The Ratification of Inadequate Surrogate Motherhood Agreements and the Best Interest of the Child

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Abstract

South Africa has developed domestic legislation governing all surrogacy matters within the country. These provisions are contained in Chapter 19 of the *Children's Act* 38 of 2005.

In *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP), the commissioning parents did not adhere to the requirement provided by Chapter 19. The parties to the (initially informal) surrogacy agreement authorised the artificial fertilisation of the surrogate mother prior to the confirmation of the surrogate motherhood agreement by the court. In considering the best interest of the resultant child, the High Court decided to ratify the inadequate surrogate motherhood agreement.

This discussion aims to establish whether the court's judgement in *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* was in accordance with the provisions of current legislation and case law. It furthermore aims to answer two primary questions: firstly, whether adjudicators should make use of the best interest of the child when ratifying inadequate surrogate motherhood agreements; and secondly, in what manner the court should go about implementing the best interest of the child when validating inadequate surrogate motherhood agreements.

It is submitted that courts should refrain from applying the best interest of the child as a constitutional right in inadequate surrogacy matters where the child is yet to be born alive, in accordance with the Digesta Texts. Parties to the invalid agreement should rather be instructed to make use of a section 22 parental responsibilities and rights agreement, a section 28 termination agreement, or adoption as provided for by chapter 15 of the *Children's Act*.

Keywords

Surrogate motherhood agreement; best interest of the child; child; confirmation; ratification.

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1 Introduction

The provisions contained in chapter 19 of the *Children's Act* 38 of 2005 (the *Children's Act*)[1] address the elements pertinent to formal surrogate motherhood agreements.[2] Parties who wish to exercise their reproductive rights by making use of surrogacy are required to enter into a written agreement that results in the complete transfer of parental responsibilities and rights from the surrogate mother to the commissioning parents once the child is born.[3] Contracting parties are furthermore instructed to approach the High Court for the confirmation of a surrogacy agreement before the artificial insemination of the surrogate mother is allowed to take place.[4]

Concern arises, however, when commissioning parents do not adhere to the requirements prescribed in chapter 19. This occurred in *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) (*Ex parte MS*). Notwithstanding the non-compliance, the court, having considered the best interest of the as yet unborn child, ratified the surrogacy agreement *ex post facto*.[5]

The High Court's decision in *Ex parte MS* has been criticised for having set a precedent that could allow for future misuse of the principle of the best

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1 Kindly note that any and all further use of "chapter 19" will be in relation to chapter 19 of the *Children's Act* 38 of 2005 (hereafter the *Children's Act*).

2 Informal surrogacy occurs when private agreements are made between family members or people who know each other. *Ex parte Application WH* 2011 4 SA 630 (GNP) para 2. Formal surrogacy, on the other hand, occurs when parties enter into a surrogacy agreement in terms of chapter 19 of the *Children's Act*.

3 Sections 292 and 297(1) of the *Children's Act*. Parental responsibilities and rights refer to those provided by s 18 of the *Children's Act*. A surrogate mother is the woman who carries the child to term and gives birth to the child (s 297 of the *Children's Act*). While the commissioning parent is the individual who makes use of surrogacy as a way of exercising her reproductive right, given their medically permanent and irreversible inability to carry a child to term (s 295 of the *Children's Act*). The term "born" refers to children who are born alive in terms of the requirements provided by the Digesta Texts.

4 Section 296(1)(a) of the *Children's Act.*

5 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 SA 312 (GNP) (hereafter *Ex parte MS*) para 9. A brief exposition regarding the nature of the parties' non-compliance is conducted in part 2 of this contribution.

interest of the child.[6] Commissioning parents who circumvent the protocol provided in chapter 19 would be able to do so in matters where it could be demonstrated that it serves the best interest of the child. Such circumvention would, however, render relevant provisions in chapter 19 moot. This possibility alludes to a need to reconsider the manner in which the High Court implements the principle of the best interest of the child when ratifying inadequate surrogacy agreements.[7]

This article reflects on the manner in which the best interest of the child is interpreted and applied in inadequate surrogate motherhood agreements.[8] The court's decision-making process in *Ex parte MS* will be analysed as a point of departure. Then a brief comparative discussion of the current practice of formal surrogacy in the United Kingdom will be conducted. Not only has the United Kingdom been regulating surrogacy since 1985, but it has also recorded an estimated number of 149 children born to surrogates per year.[9] Legislation in the United Kingdom furthermore provides for the *ex post facto* adoption of children born from surrogate motherhood agreements by means of a parental order similar to the agreement provided in section 22 of the *Children's Act*. This contribution will illustrate how and why sections 22, 28 and chapter 15 of the *Children's Act* can serve as viable alternatives for commissioning parents who did not meet the requirements provided in chapter 19.

