



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 094062/24

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
<u>24 January 2025</u>	
DATE	SIGNATURE

In the ex parte application of:

EW

First Applicant

WG

Second Applicant

VF

Third Applicant

ORDER

1. The application is dismissed.
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JUDGMENT

NEUKIRCHER J:

1] The first applicant (EW) is a 38-year old South African (SA) citizen who presently lives and works in Zug, Switzerland. His husband, the second applicant (WG), is a 27-year old Polish Citizen who also lives and works in Zug, Switzerland.¹ They have been in a relationship since approximately 2019, and were married on 20 October 2023 in Switzerland.

2] This is an application to confirm the surrogacy motherhood agreement that they have entered into with the third applicant (VF) in terms of s295 of the Children's Act No 38 of 2005 (the Act).

3] Section 295(a) provides:

“A court may not confirm a surrogate motherhood agreement unless-

(a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible.”

4] Given the content of paragraph 1 supra, there can be no doubt that EW and WG fulfil this requirement.

¹ The EW and WG are referred to in this judgment either by their initials or as “the applicants”

5] The hearing, in court but in camera², took place over two dates in order to give the applicants the opportunity to supplement the issues that were raised at the first hearing. As a result, a supplementary affidavit was filed in an effort to cure those issues. I will deal with each of the founding and supplementary affidavits in due course.

The application

6] Before I set out the facts of this application, something needs to be said about the manner in which this application was put before this court. The initial application is 192 pages long. Of that, only 16 pages comprised the founding affidavit. To say that it is cryptic is an understatement. Whilst lip service was paid to the essential allegations a court requires to be made in applications of this nature, the actual essential and relevant information was buried in the almost 170 pages of expert reports and other documents. The supplementary affidavit and annexures ran to another 75 pages and fared little better.

7] It is indeed an anomalous position that a judge deciding a surrogacy application is in: on the one hand the provisions of s28(2) of the Constitution³ and s295⁴ of the Act require an investigation into the 'best interests' of the child, and on the other hand the child has not yet been born. Thus, the question is: how do we measure this constitutional imperative when we are unable to observe – or have actual evidence of

² Given the provisions of s302 of the Act which state

"(1) The identity of the parties to court proceedings with regard to a surrogate motherhood agreement may not be published without the written consent of the parties concerned.

(2) No person may publish any facts that reveal the identity of a person born as a result of a surrogate motherhood agreement."

³ "A child's best interests are of paramount importance in every matter concerning the child."

⁴ The relevant portions of which will be set out and dealt with later in this judgment

- bonding, discipline, parenting skills, a child's routine and who the primary caregiver of the child actually is?

8] It is for this reason that simply paying lip service to the requirements of a surrogacy application, and then relying on a judge to troll through hundreds of pages of documents to find the essential supporting allegations and corroboration, is simply not good enough. It is incumbent upon the applicant(s) to set out all the relevant information in the founding and supporting affidavits themselves. After all, it is trite that in motion proceedings the evidence upon which a party relies to found the case or defence, must be contained in the affidavits themselves.⁵

9] The application of the 'best interests' principle is aided and determined *inter alia* the report(s) of the expert(s): the psychometric evaluation, clinical observations and client history play a vital role. It is also why the detail in the affidavits, especially of the commissioning parents and corroborating information, must be interwoven in the application and these reports so that the court has a full picture of the family (or person) who will be raising the child(ren).

10] In *Ex parte WH and Others*⁶ the full court stated:

"[56] In terms of s28(2) of the Constitution a child's best interest are of paramount importance in every matter concerning the child. This approach is echoed in s7 of the Act...

⁵ Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa and Others 1999 (2) SA 279 (T) at 323I/J – 324F

⁶ 2011 (6) SA 514 (GP)

[61] The best interest principle has not been given an exhaustive content, but the standard should be flexible as individual circumstances will determine the best interests of the child.

11] Although *Ex parte WH* was decided some 13 years ago, these sentiments are as true and important today as they were then.

12] But this is only the start of the picture and the remaining pieces of the puzzle must be completed with reference to the essential allegations required by s292 and s295 of the Act. Furthermore, given that Chapter 19 resorts under the Children's Act, the provisions of s7 are important. This section sets out the factors a court must consider in determining the best interests of the child. Not all of the provisions set out in Section 7 are relevant in this application, though. In my view, those that are, are:

"7 (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) ...
- (f) 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
 - (vi) and other relevant characteristics of the child;
- (h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development..."

