



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 104620/2024

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

In the ex parte application of:

JVDM

First Applicant

MVDM

Second Applicant

CB

Third Applicant

SEB

Fourth Applicant

CENTRE FOR CHILD LAW

Amicus Curiae

MEDIA SUMMARY

*Surrogacy – provisions of Chapter 19 of the Children’s Act 38 of 2005 complied with.
The surrogate mother’s first child culminated in a miscarriage at eight weeks and she*

subsequently delivered her own three children each by caesarean section full term and without complication.

The surrogate mother also previously assisted commissioning parents on two occasions: the first resulted in the birth of twins via caesarean section in February 2022; the second resulted in the birth of a girl in October 2023 also via caesarean section. Thus, as at date of the application, the surrogate mother has given birth via caesarean section on five occasions.

Third applicant examined by a reproductive medicine specialist as well as a gynaecologist/obstetrician. Both stated that the third applicant was healthy, that there is no medical reason to indicate that the third applicant cannot safely gestate another pregnancy and that the fact that she has undergone five previous caesarean section deliveries does not itself preclude her from having further caesarean deliveries.

The gynaecologist/obstetrician stated that there is no fixed rule as to the number of caesarean sections that a woman can have.

Chapter 19 of the Children's Act is silent on the maximum number of times that a woman may act as a surrogate. This is an omission in the Children's Act which a court cannot regulate as to do so would be to tread on the separation of powers doctrine.

Even though the court may have reservations, the medical evidence being of the nature that there is no physical impediment to the surrogate successfully carrying to term another child, and that a caesarean section holding little risk to her or the child, there is no reason (in this application) to refuse the relief sought.

ORDER

1. The Surrogate Motherhood Agreement entered into between the parties on 15 August 2024 and attached to the application as Annexure "A", as well as the addendum marked "A1" and dated 1 November 2024, is confirmed.
2. The child/children born of the third applicant, in accordance with the Surrogate Motherhood Agreement entered into between the parties, is/are for all purposes the child/children of the first and second applicants from the moment of the birth of the child/children concerned.
3. The first and second applicants shall have full parental rights and responsibilities in respect of the child/children born of such Surrogate Motherhood Agreement, whether in terms of the common law or the Children's Act 38 of 2005 (the Children's Act).
4. 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.
5. No adoption procedures are required in respect of the child/children to be born of the Surrogate Motherhood Agreement in terms of section 297(1)(a) of the Children's Act, together with the provisions of paragraphs 2 and 3 above.
6. The third and fourth applicants shall have no rights of parenthood or care in respect of the child/children born of the Surrogate Motherhood Agreement, no rights of contact with such child/children and the child/children will have no claim for maintenance or of succession against the third and fourth applicants or any of their relatives save such relatives who are the relatives of the first and second applicants and provided that such relatives have any duties and/or obligations in law in respect of the child/children born.

7. It is directed that the third applicant, in the event of her making a decision to terminate the pregnancy as provided for in the Choice of Termination of Pregnancy Act 92 of 1996, will not be required to refund the first and second applicants any monies paid by them in regard to any medical expenses all monies paid to her in regard to her legitimate expenses. Any provisions of the Surrogate Motherhood Agreement which may conflict with the provisions of the Children's Act shall not be enforceable.
8. The identity of the parties to this application, or any facts which may cause them to be identified, shall not be published.
9. The doctors concerned are authorized to perform the artificial fertilization procedure referred to in section 303 of the Children's Act.
10. No artificial fertilization of the third applicant may take place after the lapse of 18 months from the date of this order.

JUDGMENT

NEUKIRCHER J:

1] This is an application to confirm a Surrogate Motherhood Agreement, and its Addendum (the Agreement), in terms of Chapter 19 of the Children's Act 38 of 2005 (the Act). Section 295 of the Act states:

“295. Confirmation by court

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;
- (b) the commissioning parent or parents—

- (i) are in terms of this Act competent to enter into the agreement;
 - (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and
 - (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;
- (c) the surrogate mother—
- (i) is in terms of this Act competent to enter into the agreement;
 - (ii) is in all respects a suitable person to act as surrogate mother;
 - (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof;
 - (iv) is not using surrogacy as a source of income;
 - (v) has entered into the agreement for altruistic reasons and not for commercial purposes;
 - (vi) has a documented history of at least one pregnancy and viable delivery; and
 - (vii) has a living child of her own;
- (d) the agreement includes adequate provisions for the 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; and
- (e) 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.”

