

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 5329/2018

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

DATE

In the matter between:

K. A .F

1<sup>st</sup> Applicant

C. F

2<sup>nd</sup> Applicant

N. D

3<sup>rd</sup> Applicant

J. D

4<sup>TH</sup> Applicant

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**SUMMARY J U D G M E N T**

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**SIWENDU J**

- [1] In an application for the confirmation of a surrogacy motherhood agreement in terms of section 292 (1) (e) and section 295 of the Children Act 38 of 2005, (the

Act), the court determined the objective criteria for assessing the suitability of a prospective surrogate mother, in terms of section 295 (c) (ii) of the Children's Act 38 of 2005. The application was brought afresh following the dismissal of the first application on 29 June 2017.

- [2] The peculiar facts are that ND was 21 years old. She had a child while she was 16 years old. The court was dissatisfied with the impartiality of the report by the psychologist, and the conclusions reached about ND's suitability as a surrogate. It held that the judgment about ND's suitability and psychological well-being was not supported by the disclosed facts. There had been no objective analysis of ND's psychological wellbeing, and it was probable ND would continue to have a limited perspective of life, and, may not appreciate the consequences of her decision. The court was also dissatisfied with the extent of the financial disclosure made and found that doubt had been cast on the bona fides of the application.
- [3] The court noted that a court seized with the application must have regard of the constellation of the rights under Sections 10,12 (2) and 28 of the Constitution. It must as far as possible on the facts, strike a balance of all the rights and interest of the commissioning parents, the prospective surrogate mother and the child to be born. It observed that primary regulatory intent against the prohibition of a commercial benefit in section 295 (c) (iv) read with 301 (2) of the Act is not one sided, it is aimed at a prevention of the potential exploitation of all the parties to the agreement, namely the commissioning parents as well as the potential exploitation and commodification of would be surrogates. Of paramount are the rights and interest of the child to be born.
- [4] The prohibition of a commercial benefit does not mean the prospective surrogate mother must be well- off or that she may not derive advantage at all. In the court's view, it means she must have a reliable source of income and live within her means. The commercial benefit derived from the agreement should not place her beyond her ordinary standard of living.
- [5] The guidelines for the psychological reports and assessment in *Ex Parte WH (29936/11) [2011] ZAGPPHC 185: In re Confirmation of Three Surrogate*

*motherhood Agreements* entail that the mandated psychological assessment be considered in the light of sections 293 (1), 295 (c) and (e), 297 (1) and 301 (1). The primary aim is to safe guard the:

- [5.1] health of the child to be born;
  - [5.2] fulfilment of the surrogate motherhood agreement, and
  - [5.3] prevent commercial exploitation of all the parties in equal measure.
- [6] The issues to be assessed are inter- dependent. They involve both a qualitative and quantitative assessment, which are to be judged in their peculiar circumstances of each applicant and the facts. The personal clinical assessment must consider and report on whether the surrogate mother is:
- [6.1] Physically and mentally fit to carry the gamete and the child to be born to full term.
  - [6.2] Sound of mind, enjoys good mental health and/ or suffers from any personality disorder, severe psychiatric illness or history of self-harming behaviors.
  - [6.3] A history of substance abuse including drugs and/ or alcohol and addiction, likely to impair mental health and impose risks to the child to be born.
  - [6.4] There has been agreement on selective reduction and the risks thereof.
- [7] The emotional and welfare needs, as well as available resources of the prospective surrogate must be considered in the light of sections 297(1) (a) and section 297 (1) (c). An assessment must report on the:
- [7.1] Psychosocial support structure of the prospective surrogate.
  - [7.2] The influence of the spouse, partner, relatives or extended family on the decision.
  - [7.3] The understanding by the prospective surrogate and her support structure that the child to be born will belong to the commissioning parents.
  - [7.4] How handing over the child to be born will affect her.

[7.5] Whether the Psycho-social support structure will result in the termination of the agreement after fertilization and / or its breach.

Having regard to the fresh information provided, the court confirmed the agreement as the applicant met the criteria in section 295