13] It must be said that this list is not exhaustive, and may vary depending on the facts of the specific application that serves before a particular court.

14] Much of the provisions of s7 of the Act are also echoed in s295 and more especially in the following sections:

- a) in s295(b)(ii) which states "the commissioning parents... are in all respects suitable persons to accept the parenthood of the child that is to be conceived";

- b) in s295(d) which states “ the agreement includes adequate provisions for contact, care, upbringing and general welfare of the child that is to be born in a stable home environment, including the child’s position in the event of the death of the commissioning parents or one of them, or their divorce or separation before the birth of the child;”
- c) in section 295(e), which states “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.”

The facts

15] This leads me to turn to the facts of the application before me.

16] EW was born in SA and is a South African citizen. He is a chartered accountant presently working for UBS, an international financial corporation. He lives in Zug, Switzerland. He has been granted a temporary residency permit renewable yearly and which, at present, is valid until the 11 January 2026. He states

“16.8.1 The Second Applicant and I live a stable life. We have lived in the same community for many years. Our home is currently a 2 (two) bedroom flat, which is large enough to adequately accommodate a child(ren), albeit more than one.”

17] EW also states that he is “currently residing” at an address in Garsfontein, Pretoria “whilst in South Africa”, that both his parents live in Pretoria and that he and WG “frequently return home” to see his parents.

18] He then states

“5.7 I consider Pretoria, South Africa to be my home, as this was where I am from. It is our intention to raise our children in South Africa, specifically in Kimberley, should we be successful with the surrogacy application, so that we may raise our children close to my family. It is our intention to initially reside in Pretoria as both of my parents are elderly, and we would like for them to experience their grandchildren, whilst they can.”

19] The applicants are “in the process of” looking to purchase a farm in Kimberley but have not yet found a suitable property.

20] EW was headhunted by Credit Suisse⁷ during approximately May 2023 and he has lived and worked in London and Hong Kong prior to his employment in Switzerland. He states

58. “My employment overseas has purely been opportunistic (to receive the financial benefit of working abroad whilst we do not have children) and has often been at the request of my employers who have required me to transfer and to work overseas.”

21] As stated, EW and WG were married, in Switzerland, on 20 October 2023. As at date of the application, EW states that they have been in a committed relationship for six years.

22] WG is a Polish citizen and is a senior associate at a large international accounting firm. As with EW, he states that he is “currently residing” at the address in Switzerland as well as at the address in Garsfontein, Pretoria.

⁷ Which was taken over by UBS

23] WG's confirmatory affidavit is 8 paragraphs long. Other than setting out his profession and address, he gives no personal information whatsoever and this includes any applications for a visa to live and work in SA. In fact, it is EW who states:

"5.4 It is the Second Applicant's intention to process a spousal visa for South Africa. We have just not gotten around to making the application. It is our intention to start the process now."

24] EW also states that he and WG are financially stable and have "the financial means to support and care for the child(ren)."

25] The applicants nominated friends to be the guardian(s) of any child to be born. They live in the United Kingdom (UK).

26] VF is the prospective surrogate mother. She is a single mother of two children who are presently 14 and 10 years old. She states that she has had three successful pregnancies, was in good health and carried her pregnancies successfully. This is her second surrogacy: her first was in 2021 and in September 2021 she gave birth to triplets. It appears that she reached out directly to the applicants' attorney of record to indicate her willingness to be a surrogate mother, and he then introduced the applicants to her. Mr. Martin (the attorney of record) confirms that he does not act as a surrogacy facilitator or agency and charges no fee; nor does he incur any expenses for these services. He provides free of charge information to assist the parties in meeting.

27] The annexures to the application provided the court with a treasure trove of information left unanswered by the cryptic affidavits, which raised several more

questions as to the applicants' domicile and as a result of certain other allegations, their habitual residence.

The annexures

28] The first issue is that the founding affidavit of EW and the confirmatory affidavit of WG leave this court with the impression that they have a residence in Garsfontein, Pretoria. This, of course must then be seen in the context of the allegation that they are looking to purchase a farm in Kimberley where they intend to raise their children - albeit temporarily.

