surrogate motherhood agreement is confirmed by the court;

- (b) after the lapse of 18 months from the date of the confirmation of the agreement in question by the court

[5] The term 'artificial fertilisation' is defined as follows in the CA:

" artificial fertilisation" means: the introduction, by means of other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human production, including-

- (a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or
- (b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person'.

[6] The applicants explain that the broad definition of artificial fertilisation is an all-inclusive definition that includes and touches on three separate processes, namely:

- i. Egg retrieval to enable the fertilisation of the oocytes that are removed from the ovaries of a woman, outside the body;
- ii. Intracytoplasmic sperm injection, which brings about the fertilisation of an ovum with male sperm outside the women's body; and
- iii. Embryo transfer into the uterus or fallopian tube of the recipient.

[7] The applicants expressed the view that it is an unintended consequence of the broad definition of the term artificial fertilisation used in conjunction with the term 'rendering of assistance in such artificial fertilisation' that prohibits any of the three aforementioned processes in the absence of a court order authorising same, where the treatment is undergone in the context of a couple who wants to use surrogacy as their reproductive avenue.

[8] The applicants thus approached the court for an order directing the doctors concerned to perform *in vitro* fertilisation, including oocyte (egg) retrieval, intracytoplasmic sperm injection, and cryopreservation of the blastocysts (embryos)

created by such IVF procedures. They aver that s 303(1) is open for a broad interpretation in that both the phrases 'artificial fertilisation' and 'render assistance in such artificial fertilisation' can be interpreted to necessitate the authorisation of the procedures where the procedures will be executed with the view of approaching the court at a later stage to approve a surrogacy motherhood agreement.

The *amicus curia*'s submissions

- [9] Subsequent to the issue of the *ex parte* application, Professor Donrich Thaldar applied to be, and was, admitted as *amicus curiae*. In his initial correspondence, before the application to be admitted as *amicus curiae* was filed, Professor Thaldar expressed the view that:

'The novel practice of 'breaking up' surrogacy applications by first launching an *ex parte* 'pre-surrogacy' application regarding the creating of embryos with ART, followed by a full surrogacy application, is unnecessary and costly – this practice only serves to increase the legal costs of surrogacy applications for members of the public.

We intend to submit that this novel practice is unnecessary, as the law on this issue is clear and unambiguous. Nothing in our law prohibits the creation of embryos through ART – provided that it is done in accordance with the relevant regulations in terms of the National Health Act.'

- [10] Professor Thaldar formulated the legal question underpinning this application as follows:

'Is the act of creating embryos through *in vitro* fertilisation (IVF) for reproductive purposes by health care professionals on instruction of persons who intend to use surrogacy as their reproductive avenue, but who have not yet obtained a court order that confirms their surrogate motherhood agreement –

- (i) lawful,
- (ii) only lawful if confirmed by the court in terms of Chapter 19 of the Children's Act, or
- (iii) unlawful?'

- [11] Professor Thaldar analysed the definition of the term artificial fertilisation as used in the CA, and submits that it can have three distinct meanings. The meaning of the term that is intended in a particular provision, he then submits, is determined by the context within which the terms are used in any specific section of the CA. He further submits that the prohibition in s 296(1) and 303(1) of the CA relates to performing embryo transfer or intra-cervical or intra-uterine insemination on a woman in the execution of a surrogate motherhood agreement, but not to the 'bringing together of a male and female gamete outside the human body with a view to place the product of a union of such gametes in the womb of a female person'. This interpretation is based on the construction of both sections 296 and 303 which refer respectively to 'artificial fertilisation of the surrogate mother' and 'artificial fertilisation of a women'
- [12] Professor Thaldar submits that an application in terms of Chapter 19 of the CA to authorise IVF is not legally competent. He opines that Chapter 19 creates a specific *sui generis* type of *ex parte* application, namely an application to confirm a surrogate motherhood agreement. In his view a party may, however, seek declaratory relief in respect of an aspect of surrogacy, and ultimately proposes that the court grants a declaratory order declaring that the applicants have the right to have embryos created through IVF with the intention that said embryos will eventually be transferred to a surrogate mother still to be identified.
- [13] Professor Thaldar drew the court's attention to the judgment by KeightleyJ in *Ex parte: MS and Others*¹ and to Regulation 10(2)(a) of the Regulations relating to the Artificial Fertilisation of Persons in his heads of argument. The relevance of the latter is discussed below.

