

SOUTH AFRICA / JUDGMENT

CJD and Others (53101/2017), Ex parte [2017] ZAGPPHC 717; 2018 (3) SA 197 (GP) (17 November 2017)

[2017] ZAGPPHC 717

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay

CASE / FILE NUMBER

53101/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

number: 53101/2017

Reportable

Of

interest to other judges

Revised.

17/11/2017

In

the matter between:

CJD FIRST
APPLICANT
HN SECOND
APPLICANT
GLJ THIRD
APPLICANT
ROM FOURTH
APPLICANT
AND
CENTRE
FOR CHILD CARE (AMICUS
CURIAE) AMICUS
CURIAE

JUDGMENT

TOLMAY, J:

- [1] This is an ex parte application brought for the confirmation of a Surrogate Motherhood Agreement (the surrogacy agreement) in terms of chapter 19 of the Children's Act 38 of 2005 (the Act).
- [2] After perusal of the papers certain questions pertaining to the best interests of the child to be born from the surrogacy agreement arose as CJD and HN do not live together and HN does not want his sexual orientation to become public. The Applicants filed a supplementary affidavit and report by the psychologist. After hearing argument the Court requested both the

Applicant and the Child Law Centre (CLL) as amicus curiae to file heads of argument. The Court is indebted for their valuable assistance. After the CLL's heads of argument was received counsel for Applicants filed supplementary heads. I considered argument by Applicant and the heads of argument before I came to a conclusion.

- [3] CJD and HN approached the Court to confirm the surrogacy agreement they entered into with the Third and Fourth Applicants, who are, although not married to each other in a relationship, live together and who have twin boys. Only the gametes of CJD will be used during the fertilisation process, as well as the gametes of an unknown egg donor. A perusal of the main application did not reveal any controversial issues, but a perusal of the report filed by the psychologist raised the issues already referred to, which in my view needed clarification and consideration before any confirmation of the agreement could be considered.
- [4] The questions that need to be considered by the Court is how the fact that the parties do not live together and the fact that HN does not want his sexual orientation to be made public will impact on the best interests of the unborn child. It is of no importance at all that CJD and HN are homosexual, the fact however is that the specific situation may impact on the interests of the child to be born.

THE FACTUAL BACKGROUND

- [5] According to the report CJD and HN have been in a loving and stable relationship for 10 years. Both of them are financially independent. They however do not live together and this apparently works well for them as HN "needs more space" and goes away on short breaks alone. They have been discussing parenthood for the last four years. CJD always dreamt about becoming a parent, but HN was more hesitant. HN reported to the psychologist that "he was not really given a choice about becoming a parent" but it must be noted that he also stated that he is now totally on board. CJD's mother is going to move in with him to assist with the care of the child to be born.

- [6] The report states that HN is more private and introverted and although he does not hide the fact that he is homosexual, he says he needs to be discreet about his sexual orientation, as he is concerned about the impact that becoming a parent in a homosexual relationship will have on his practice as a medical specialist. He is concerned about the conservative views of both referring medical practitioners and patients. He also reported that their age difference, there is a difference of 18 years, also generates reaction from people. HN states that in the past rumours of his sexual orientation impacted negatively on his practice. Despite the remark that he is now totally "on board" it is clear from the aforesaid that he has reservations about the impact of having a child with his partner may have on him and his career.
- [7] After the Court raised the concerns alluded to, a supplementary report was filed by Ms Erasmus, the clinical psychologist. In the supplementary report HN and CJD attempted to address the Court's concerns by stating that they will be actively and responsibly involved in all the aspects of the child's upbringing. How this is going to be achieved, in the light of HN's fears, is however not clear.
- [8] In the supplementary report, Ms Erasmus stated that CJD and HN, despite living apart, spend most of their time together. She continues to reiterate that this arrangement works well for both parties and continues to reiterate their love, respect and mutual commitment to each other. According to her they are now considering moving in together. I must say that this does not convince me, as it seems to be a thinly concealed attempt to convince the Court to confirm the surrogacy agreement.
- [9] After the filing of the report it would seem that the parties still did not grasp that the real concern of the Court, is that the parties do not share a common household and one of the parties deems it necessary to be "discreet" about his sexual orientation. This by necessity means that he will have to be discreet about the fact that he is the parent of a child born from a surrogacy process to him and his same-sex partner. Although one may be discreet about your private life it is difficult to comprehend how one could be discreet about being a parent in a same-sex relationship. What is glaringly absent from the reports filed by the psychologist and the affidavits filed in support of the application is how all of this will impact on the best interests of the child. The supplementary affidavits and report do not deal with what the effect on the child will be where one of the parents need to hide the very essence of who he is. A lot of scenarios come to mind. I can see a little toddler excitedly running towards his father in a public place, shouting out "daddy". Would his father then pretend not to be the parent? How would that impact on the child? What will they tell the kindergarten and later teachers about who the parents are of the child? Who will attend parents' day at school? Most importantly how will all of this impact on a child? No affidavit was filed by CJD or HN to explain how they intend dealing with their roles as parents under these circumstances.