29] There is no confirmatory affidavit by either of EW's parents to confirm the allegation of EW's SA residence/domicile. Instead, and seemingly to support EW's allegations, a letter from the general manager of the retirement home in which EW's parents live is attached to the application. This simply confirms the residential address of EW's parents. A comparison of that address and the one given by the applicants reveals that it is one and the same. Two issues arise from this: there is no confirmatory affidavit from the general manager, nor does he confirm in the letter that this address is, in fact, the applicants' residential address; and, as stated, EW's own parents do not confirm that he resides there. No explanation is provided for the absence of either. In fact, other than that they are elderly and that EW's father lives in assisted living in the retirement village, this court knows little else about them. Given the content of paragraph 5.7 of EW's affidavit⁸, this absence is concerning as there is now no corroboration for the allegations set out in EW's affidavit especially as he has not resided in SA since 2015.

⁸ See paragraph 18 supra

30] The expert reports completed by Mandy Rodrigues, a clinical psychologist based in Lanseria, raise even more questions as regards the issue of domicile and residency. Under the heading “General History” in her report she states:

- a) the applicants visit EW's parents “at least quarterly” and that they are buying a home in South Africa⁹;
- b) EW's decision to work overseas “was to gain experience and opportunity internationally whilst still using South Africa as his home base”;
- c) that WG has visited SA “frequently” with EW;
- d) that WG's parents are in their 60s, “and his mother does not work with his father working for two-month periods, 6 times a year. They live an hour away and are able to help out with the new baby”;
- e) EW and WG plan on staying in SA immediately after the birth of the child.

31] The further issue that arose was the fact that EW and WG had chosen prospective guardians that live in the UK. The applicants state that they are both only children. Both sets of parents are not in the summer of their lives, but there is no suggestion anywhere of any other form of support system. This means that a child born here and living here would suddenly be uprooted to foreign shores and strangers (there being no suggestion of how a bond would be forged with the prospective guardians at all), were something to happen to both applicants. Furthermore, given that they voiced the intention to raise any child in SA, it begs the question as to why guardians who do not live in this country, would be appointed.

⁹ This is in contrast with the allegation that they reside in Pretoria

32] This court was also not placed in the picture regarding the parties' actual financial positions. Whilst I am told that they both work for large international financial corporations and are financially able to provide for any child(ren), the assumption sought to be drawn is not fact based.

33] Then the following is reported by Rodrigues under the heading "Why the couple want children". She states:

"The two have looked into adoption but understand this can be a tiresome process. They are not Swiss citizens and adoption in Switzerland will not be possible. They are also aware that as a same sex couple, the process of selection might take longer. Surrogacy is perceived to be more certain than adoption and they can have one of their genetic material involved."

The supplementary affidavit

34] As a result of the debate that took place at the first hearing, the applicants then filed a supplementary affidavit in which they not only provide vastly more detail of their own personal background and circumstances, but add crucial information required by the court to determine whether the provisions of s292(1)(c) as well s295(d) and (e) have been met.

35] It appears that EW was headhunted by Ernst & Young in London in 2015. He was working at Nedbank (SA) at the time. From 2015 until 2022 he worked for various companies in London and he states that, through necessity, he stayed in London during the COVID pandemic which resulted in his obtaining his British citizenship. EW is thus a dual citizen of the UK and SA. He states however

“It was not my intention to move to the UK in order to obtain British citizenship, it was merely a consequence of me being there for the required period of time. The British passport allows me visa-free international travel and, in my opinion, adds to my marketability in career applications both in South Africa and abroad.”

36] In 2022 he joined Deloitte, Hong Kong where he worked for approximately one year before being headhunted by Credit Suisse. He moved to Switzerland in 2023. When UBS purchased Credit Suisse he stayed on and has been employed at UBS for approximately sixteen months. He states that his role is mainly related to UBS's integration of Credit Suisse into its financial infrastructure which could take another twelve to eighteen months after which

“my role may be reassessed to be in duplicate and, because of cost cutting, the bank will make duplicate roles redundant. This will present an opportune time for me to return to South Africa due to the possibility of redundancy pay.”

37] During argument I was informed that given the amount he would receive if made redundant by UBS, it is beneficial for EW to wait until his contract is actually terminated rather than for him to resign to return to SA. However, were any child to be born, he would be in SA “like a shot”.