2] The main issue in this matter was whether, given the facts set out in the application, the third applicant (CB) complied with the provisions of section 295(c)(ii) of the Act. The concern was whether, given the fact that she had already had five caesarean sections, a sixth one would put her or the foetus at risk. The other question

raised was whether there should be a limit placed on the number of times a woman could act as a surrogate. To this end, the Centre for Child Law was appointed as *amicus* to make submissions.

3] I am indebted to the *amicus* for her insightful and helpful submissions.

Background

4] The first and second applicants¹ have been together for approximately ten years, were married to each other on 29 January 2022 and this marriage still subsists. They have one child together, a daughter who is almost three years old. During her second pregnancy, the first applicant suffered a ruptured uterus at twenty weeks gestation and their son sadly passed away. JVDM underwent an emergency peripartum hysterectomy leaving one ovary intact.

5] As a result of this, she is unable to gestate a pregnancy and her condition is permanent and irreversible. Dr Trouw² has confirmed that the commissioning parents have five eggs (oocytes) cryopreserved at his fertility clinic, that JVDM's oocytes will be fertilized using MVDM's gametes and that the resultant embryos will be used during the artificial fertilization treatments on CB. However, in the event that these attempts are all unsuccessful, MVDM's gametes will be used to fertilize an anonymous donor's oocytes. He states that in all treatments, MDVM's gametes will be used thus complying with s294 of the Act.³

¹ Also referred to herein as "the commissioning parents" or by their names "JVDM" and "MVDM" respectively

² A reproductive medicine specialist

³ "No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the

6] But this matter is not about whether or not the commissioning parents have complied with the provisions of Chapter 19 of the Act which regulates surrogate motherhood agreements: I have carefully perused the application and I am satisfied that they have complied with the provisions of Chapter 19 and that, insofar as they are concerned, they are emotionally, physically and financially capable of caring for a child. I am, given the factors set out in s295 (d) and (e)⁴ of the Act, satisfied that the Agreement should be confirmed.⁵ I am also satisfied that all the other requirements set out in Chapter 19 have been complied with.

7] My concern lay with the confirmation of the agreement vis-à-vis CB who is the intended surrogate mother.

8] CB was married to SEB on 4 May 2013 – they are still married. She is 33 years old. Her first pregnancy terminated in a miscarriage at eight weeks. She subsequently delivered three children via caesarean section, each at full term and without complication. Her children are four, seven and eight years old respectively. They have both stated to the counselling psychologist (Carryn de Raudeville) that they do not wish to have any more children.

9] CB has acted as a surrogate on two previous occasions:

commissioning parents or, where the commissioning parent is a single person, the gamete of that person.”

⁴ “(d) 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;

(e) 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.”

⁵ *Ex parte WH and Others* 2011 (6) SA 514 (GP)

- a) she gave birth to twins via caesarean section at full term and without complications in February 2022;
- b) she gave birth to a baby girl in October 2023 also at full term and without complications.

10] Thus, were this court to grant this application, this will be her third surrogacy and her sixth caesarean section.

11] Dr Trouw confirms that he has performed an ultrasound scan on CB's uterus in order to determine its viability and her competency to gestate another pregnancy and to undergo a sixth caesarean section delivery. He states that CB's uterus is in all respects completely normal and there is no defect of the interior uterine wall. According to him, the fact that she has undergone five previous caesarean section deliveries does not in itself preclude her from having further caesarean section deliveries provided that her uterus remains healthy and capable of gestating another pregnancy. He lastly opines that the number of previous caesarean sections is always a consideration however, the most relevant consideration is the present clinical picture of her uterus. He states "I am satisfied that her uterus is sound".