¹ *Ex Parte MS and Others* (48856/2010) [2014] ZAGPPHC 457 (2 December 2013).

- [14] Keightley J remarked in *Ex parte: MS and Others* that a surrogate motherhood agreement must, 'ideally', be confirmed 'before there is any prospect of conception.' She pointed out that s 295(b)(ii) of the CA requires that the court must be satisfied that the commissioning parents are in all respects suitable to accept the 'parenthood of the child that **is to be conceived**'. (*My emphasis.*) The *amicus* criticised the court's approach in *MS*, on this aspect.
- [15] Reference must be made to the expert evidence of Ms. Els-Smit presented by the *amicus curiae* on affidavit. Ms. Els-Smit has over 15 years clinical experience as an embryologist. Ms. Els-Smit points out that it is not uncommon for commissioning parents in a surrogate motherhood agreement confirmation application to already have cryopreserved embryos. This is because the commissioning parent typically first, unsuccessfully, attempts to fall pregnant herself through IVF and embryo transfer, before being diagnosed as being unable to carry a pregnancy to term. In such cases, surplus embryos often remain from the commissioning parents' fertility treatment. A reported judgment on a surrogate motherhood agreement confirmation application where this was the case is *Ex Parte Kaf 2*.² In her expert opinion commissioning parents may have objectively good reasons to wish to create embryos in anticipation of a surrogacy arrangement.
- [16] The *amicus curiae* and the applicants jointly provided the court with a draft order that provides for a declaration of rights, in the following terms:
- 'Declaring that the applicants have the RIGHT to have embryos created through *in vitro* fertilisation (IVF) with the intention that said embryos will eventually be transferred to a surrogate mother still to be identified, provided that:
- The applicants comply with the relevant provisions of the Regulations relating to the Artificial Fertilisation of Persons; and
- If and when a surrogate mother is identified by the applicants, embryo transfer to the said surrogate mother may only transpire once a court of

² *Ex Parte Kaf 2* 2019 (2) SA 510 (GJ)

competent jurisdiction has confirmed the applicant's surrogate motherhood agreement with said surrogate mother.'

Discussion

[17] It cannot be gain-said that the science in the field of assisted reproduction is ever advancing. As stated in the South African Law Reform Commission's Issue Paper 32, Project 140,³ assisted reproduction is used to treat infertility and entails the use of fertility medications and medical techniques to bring about the conception and birth of a child. It is stated in the Summary of the Issue Paper that:

'Children are conceived using donor gametes in techniques such as *in vitro* fertilization, mitochondrial replacement therapy and genetic surrogacy. Assisted reproduction in South Africa is regulated by the National Health Act 61 of 2002 and the Regulations Relating to Artificial Fertilisation of Persons, 2012 as well as the Children's Act 38 of 2005 and the regulations thereto.'

[18] Khampepe J in a minority judgment in *AB v Minister of Social Development*⁴ stated that we are fortunate to live in an era where the effects of infertility can be ameliorated to a large extent through assistive reproductive technologies.

[19] Assisted reproduction should, however, be facilitated within the existing statutorily prescribed legal framework. In the context of parties opting for surrogacy, this legal framework is composed of the applicable principles of both the National Health Act 61 of 2002 and its concomitant regulations, and the Children's Act 38 of 2005 with its associated regulations. The interaction between these two statutes is highlighted in the application before me.

[20] If the initial relief sought by the applicants, *id est* an order authorising the doctors concerned to perform *in vitro* fertilisation and cryopreservation of the blastocysts

³ 'The right to know one's own biological origins', Issue paper 32, Project 140.

⁴ 2017 (3) SA 570 (CC) at para [3].

created by the *in vitro* fertilisation process, is considered, the context within the relief is sought is important. The applicants inform the court that they intend to utilise the assistance of a surrogate mother because they are unable to have children of their own due to the first applicants' irreversible and permanent medical condition.