38] The applicants have not yet purchased the property in SA for various reasons which include that:

- a) they do not have certainty as to their future employment;
- b) they do not find it a viable investment to have a non-income producing property before obtaining employment in South Africa and state that “it is very hard to find tenants who would accept a short-term lease, as I would like

to move to South Africa and into the house, when an opportunity for my return occurs. I would, therefore, prefer to have certainty in the location of my and the Second Applicant's future employers, as well as employment itself, before buying a property”;

- c) EW has worked in very similar roles in insurance, banking and consulting and will have the qualifications, credentials and experience to satisfy a South African employer. However, with the South African economy being smaller than those of Europe and Asia there are fewer senior management opportunities available in SA than abroad. He then states that any opportunities are also subject to BEE requirements “and often when I am perusing the advertisement for possible job opportunities, it will state that only BEE candidates will qualify for these senior positions. I hope that by continuing my search for suitable opportunities and my South African networking whilst building my credentials, that I will find suitable career opportunity in the short to medium term”;
- d) they have looked at potential properties in the greater Kimberley area but have yet to find one that is to their liking. They intend to purchase a farm as it “makes economic sense and secondly, we like the idea of having a farm and raising children who will have the exposure to this type of lifestyle.” But it is not their intention to permanently reside there as “that would not make economic sense as the vast majority of entities that will offer us future employment opportunity are based in Pretoria, Johannesburg, and in some exceptions, Cape Town.”

39] As to the intended guardians in the UK, the applicants have now nominated Mr JHCI Kritzingner and his spouse, H H Hseih who live in Sandton, Johannesburg.

40] And then EW states:

“It is our intention to be permanently based in South Africa upon finding the right employment opportunity. It will allow us to raise the children close to family, especially with the Second Applicant’s parents showing interest in moving to South Africa during retirement. The interest arises from the fact that our family would be based in South Africa, and South Africa having well established and affordable private elderly care system.”

41] To confirm this, WG states:

“My parents have also been here on a number of occasions and are planning to come again during this December. They have indicated that they are open to the prospect of moving to South Africa during their retirement, as I am an only child, and they would want to be close to me and their grandchild.”

42] The applicants assert that the requirements of s292(1)(c) and (e) are fulfilled as it is EW who is domiciled in SA. This argument is made based on the following:

- a) EW was born in Pretoria;
- b) his parents live in a retirement village in Pretoria and he purchased the property for them;
- c) he and WG stay there when they visit SA which EW states he has done “at least 37 times of varying lengths” since he moved overseas in 2015;
- d) he maintains his SAICA¹⁰ membership;
- e) SA is his home “and always will be”;

¹⁰ South African Institute of Chartered Accountants

- f) he did not give up his SA citizenship when he acquired his British citizenship and has a Certificate of Exemption in terms of s6(2) of the South African Citizenship Act 88 of 1995;
- g) they rent their apartment in Switzerland and have no other property overseas because they do not have the intention to stay there;
- h) they seek property in Kimberley where their friend, DR Griesel, has two farms;
- i) it is their intention to be permanently based in SA "upon finding the right employment opportunity" after EW's present role at UBS may possibly be made redundant in another twelve to eighteen months because of the company's cost cutting, which carries with it the possibility of a redundancy pay.

The domicile requirement

43] The Domicile Act 3 of 1992 came into operation on the 1st of August 1992.

There are several provisions which have a bearing on this matter:

- a) the first is s1:
 - "(1) Every person who is of or over the age of 18 years,... shall be competent to acquire a domicile of choice, regardless of such person sex or marital status.
 - (2) A domicile of choice shall be acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite.";
- b) the second is s2(1):

"(1) a person not capable of acquiring a domicile of choice as contemplated in section 1¹¹ shall be domiciled at the place with which he is most closely connected."

c) the third is s3:

"(1) no person shall lose his domicile until he has acquired another domicile, either by choice or by operation of law.

(2) Notwithstanding any law or the common law, no person's domicile of origin shall revive except within the meaning of section one or two."

44] According to s5 of the Domicile Act, the acquisition or loss of a person's domicile shall be determined by a court on a balance of probabilities.

45] Thus, succinctly stated: any person who reaches the age of majority will retain the domicile they have at the time¹² which will be the place with which they are the most closely are connected at the time¹³. After this, a person may acquire a domicile of choice¹⁴.

46] A domicile of choice is acquired by a person who, having the necessary legal capacity, in the exercise of his or her free will, is lawfully present at a particular place with the intention of settling there for an indefinite period¹⁵.

