



Surrogacy in South Africa - Does genetic really matter?

The decision to have a child of one's own has for thousands of years formed a central part of the lives of human beings. The reality is that infertility is on the rise, and for some women the possibility of carrying their own child is very little. Fortunately, we live in a society where the effects of infertility can be ameliorated by way of assistive reproductive technologies, such as surrogacy. Surrogacy can be described as where a third party carries a fetus in her womb for the commissioning parents (or parent), and this is done for altruistic reasons.

Chapter 19 of the Children's Act 38 of 2015 ("the Act") governs the law regarding surrogacy in South Africa and sets out certain requirements that has to be met in order to make use of surrogacy in South Africa. A written surrogacy agreement must be concluded by the commissioning parent/parents and the surrogate, and such agreement must be confirmed by the High Court. Furthermore, as per section 294 of the Act there must be a genetic link between the commissioning

parent/parents and the gamete/gametes used to impregnate the surrogate. If this requirement cannot be complied with, a court will not confirm the surrogate agreement.

Due to the abovementioned genetic link requirement the commissioning parent/parents may not use double donor gametes. If a genetic link cannot be established, surrogacy cannot be used and alternative forms of establishing a family, such as adoption, must be considered. In stark contrast to the genetic link requirement there is something called in vitro fertilization ("IVF"), another common infertility treatment. IVF can be described as a medical procedure whereby an egg is fertilized by a sperm in a test tube or elsewhere outside the body. Interestingly enough, with IVF there is no genetic link requirement, and consequently double donor gametes can be used. It is thus clear that there are assistive reproductive technologies available, but the regulation thereof differs widely. The question therefore is whether the differentiation between surrogacy and IVF can be justified.

In the case of *AB and Another v Minister of Social Development as Amicus Curiae: Centre for Child Law* 2016 (2) SA 27 (GP) the Applicants challenged the constitutionality of the genetic link requirement. The facts of the case are briefly that the first applicant, AB, was medically unable to fall pregnant using her own gametes, or with the assistance of donated gametes. AB underwent 18 unsuccessful IVF cycles. The strain on her marriage was so severe that AB and her husband divorced. After the divorce AB considered surrogacy as an alternative option to establish a family. However, upon seeking legal advice she was informed that she cannot enter into a surrogate agreement unless she, as a single woman, donated one of her own gametes. The High Court ordered that section 294 of the Act is invalid due to it being inconsistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution").

On 29 November 2016, in the case of *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) the Constitutional Court handed down judgment in an application for confirmation of the abovementioned High Court order. The primary challenge to section 294 was that it infringed upon AB's right to equality. One of the many arguments put forward by the Applicants are that section 294 lacked a rational connection in terms of section 9(1) of the Constitution. The majority of the court found that section 294 is not irrational.

The majority confirmed that there is differentiation between the provisions regulating IVF and surrogacy due to the fact that the use of double donor gametes in surrogacy is prohibited, yet allowed in the IVF process. This is indeed correct as IVF is governed by the Regulations Relating to Artificial Fertilisation of Persons. These regulations are enacted in terms of the National Health Act. On the other hand, surrogacy is governed by Chapter 19 of the Children's Act. The Constitutional Court also found that the objectives of the Children's Act differs greatly from that of the National Health Act.

Furthermore, the Constitutional Court held that the requirement of donor gamete(s) within the context of surrogacy indeed serves a rational purpose. The justification for this finding was that the genetic link requirement creates a bond between the child and the commissioning parent/parents. The creation of a bond is designed to protect the best interests of the unborn child so that the child has a genetic link with its parent/parents. It was furthermore also held that an IVF arrangement cannot be compared with the use of donor gamete within the surrogacy context. This is due to the fact that the procedures in respect of IVF and surrogacy differ substantially.

The majority of the Constitutional Court did not confirm the High Court's declaration of the constitutional invalidity of section 294. Consequently, the

genetic link requirement is still applicable. From the abovementioned discussion it is clear that there is a differentiation between surrogacy and IVF, but that such differentiation did not result in declaring section 294 of the Children's Act unconstitutional.

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