2 *Ex parte MS. In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP)

2.1 Introduction

In *Ex parte MS* the High Court was approached by three applicants. The first and second applicants were the commissioning parents and the third the surrogate mother.[10] The *ex parte* application brought before Keightley J

6 Louw 2014 *De Jure* 116.

7 An agreement where the parties did not adhere to all the requirements provided in chapter 19 of the *Children's Act*. Kindly note that the legislative guidance regarding the court's use of the principle of the best interest of the child (ie whether or not the principle is of paramount or primary consideration) will be discussed in part 3.1 of this contribution.

8 The term "inadequate" throughout this discussion refers to the commissioning parents' administrative and material non-compliance with chapter 19 of the *Children's Act* in surrogacy matters.

9 Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 19, 38.

10 *Ex parte MS* para 1. The legal provisions according to which the application was brought before the court, being s 292 read together with s 295 of the *Children's Act*.

for the confirmation of a surrogate motherhood agreement in accordance with section 292(1)(e) of the *Children's Act* was heard in chambers.[11]

Two legal questions arose in *Ex parte MS*. The first pertained to the competency and discretion of the court to confirm surrogate motherhood agreements that do not meet the requirements contained in chapter 19.[12] The second pertained to the proper interpretation of chapter 19 and the protocol that should be followed in future cases that present similar facts.[13] The court essentially aimed to clarify what the requirements were for parties who entered into oral surrogate motherhood agreements with the further intent to approach the High Court for the confirmation of those agreements.[14]

Having received the requested written submissions from Ms Retief, the applicants' counsel, and after hearing the oral submissions, Keightley J granted an order on 1 November 2013 which resulted in the confirmation of the surrogate motherhood agreement entered into by the applicants after the artificial fertilisation of the surrogate mother had taken place.[15]

In order to understand fully the adjudication process of the High Court it is necessary to analytically consider the facts in *Ex parte MS*.

2.2 Facts of the case

The commissioning parents in *Ex parte MS* were both South African citizens, residing in Gauteng, and married in 1991.[16] Attempts to conceive a child of their own were unsuccessful due to the commissioning mother's chronic medical diagnosis.[17] Upon receiving this diagnosis the commissioning parents sought the advice of numerous fertility specialists and underwent medical treatment and procedures, including *in vitro* fertilisation.[18] After two miscarriages the commissioning parents were

11 *Ex parte MS* para 2.
12 *Ex parte MS* para 10.1.
13 *Ex parte MS* para 10.2.
14 *Ex parte MS* para 10.2.
15 *Ex parte MS* para 2. Kindly note that by confirming the surrogate motherhood agreement the court also nullified the parties' violation of ss 303 and 305 of the *Children's Act*. Therefore, none of the individuals who were party to the unlawful artificial fertilisation of the surrogate mother were held accountable.
16 *Ex parte MS* para 11.
17 *Ex parte MS* para 11.
18 *Ex parte MS* para 11.

informed by medical experts that they could realise their desire to have a child of their own only by making use of an egg donor and a surrogate.[19]

In 2010 the commissioning parents entered into their first surrogate motherhood agreement, which was confirmed by the court on 8 September 2010. The surrogate mother decided, however, not to honour the agreement, which resulted in the abandonment of the fertilisation process.[20] The commissioning parents subsequently entered into a second surrogate motherhood agreement with a different surrogate.[21] The court confirmed this second surrogate motherhood agreement on 8 June 2011 and the surrogate mother attempted artificial fertilisation twice to no avail.[22]

Having endured both emotional and financial loss the commissioning parents hesitated about entering into a third surrogate motherhood agreement.[23] They decided to go ahead, however, after they had been approached by a surrogate who was well acquainted with the second surrogate mother and familiar with the earlier difficulties.[24] Given their past disappointments, the commissioning parents decided to refrain from contacting their attorney until they were certain of the surrogate mother's commitment and successful pregnancy.[25] The parties thereafter entered into a verbal surrogate motherhood agreement during September 2012 and sought the assistance of their attorney only after the successful artificial insemination and stabilisation of the surrogate.[26] Upon critically analysing the facts that were placed before the court, it can be argued that the parties' non-compliance was both administrative and material in nature. Regarding the former (administrative) non-compliance, the parties failed to adhere to the provisions in chapter 19 that regulate the confirmation of surrogate motherhood agreements.[27] Their non-compliance was also material in nature because it resulted in the artificial fertilisation of the surrogate mother.[28]

19 *Ex parte MS* para 12.
20 *Ex parte MS* para 13.
21 *Ex parte MS* para 13.
22 *Ex parte MS* para 13.
23 *Ex parte MS* para 14.
24 *Ex parte MS* para 14.
25 *Ex parte MS* para 15.
26 *Ex parte MS* para 15.
27 Section 296(1)(a) of the *Children's Act*.
28 Section 303 of the *Children's Act*. The reader is reminded of the fact that the parties had followed the correct protocol during their first two attempts at concluding a valid surrogate motherhood agreement. This argument will be extrapolated in part 2.4 of this contribution.