47] In *Eilon v Eilon*¹⁶ the majority court stated:

¹¹ A minor or a person who does not have the mental capacity to make a rational choice – s1(1)

¹² Section 3(1) of the Domicile Act

¹³ Section 2(1) of the Domicile Act

¹⁴ Section 1(1) of the Domicile Act

¹⁵ Boberg's Law of Person and The Family; 2nd ed; pg 100-104

¹⁶ 1965 (1) SA 703 (A) at 719H – 720°; some citations excluded

“The onus of proving that a domicile of choice has been acquired rests on the party who asserts it and this onus is discharged by a preponderance of probabilities. (See *Webber v Webber* 1915 AD 239 and *Ley v Ley's Executors and Others*, 1951 (3) SA 186 (AD)).

In the case of *Johnson v Johnson* 1931 AD 391 at p. 398, DE VILLIERS, C.J., indicated what has to be proved in order to discharge this onus in the following terms:

‘Both in the Roman law and in our own and the English law a person *sui juris* is free to choose for himself a domicile of choice *animo et facto* by establishing for himself in fact a residence in the territory in question, combined with *animus manendi* in that territory.’

Appellant therefore had to prove the two requirements, namely residence in the Court’s area and an intention of settling there permanently.”

and

“... the onus of proving a domicile of choice is discharged once physical presence is proved and it is further proved that the de cujes had at the relevant time affixed and deliberate intention to abandon his previous domicile, and to settle permanently in the country the choice. A contemplation of any certain or foreseeable future event on the occurrence of which residence in that country would cease, excludes such an intention. If he entertains any doubt as to whether he will remain or not, the intention to settle permanently is likewise excluded...”

48] In *Chinatex Oriental Trading Co v Erskine*¹⁷Chetty J stated:

“The South African Domicile Act 3 of 1992 provides that a person of 18 years or older and with sound mind can acquire a domicile of choice when such person is lawfully present at a particular place with the intention of settling there for an indefinite period of time (s 1); that no person shall lose their domicile until he/she has acquired another

¹⁷ 1998 (4) SA 1087 (C) at 1093H- 1094C/D

domicile, either by choice or by operation of law (s 3) and insofar as proof is concerned s 5 requires that the acquisition or loss of domicile is to be determined by a court on a balance of probabilities. A domicile of choice can thus be acquired by sufficing two elements:

- (i) physical presence (an objective fact) and
- (ii) an intention to remain indefinitely (a subjective test).

A person's physical presence requires more than a visit or a sojourn to the country. Accordingly the longer the person is settled at a particular place, the greater the likelihood of a court regarding him as resident there for the purposes of domicile. (*Johnson v Johnson* 1931 AD 391 at 411.) The second element, *animus manendi*, does not require an intention to remain permanently. The person must display a state of mind which is consistent with the intention of remaining indefinitely, which intention need not be irrevocable in order to show that a domicile of choice has been acquired. (Pollak (1933) 50 SALJ at 465; *Ley v Ley's Executors and Others* 1951 (3) SA 186 (A); *Eilon v Eilon* 1965 (1) SA 703 (A) at 721A.) Furthermore a continuing emotional attachment to one's country of origin is insufficient to negative a domicile of choice. (*Eilon v Eilon* (*supra* at 705A).)" (my emphasis)

49] In *Levy v Levy's Executors*¹⁸ it was stated:

"There are cases where a person leaves his country of origin intending never to return to it and yet does not acquire a domicile of choice in another country, even although he remains in such other country for some time. *Bell v Kennedy*, 1 Scotch & Divorce Appeal Cases 307, is an example. The question in that case was: had Bell at the date of the death of his wife acquired a domicile of choice in Scotland? Bell, whose domicile of origin was in Jamaica, left that country for good in June, 1837, remained in London for a short while and then went to Scotland where he remained until after the death of

¹⁸ *Supra* at 1094C-F/G

his wife in September, 1838. The House of Lords held that the *onus* of proving that Bell had acquired a domicile of choice in Scotland in or before September, 1838, had not been discharged, the main ground being that his letters showed that he had not yet made up his mind as to whether he would make his home in Scotland. In the present case, however, the preponderance of probabilities seems to me to prove that Ley did intend to settle in the Cape Colony."