12] Dr Janse van Rensburg is a gynaecologist and obstetrician who manages high risk pregnancy cases. He medically screened CB for the purposes of acting as a surrogate mother to the commissioning parents. He confirms that he performed an ultrasound scan on CB's uterus, that she is gynaecologically healthy and that he does not foresee any difficulties with her gestating another pregnancy. He states "[t]here is no medical reason preventing her from gestating another pregnancy without any foreseeable

risks or complications arising to her or the fetus.” He also states “there is no medical or surgical risk factor that I can find which would exclude [CB] from undergoing another surrogate pregnancy.”

13] Dr van Rensburg then states:

- “5. [CB] has undergone five previous cesarean section deliveries, and she is medically suitable to undergo a further cesarean section delivery. Her uterus is sound and there is no wedge scar defect in the lower segment of her uterus which would put a pregnancy at risk. There is no medical or surgical risk factor that I can find which would exclude [CB] from undergoing another surrogate pregnancy.
6. [CB]’s 1st pregnancy with her own child culminated in a miscarriage at eight weeks gestation. Despite her previous miscarriage there is no medical reason to indicate that a miscarriage is likely to occur again.
7. There is no fixed rule as to the number of cesarean section deliveries that a pregnant woman can have as every patient is different, and each case is unique. In this instance, there is no medical reason to indicate that [CB] cannot safely gestate another pregnancy.”
8. The risk factors associated with pregnancy and childbirth ... are a risk for all pregnant women...”

14] It is thus clear that two separate medical experts have found CB to be healthy and capable of carrying another child to term successfully. They have also found that there is no reason she cannot undergo another caesarean section.

15] I cannot find that CB is using the surrogacy as a source of income. She will receive the following from the last day of the month in which the Agreement is confirmed:

- a) out of pocket expenses directly pertaining to the surrogacy process in the maximum amount of R9 000 only for:
 - i) vitamins and scar creams (maximum R1 000);
 - ii) maternity clothing (maximum R1 500);
 - iii) special nutritional requirements (maximum R4 500);
 - iv) cellphone time and data (maximum R500);
 - v) child care/domestic worker (maximum R1 500);
- b) expenses directly related to the artificial fertilization process and pregnancy and birth will be borne by the commissioning parents;⁶
- c) life, dreaded disease and disability insurance cover;⁷
- d) any sick leave or loss of earnings⁸ calculated on a *pro rata* basis taking into account her monthly income of R9 460;
- e) two months maternity leave paid by the commissioning parents less any amount she receives from her employer.

16] I also cannot find on the facts before me that the surrogacy is anything other than altruistic. CB's psychometric evaluation provided the following information:

⁶ Section 301(20)(a): for example doctor's visits, ultra-sound, other medical expenses and the fertilisation process itself

⁷ Section 301(2)(c) Which will be for a maximum cover of R3 million and will endure for three months after the birth of the child(ren) or for one month following termination of the agreement

⁸ Section 301(2)(b)

- a) according to Ms de Rauville, the outcome of the Altruistic Personality Inventory test indicates that CB presents with a healthy capacity for altruism and an above average capacity for empathy;
- b) collateral sources consulted by Ms de Rauville indicate that CB goes out of her way to help people by giving clothes, food and emotional support whenever she sees a need;
- c) CB is a regular blood donor and has donated breast milk on two occasions. She is also a registered organ donor;
- d) her interest in surrogacy was sparked by her maternal aunt who was unable to conceive and she offered to be her surrogate – her aunt then fell pregnant naturally;
- e) she loves being pregnant and she loves the notion of giving the gift of parenting and the related joy to others. She told Ms de Rauville “I’m really good at pregnancy. It’s something that I am so proud of and ...the contribution to people’s lives.”

17] This all being good and well, the question is whether this court should overlook the fact that this would be CB’s sixth caesarean and seventh child – and all this at 33 years of age. It is for this reason that the Centre for Child Law was appointed as *amicus*.