- [21] The Children's Act regulates surrogacy as a mechanism of assisted reproduction. In order to ensure that there is legal certainty in the relationship between the parties involved before the prospective child is a reality, and to ensure that the rights and obligations pertaining to the prospective child and the child's legal and parental status are settled, the legislature requires the confirmation of the surrogacy motherhood agreement before a woman (the surrogate) may be artificially fertilised in the execution of such an agreement.⁵ In the context of surrogate motherhood, the artificial fertilisation of the surrogate mother can only be authorised by the court confirming the surrogate motherhood agreement after the court has satisfied itself that the requirements for the confirmation of such agreement as prescribed in Chapter 19 of the Children's Act are met.
- [22] The second Act that contributes to the legal framework regulating artificial fertilisation, and specifically *in vitro* fertilisation and the cryopreservation of blastocysts or embryos, is the National Health Act, and specifically the Regulations Relating to the Artificial Fertilisation of Persons (the Regulations).⁶
- [23] In the case of gestational surrogacy, artificial fertilisation entails the 'bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person'. This procedure is referred to as *in vitro* fertilisation (IVF).
- [24] For the purpose of this application, regulation 10(2)(a) is of specific importance. The regulation provides as follows:

'10. Control over artificial fertilisation, embryo transfer, storage and destroying of zygotes and embryos.'

⁵ *Ex Parte MS* (48856/2010) [2014] ZAGPPHC 457 (2 December 2013).

⁶ GNR. 175 of 2 March 2012 *Government Gazette No.* 35099.

- (1) No gamete—
 - (a) that has not been imported, removed or withdrawn in terms of the provisions of the Act or these regulations;
 - (b) from a gamete donor of whom the results of the tests, analysis or examination referred to in regulation 7 (e) to (g), as the case may be, are not available yet; or
 - (c) from the gamete donor younger than 18 years of age except in the case of a medical indication, may be used for artificial fertilisation.
- (2) (a) A competent person shall not effect **in vitro fertilisation except for embryo transfer, to a specific recipient** and then only by the union of gametes removed or withdrawn from the bodies of—
 - (i) such recipient and an individual male gamete donor; or
 - (ii) an individual male and an individual female gamete donor;
- (b) an embryo, referred to in paragraph (a) shall be stored in a frozen/cryopreserved state in a prescribed institution;
- (c) a competent person shall destroy an embryo, which she or he has in storage as soon as the recipient for whom that embryo has been effected conceives or as soon as it is decided not to go ahead with the embryo transfer into that recipient, unless—
 - (i) the competent person decides, and with the informed consent of the recipient, to store such embryo for a further period for the purpose of a subsequent embryo transfer to that recipient; or
 - (ii) the recipient consents in writing that the competent person—
 - (aa) may, with the informed consent of such recipient, use such embryo for transfer to another specific recipient; or
 - (bb) may, with the informed consent of such recipient; use the embryo for a purpose, other than embryo transfer, which purpose shall be stated in that consent;
- (d) a competent person shall destroy an embryo that has been unclaimed by the recipient for a period of 10 years.’

[25] The prohibition in regulation 10(2)(a) that a competent person shall not effect **in vitro fertilisation except for embryo transfer to a specific recipient**, gives rise to the question whether the court can authorise the *in vitro* fertilisation in the absence of an identified surrogate recipient. The answer to this question depends on the interpretation of the phrase ‘specific recipient’.

- [26] The *amicus* proposes that the phrase ‘specific recipient’ is susceptible to a narrow and broad interpretation. According to the narrow interpretation, the recipient must be exactly named as precondition for IVF. This would exclude the possibility of creating embryos prior to confirmation of a surrogate motherhood agreement. According to the broad interpretation, the recipient must either be named, or capable of being named, as precondition for IVF. Since there are commissioning parents involved who can, at an appropriate stage in future, name their surrogate mother, this interpretation would, according to the *amicus*, allow the possibility of creating embryos prior to confirmation of a surrogate motherhood agreement.
- [27] To interpret regulation 10(2)(a) the meaning ascribed to the following terms need to be considered: (i) ‘in vitro fertilisation’ is the process of spontaneous fertilisation of an ovum with a male sperm outside the body in an authorised institution; (ii) ‘embryo transfer’ means the placing of the embryo into the uterus or fallopian tube of the recipient; (iii) ‘recipient’ means a female person in whose reproductive organs a male gamete or gametes are to be introduced by other than natural means; or in whose uterus/womb or fallopian tubes a zygote or embryo is to be placed for the purpose of human reproduction; (iv) ‘Surrogate’ means a voluntary recipient of an embryo who will carry such embryo to birth for contractual parents.
- [28] Professor Thaldar, the *amicus* before this court, published an article in 2020, titled ‘The *in Vitro* Embryo and the Law: The Ownership Issue and a Response to Robinson’.⁷ In his opinion, the term ‘recipient’ as defined in regulation 1, refers to the intended gestational mother, and not necessarily the intended legal mother or the genetic mother. He proposed that regulation 10(2)(a) means the following:
- ‘A competent person (in this context, an embryologist) may create an in vitro embryo only if the following conditions are met: (a) the in vitro embryo is intended for reproduction in general (and not for scientific research, for instance); (b) there is a specific recipient for the in vitro embryo; and (c) the in vitro embryo will be created from gametes (not from a denucleated egg and the nucleus of a skin cell, or from an