[10] I do not question CJD and HN's love for each other or the stability of their relationship but as Upper Guardian of children the Court has a duty to consider whether the aforementioned concerns are not going to impact on the best interests of the child to be born. No one can judge a gay person, who as a result of persisting public prejudice, is reluctant to reveal his/her sexual orientation. It is a sad indictment against society that HN is placed in this position, but the Court must always place the rights of children and their interests first, even in circumstances where the rights of the prospective parents may be compromised[1].

[11] In the affidavits no mention was made of the living arrangements of the parties, the initial attitude of HN pertaining to his reservations about having a child and his reluctance to make his sexual orientation public. The psychologist dealt with these aspects in her report, in the absence of these revelations the Court would have been unaware of circumstances, which are germane to the decision to be made. It goes without saying that all aspects that might be relevant to the question of whether a surrogacy agreement should be confirmed, should be set out in the affidavit.

[12] This Court emphasised in the past the need for Applicants to act with the utmost good faith in surrogacy applications[2]. The interests of children are at stake and it is essential that Applicants play open cards with the Court. All relevant information

must be set out in the affidavit itself and properly dealt with by the parties under oath. The fact that issues of relevance are set out in reports attached to the application is not sufficient at all. It goes without saying that the best interests of the child to be born from a surrogacy agreement must be considered by the Court, in order for a Court to make an informed decision on whether the surrogacy agreement should be confirmed.

[13] It is the duty of the Court to protect the interests of children. In *Ex parte WH*[3] the position and vulnerability of children was set out as follows:

"Children occupy a special place in the social, cultural and legal arrangements of most societies. That this is so is understandable in recognition of both the vulnerability of children and the almost instinctive need to advance their wellbeing and ensure their protection, as well as the compelling human and social imperative to pursue and further their best interests as they are set out in the path of developing their full potential and taking their rightful place as full and responsible citizens of society. The preamble to the United Nations convention on the Rights of the Child provides that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'".

[14] The aforesaid reiterates not only the court's obligation to protect and advance the best interests of children, but the obligation of all role players to ensure that all relevant

information that may impact on a Court's discretion to, either grant or dismiss the application, is set out in the affidavit.

[15] As a result of what occurred in this application I think it prudent that parties in surrogacy agreements should in future set the following out in the founding affidavit, in order to prevent a re-occurrence of what transpired in this application:

- (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 state of affairs will not impact on the interests of the child and them functioning as a family unit.

This information will at least assist the Court in exercising its discretion properly.

[16] CLC dealt extensively in their heads of argument with the question whether HN will be entitled to obtain parental rights and

obligations, seeing that he will not be genetically linked to the child. Extensive reference was made to the development of the law in this regard. I am however of the view that this is not the real issue in this matter. But as far as this may be require consideration it would seem to me that section 293 of the Children's Act provides for the eventuality that HN may be granted parental rights and obligations

[17] Section 293(1) states as follows:

"Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement."

[18] The aforementioned provisions clearly envision a situation where a commissioning parent can be a single person, or a single person who is in permanent life-partnership, thus not legally married, but in a committed relationship. CLC in their heads of argument pointed out that the view has been expressed that whatever the qualifying requirements of a 'permanent relationship' may be, it is reasonable to assume that the court will give a wide rather than a narrow interpretation to the term in order to involve and commit all persons to the agreement that might possible claim

parental rights, contrary to the intention of the parties as reflected in the surrogacy agreement[4]. In my view it is correct that a wide interpretation should be preferred, but however wide the interpretation of a permanent relationship may be, a Court will still have to determine whether the way that the permanent relationship is structured will be supportive of raising a family.

[19] A reading of section 293 appears to favour an interpretation that because a partner in a permanent relationship, not only gives written consent to the surrogate motherhood agreement, but also becomes a party to the application for the confirmation of the agreement, he or she acquires parental responsibilities and rights when the order of confirmation is made. This interpretation is also in line with section 22 of the Act, which opened the door for "any person having an interest in the care, well-being and development

of the child" to obtain parental rights and obligations. Someone who co-signs the surrogacy agreement may be such a person.

[20] In terms of section 294 of the Children's Act 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 commissioning parents, or where the commissioning parent is a single person, the gamete of that person[5].