18] The *amicus* has submitted that there is no specific rule or regulation in South Africa guiding or regulating the maximum number of times a woman is allowed to be a surrogate. There is also no rule or regulation in this country that places a limit on the number of cesarean sections any woman (whether acting as a surrogate or not) may

have. Indeed, were it not for the fact that this court exercises oversight of surrogacy applications, were this to be any other woman, this decision would be left to her and her obstetrician or gynaecologist to make. In this case, all the risks associated with another pregnancy have been fully explained to CB who understands them.

19] The only limitation placed on a surrogate mother in terms of the Children's Act is that there should be a documented history of at least one pregnancy and viable delivery, and a surrogate should have a living child of her own.⁹ In an article titled *Surrogate Motherhood Regulation in South Africa: Medical and Ethico-Legal Issues in need of Reform*¹⁰ the following is said:

"Surrogate motherhood by default invokes the constitutional right to make decisions about reproduction. The right to make decisions regarding reproduction is included under the right to bodily and psychological integrity, protected in section 12 of the Constitution¹¹. However, the extent of the right 'to make decisions concerning reproduction' is unclear."

20] I have already stated that there is no general rule or provision limiting the number of times a woman can be a surrogate, as long as the Agreement meets the requirements set out in Chapter 19. In my view, as it stands now, there are limited reasons a court may legitimately refuse to confirm such an agreement vis-à-vis the surrogate:

⁹ Section 295(c)(vi) and 295(c)(vii) of the Children's Act

¹⁰ South African Journal of Bio Ethics and Law Vol 17 No 3; published 1 December 2024; Labuschaigne M, Auret E and N Mabeka

¹¹ "12(2) Everyone has the right to bodily and psychological integrity, which includes the right—
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent."

- a) if the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement not domiciled in South Africa¹² and a court does not waive this requirement¹³;
- b) if the surrogate mother does not have a documented history of at least one pregnancy and viable delivery¹⁴ and have one living child of her own¹⁵;
- c) if the surrogate is not medically suited either physically or emotionally¹⁶;
- d) if there is any suggestion that the surrogacy is entered into for commercial reasons and is not altruistic¹⁷, or that the surrogate is using the surrogacy as a source of income¹⁸; and/or
- e) in the event that the surrogate mother is not competent to enter into the agreement or she does not understand the legal consequences of the agreement and her rights and obligations in terms thereof.¹⁹

21] None of these are relevant *in casu*.

22] The *amicus* has submitted that the failure to place a limitation on the number of times a woman may act as a surrogate is an omission which the legislator must consider. This must be done with the assistance of medical experts. In my view, there is no purposive interpretation of the provisions of s295(c) of the Act that can be successfully undertaken which would place a limitation on the amount of pregnancies

¹² Section 292(1)(d)

¹³ Section 292(2)

¹⁴ Section 295(c)(vi)

¹⁵ Section 295(c)(vii)

¹⁶ Section 295(c)(ii)

¹⁷ Section 295(c)(v)

¹⁸ Section 295(c)(iv)

¹⁹ Section 295(c)(i) and (iii)

a court may/should allow in these circumstances²⁰ - the present legislation simply does not allow it.

23] Furthermore, this court is not a medical expert and is therefore not in a position to override the expert opinions of two specialists who practice in the field of fertility and gynaecology and obstetrics. In this regard too, to impose a limit would be to impose on the separation of powers doctrine. In general, a court may only trespass on the separation of powers doctrine in the clearest of cases and after a careful consideration of the separation of powers harm.²¹ Although the *OUTA* test was contextualized vis-à-vis interim interdicts, seen in the light of the facts of this case and the present legislation, neither the *OUTA* test nor a purposive interpretation of the legislation allow for anything other than the grant of the application in circumstances where the provisions of the Act have been complied with.