⁷ PER / PELJ 2020 (23).

induced pluripotent stem cell, for instance). Condition (b) is relevant to our present purposes. *Clearly an in vitro embryo may be created only if there is a specific woman who intends to become pregnant with such an embryo.* (My emphasis)

He, however, had a change of heart, and now submits that after careful consideration, he is of the view that the phrase 'specific recipient' must be broadly interpreted to include a recipient 'capable of being named'.

[29] I do not agree with the proposition that the phrase 'specific recipient' as it is used in regulation 10(2)(a) is subject to the broad interpretation proposed by the *amicus*. The context within which the phrase is used, militates against any interpretation other than that the recipient of the embryo must be identified before in vitro fertilisation may be effected. Reference is made in regulation 10(2)(c) to 'the recipient for whom that embryo has been effected'; and in regulation 10(2)(c)(aa) and (bb) to 'the informed consent of such recipient'. In addition, regulation 18 deals with the ownership of zygotes and embryos, and regulation 18(2) provides that after artificial fertilisation the ownership of a zygote or embryo is vested in the recipient. The recipient thus needs to be identifiable from the moment that the embryo comes into being. In this context, the term 'specific recipient' requires a narrow interpretation, and the broader interpretation contended for is not supported in the Regulation's language. It cannot be interpreted as proposed by the *amicus* in this application, to refer to a person 'capable of being identified.'

[30] The interaction between the National Health Act and the Children's Act, as far as assisted reproduction by way of gestational surrogacy is concerned where no embryos were created in the period before it became apparent that the woman concerned would not be able to carry a fetus to full term pregnancy, is that a surrogate motherhood agreement needs first be confirmed by the court, before *in vitro* fertilisation can commence. Once the surrogate motherhood agreement is confirmed, the surrogate mother is identified and she will be included within the definition of recipient and more importantly, within the phrase 'specific recipient' as it appears in regulation 10(2)(a).

[31] I accept that the science regarding *in vitro* fertilisation and embryo transfer develops swiftly, and that situations can arise that are not catered for in the existing legal framework. However, this court cannot, in an *ex parte* application, authorise a competent person as defined in the National Health Act, who is not a party to the proceedings before the court, in the absence of the Minister on whose authority the Regulations were published, to contravene the Regulations promulgated in terms of the Act.⁸ The court can also not after being approached on an *ex parte* basis, grant a declaration of rights that may have a far-reaching effect, or consider the constitutional validity of the existing legal framework.

[32] Despite Ms. Els-Smit's expert opinion that good reason exists for applicants to want to cryopreserve embryos rather than individual male and female gametes, the current legislative framework does not provide that option to applicants who are bound to choose gestational surrogacy as their method of assisted reproduction before a specific recipient of the embryos is identified. If the applicants want to challenge the wording, or constitutional validity of regulation 10(2)(a) they will have to join the Minister of Health to such proceedings.

[33] The relief sought by the applicants thus falls outside the ambit of the Children's Act since it has no bearing on the execution of a confirmed surrogate motherhood agreement. The Regulations Relating to the Artificial Fertilisation of Persons, as it currently stand, prohibit *in vitro* fertilisation except for embryo transfer to a specific recipient. In the absence of a constitutional challenge to the Regulations with interested and affected parties joined to the proceedings, the application stands to be dismissed.

ORDER

In the result, the following order is granted:

- 1.** The application is dismissed.

⁸ See *Schierhout v Minister of Justice* 1926 AD 99 at 109, and *Ex Parte WP* (Unreported case) Case No:3167/2019, Western Cape High Court (24 June 2019) at para [36].



E van der Schyff

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.

For the applicants:

Adv. R Randall

Instructed by:

AMA Law

Amicus curiae:

Professor D Thaldar

Date of the hearing:

9 September 2022

Date of judgment:

26 September 2022