50] It goes without saying that EW's domicile of origin is SA. The question is whether it has remained his domicile or whether he has acquired a domicile of choice elsewhere. In my view, although he uses the Pretoria property in an attempt to establish an ostensible domicile in SA, it does not: on his own version it was purchased for his parents; it was never his intention to live there and he also never asserts that it was. In fact, in his own words, it is the applicants' intention to reside in Pretoria but they are in the process of looking to purchase a farm in Kimberley to raise a child, at least temporarily. There is no indication on these papers that the property in Garsfontein is the residence in which they will reside with the child and, it being a two-bedroomed property in a retirement village, there is no indication on these papers that this would be in the interests of the child(ren) to do so – even if temporarily.

51] The fact remains that EW does not state whether, when he left SA in 2015 to work in the UK, it was his intention to live there - if not permanently then at least for an indeterminate period¹⁹. He then lived and worked in Hong Kong and now lives and works in Switzerland which is where he and WG were married. He specifically states in his founding affidavit that the apartment in Switzerland where he and WG live is

¹⁹ Which is exactly what transpired

large enough to adequately accommodate children, which is puzzling given the fact that he states that he wants to raise the child(ren) close to family in SA.

52] EW asserts that the fact that he and WG only rent property in Switzerland evinces an intention to be domiciled in SA - but in my view it does not: millions of people the world over rent property in the country in which they are domiciled. The fact is that I cannot find that EW has remained domiciled in SA as:

- a) he does not state that irrespective of whether or not his job at UBS would be made redundant in twelve to eighteen months, he would return to SA;
- b) the timing of his return and settling his family in SA has always been heavily dependent on when he and WG start a family;
- c) as at date the application was launched, the applicants had yet to commence the process of applying not only for WG's spousal visa, but the search for employment in this country;
- d) the originally intended guardians do not live in SA;
- e) EW has failed to attach any confirmatory affidavits from any family in SA²⁰, and more importantly from his parents, who would be his support structure.

53] In my view EW has acquired a domicile of choice in Switzerland: he lives and works there and had an intention of remaining there indefinitely. On the facts before me, the only reason the applicants voice an intention to live in South Africa is

- a) because surrogacy is not recognised in Switzerland; and
- b) because adoption is not available to them in Switzerland; and

²⁰ Which is relevant as he states that they want to raise their children close to family

- c) surrogacy is recognized in SA.

54] I therefore find that, on a balance of probabilities, there is non-compliance with the provisions of s292(1)(c) of the Act.

Habitual residence

55] But I am also of the view that this court cannot confirm the agreement as it does not have the jurisdiction to do so. In my view neither of the applicants are either domiciled or habitually resident - at least at this stage - within this court's jurisdiction. It is clear that they do not reside within this court's jurisdiction. As stated supra, the Pretoria residence is not intended to be their actual residence and it is clear that it is simply an address of convenience. In fact, in several paragraphs in the respective affidavits, EW states that he and WG intend to live in Kimberly, are looking for a property in that jurisdiction and intend to live there and (temporarily) raise any children there. This being so, this court has no jurisdiction to confirm the agreement in terms of s292(1)(d) of the Act.

General

56] In addition, I am not convinced on the papers before me that the application should be granted:

- a) there is too much uncertainty surrounding where any child(ren) will be raised. It certainly will not be in Pretoria; it may be temporarily be in Kimberley as to remain there permanently "would not make economic sense; and future employment opportunities are based in Pretoria, Johannesburg and, in some exceptions, Cape Town";

- b) there is also uncertainty surrounding their future employment in SA as EW states that with the SA economy being smaller than those of Europe and Asia, and any employment subject to BEE requirements, “only BEE candidates will qualify for [these] senior positions.”;
- c) there is no indication whether their present finances would sustain them in SA were they not to secure employment immediately;
- d) WG has no spousal visa and as at date of the application had yet to apply for one. Although it is stated in the supplementary affidavit that that process has been commenced, there is dearth of information regarding precisely what they have done and when.

57] This being so, and given all the uncertainties set out *supra*, I am also not satisfied that the provisions of s296(d) and (e) have been met.

58] Of course, the outcome of this application is based solely on the facts placed before me in the affidavits and annexures before me.

ORDER

The application is dismissed.




B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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 24 January 2025.

For the applicant	:	Ms de Meyer
Instructed by	:	Andrew Martin & Ass. Inc
Matter heard on	:	28 October 2024 and 6 November 2024
Judgment date	:	24 January 2025