24] The *amicus* has provided the court with comparative research undertaken in India, America and South Africa as regards the regulation of the number of times a woman may act as a surrogate. It also appears that the new legislation was promulgated in Vietnam. The answer is: it varies depending on the country or the regulations of the specific fertility clinic²². The comparison revealed the following:

²⁰ Such as was discussed in *Organisation Undoing Tax Abuse v Minister of Transport and Others* 2024 (1) SA 21 (CC)

²¹ *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) (*Outa*)

²² PRSIndia "International Comparison of Surrogacy Laws" (2016) available at <https://prsindia.org/billtrack/prs-products/international-comparison-of-surrogacy-laws-2713>; Brandão P' Garrido N Commercial Surrogacy: An Overview. *Rev. Bras Ginecol Obstet.* 2022 Dec; 44(12): 1141-1158 available at <http://pubmed.ncbi.nlm.nih.gov/28069181/#full-view-affiliation-1>; Labushaigne et al « Surrogacy Motherhood Regulation in South Africa: Medical and Ethico-Legal issues in Need of Reform" *Safr Bioethics Law* 2024; 17(3):2482. Available at file:///C:/Users/u05162948/Downloads/SAJBL+2482.PEDF; *Regulations on agreement on altruistic gestational surrogacy in Vietnam*; Qauang Nam; Available at <https://lawnet.vn/thong-tin-phap-luat/en-dan-su/regulations-on-agreement-on-altruistic-gestational-surrogacy-in-vietnam-117607.html>

	INDIA	AMERICA	SOUTH AFRICA	VIETNAM
Age	25 - 35	21 - 38	No age limit	-
Number of own children	At least one	At least one	At least one	Has given birth once
Number of times one can act as a surrogate	One (in terms of the Surrogacy Regulations) Act 2021	No restriction – but in terms of the recommendations made by the Society for Reproductive Medicine, the number should be limited to six pregnancies	No restriction	Once and the surrogate must be related to the commissioning parents
Consent of partner	No provision	Required	Required	Written consent of spouse required

25] Thus without a limitation such as that imposed by Legislation in India and Vietnam, there is no bar to the application and it is granted.

ORDER

1. The Surrogate Motherhood Agreement entered into between the parties on 15 August 2024 and attached to the application as Annexure "A", as well as the addendum marked "A1" and dated 1 November 2024, is confirmed.
2. The child/children born of the third applicant, in accordance with the Surrogate Motherhood Agreement entered into between the parties, is/are for all purposes the child/children of the first and second applicants from the moment of the birth of the child/children concerned.
3. The first and second applicants shall have full parental rights and responsibilities in respect of the child/children born of such Surrogate Motherhood Agreement, whether in terms of the common law or the Children's Act 38 of 2005 (the Children's Act).
4. 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.
5. No adoption procedures are required in respect of the child/children to be born of the Surrogate Motherhood Agreement in terms of section 297(1)(a) of the Children's Act, together with the provisions of paragraphs 2 and 3 above.
6. The third and fourth applicants shall have no rights of parenthood or care in respect of the child/children born of the Surrogate Motherhood Agreement, no rights of contact with such child/children and the child/children will have no claim for maintenance or of succession against the third and fourth applicants or any of their relatives save such relatives who are the relatives of the first and

second applicants and provided that such relatives have any duties and/or obligations in law in respect of the child/children born.

7. It is directed that the third applicant, in the event of her making a decision to terminate the pregnancy as provided for in the Choice of Termination of Pregnancy Act 92 of 1996, will not be required to refund the first and second applicants any monies paid by them in regard to any medical expenses all monies paid to her in regard to her legitimate expenses. Any provisions of the Surrogate Motherhood Agreement which may conflict with the provisions of the Children's Act shall not be enforceable.
8. The identity of the parties to this application, or any facts which may cause them to be identified, shall not be published.
9. The doctors concerned are authorized to perform the artificial fertilization procedure referred to in section 303 of the Children's Act.
10. No artificial fertilization of the third applicant may take place after the lapse of 18 months from the date of this order.


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 : Adv Gradidge

Instructed by : Robynne Friedman Attorneys
Amicus curiae : Centre for Child Law
Matter heard on : 28 October 2024 and 17 February 2025
Judgment date : 24 February 2025