[21] This then bring us to the two issues that were raised by the Court. As stated in this case the fact that the parties do not live together. Although one is alive to the fact that there are many possible permutations of relationships and that many relationships, in any event, do not withstand the test of time, it is difficult to comprehend a notion where a child is conceived by way of a process of surrogacy on the basis that from the start its parents won't be living together as a family unit or sharing a common household. A comparison with adoption procedures might be appropriate under the circumstances, although it is accepted that the process is quite different, the requirements for allowing people to adopt children may be relevant. The legislation pertaining to adoption might be of assistance as it is indicative of the Legislature's approach when considering the creation of family units other than by natural means. Section 231 of the Act reads as follows:

"(1) A child may be adopted -

(a) jointly by -

(i) a husband and wife;

(ii) partners in a permanent domestic life-partnership; or

(iii) other persons sharing a common household and forming a permanent family unit;

(b) by a widower, widow, divorced or unmarried person;

(c) by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child;

(d) by the biological father of a child born out of wedlock; or

(e) by the foster parent of the child.

(2) ...

[22] Section 231 (1) is clearly divided into categories and a child may only be jointly adopted by three categories of persons, mentioned in sub-section

(1) (a) (i) - (iii). From what is stated in the section, it is clear that the intention of the Legislature was that for persons to jointly adopt a child, there must be a permanent household or common household run by such persons. A husband and wife[6] share a household and share the household rights and liabilities, similarly so, do partners in a permanent domestic

life-partnership.[7] The subsection with the clearest intent is subsection (1)(a)(iii), stating the other persons may adopt a child jointly , if they share a common household and form a permanent family unit. From the above the importance of a family unit and common household is illustrated. I am of the view that the existence of a family unit and common household should also be regarded as an important aspect in surrogacy

applications. This is not to say that I exclude the possibility that in some cases there might be good reason to allow for the deviation of the norm, but then certainly a case must be made out for it.

[23] In *Minister of Home Affairs and Another v Fourie and Another (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs and Others*[8]:

"[51]...

The pertinent question was the impact on same-sex life partners of being excluded from the relevant provisions. The judgment pointed out that under the South African common law a marriage creates a physical, moral and spiritual community of life, a consortium omnis vitae described as 'an abstraction comprising the totality of a number of rights, duties and advantages accruing to spouses of a marriage ... These embrace intangibles such as loyalty and sympathetic case and affection, concern.. as well as the more material needs of life, such as physical care, financial support, the rendering of services in the running of the common household or in a support- generating business...'

[24] The aforesaid illustrates in my view the importance of the desirability of sharing a community of life for a family. In this

matter the parties did not explain how they will operate as a family unit despite living apart. In the absence of such evidence I am not convinced that the fact that they do not live together could be disregarded as irrelevant.

[25] Despite being given the opportunity to file supplementary reports and affidavits the Applicants did not address the question of the best interests of the child. As a result I am not convinced that the surrogacy motherhood agreement should be confirmed. Counsel for CJD and HN suggested that I could confirm the agreement as far as CJD is concerned. I have problems with this approach, firstly the agreement was signed by both CJD and HN and the other applicants. A Court can surely not vary an agreement entered into between parties. I am also of the view that additional information may be required to deal specifically with CJD acting as a single parent. If HN in future finds it less daunting to be open about his sexual orientation he can still approach the Court and may obtain parental rights and responsibilities, if he makes out a case for it.

[26] It is clear that in our constitutional dispensation there is acknowledgment and respect for the many varied permutations of what a family would constitute, but in my view the circumstances of this case do not allow for a confirmation of the agreement for all the reasons I have already alluded to.

[27] Consequently I make the following order:

27.1 The application is dismissed.

R G TOLMAY

JUDGE OF THE HIGH COURT

DATE OF APPLICATION:

14 AUGUST 2017

DATE OF JUDGMENT:

17 NOVEMBER 2017

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ADVOCATE FOR APPLICANT:

ADV L A RETIEF

FOR THE AMICUS CURIAE:

CENTRE FOR CHILD LAW

ADVOCATE FOR amicus curiae:

ADV OZAH

[1] V v V 1998(4) SA 169, p 198 8-F (C); Sec 28 and 36 of the Constitution of the Republic of South-Africa 1996

[2] Ex Parte HPP & Others, Ex Parte DME & Others 2017 2 All SA 171 (GP) par 9 p 174

[3] 2011 (6) SA 514 on 517 par 4

[4] Louw A "Surrogate Motherhood" in Davel T and Skelton AM (ed) "Commentary on the Children's Act" (2007) at 19-9 Nicholson C and Bauling A "Surrogate motherhood agreements and their confirmation: A new challenge for practitioners?"

(2013) De Jure 510 at 521

[5] In *AB and Another v Minister of Social Development (Centre for Child Law amicus curiae)*⁵ declared that the genetic link requirement as envisaged by sec 294 to be constitutional

[6] (1)(a)(i).

[7] (1)(a)(ii).

[8]

[2005] ZACC 19; 2006 (1) SA 524 (CC).

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