According to the High Court the commissioning parents were not legal experts and, being lay people, did not fully appreciate or anticipate the consequences of their actions.[29] This justified their commencement with the artificial fertilisation of the surrogate prior to the legal confirmation of the surrogate motherhood agreement by the High Court.[30] The parties obtained legal advice upon discovering that their failure to adhere to the requirements set out in chapter 19 would influence the status of the unborn child and, furthermore, burden the surrogate mother with the obligation of supporting her resultant child.[31] They therefor applied for the confirmation of their surrogate motherhood agreement in order to rectify their respective legal positions. At this point the surrogate mother was already 33 weeks pregnant.[32] She confirmed to the court that she had entered into the agreement with the commissioning parents for altruistic reasons and had no intention of keeping the child she was carrying on behalf of the commissioning parents as she had four children of her own.[33]

During its decision-making process the High Court made specific reference to relevant sections in chapter 19.[34]

2.3 Ratio decidendi

The High Court correctly identified the artificial fertilisation of the surrogate mother prior to the confirmation of a surrogate motherhood agreement as unlawful in accordance with section 296(1)(a) of the *Children's Act*.[35] It made reference to the common law principle which holds that any agreement to commit an unlawful act be deemed unenforceable.[36] This includes acts that are "unlawful in terms of a statute".[37] According to the High Court any indirect or direct act that contributes to or encourages another to commit an unlawful act may also be regarded as being unenforceable, depending on the existence of a sufficiently close connection.[38]

29 *Ex parte MS* para 16.
30 *Ex parte MS* para 16.
31 *Ex parte MS* para 16.
32 *Ex parte MS* para 16.
33 *Ex parte MS* para 16.
34 *Ex parte MS* paras 19-23.
35 *Ex parte MS* para 32. See furthermore ss 303(1), 305(1), 305(1)(b), 305(6) and 305(7) of the *Children's Act*.
36 *Ex parte MS* para 31.
37 *Ex parte MS* para 31.
38 *Ex parte MS* para 31.

The court maintained, however, that the common law principle need not be applied in a determinative manner with regard to the issues arising in *Ex parte MS*.[39] In this instance the court referred to *Ex parte WH,*[40] where the adjudicator emphasised the unique nature of surrogate motherhood agreements and their ultimate purpose to secure the best interests of the child to be born.[41] Keightley J also emphasised that the framework of a surrogate motherhood agreement is multifaceted and inter-relational.[42] Thus it requires careful consideration and weighing up of the rights and interests of all the parties involved.

In addition, the High Court made reference to the provisions contained in section 39(2) of the *Constitution*.[43] This provision encourages courts to adopt the most reasonably plausible interpretation.[44] In attempting to reach a reasonably plausible interpretation that still complies with the *Constitution*, a court must read legislation in a purposeful and contextual manner.[45] Such a reading may necessitate a more generous statutory interpretation in some instances.[46]

Keightley J furthermore maintained that the provisions contained in chapter 19 of the *Children's Act* do not explicitly make provision for instances where the commissioning parents enter into a verbal surrogate motherhood agreement which results in the artificial fertilisation and eventual pregnancy of the surrogate mother *before* approaching the court for the confirmation of a legally concluded (written and signed) surrogate motherhood agreement.[47]

The court in *Ex parte MS* made its three-pronged argument regarding the interpretation and application of chapter 19 in relation to its competency to confirm inadequate surrogacy agreements against this backdrop.

The first argument made by the court is based on the ambiguity of chapter 19 with respect to the authority attributed to the High Court when confirming

39 *Ex parte MS* para 34.
40 *Ex parte Application WH* 2011 4 SA 630 (GNP).
41 *Ex parte MS* para 34.
42 *Ex parte MS* para 7.
43 Section 39(2) of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) places an obligation on courts to interpret legislation in a manner that would promote the object, spirit and purport of the Bill of Rights.
44 Currie and De Waal *Bill of Rights Handbook* 61.
45 *Ex parte MS* para 36.
46 *Ex parte MS* para 36.
47 *Ex parte MS* paras 4 and 5.

a surrogate motherhood agreement.[48] It emphasised what it considered to be contradictory wording between the provisions made in section 295(b)(ii) and section 295(d) and (e) of chapter 19.[49] The wording in section 295(b)(ii) requires the court to be satisfied that the commissioning parents are on all counts suitable to accept "the parenthood of the *child that is to be conceived*".[50] At the same time section 295(d) and (e) requires the court to be satisfied that due provision has been made towards the future care, welfare, interests and upbringing of the *child to be born*.[51]

The court therefore maintained that the category provided in section 295(d) and (e) seems broad enough to encompass not only a child not yet conceived but also an unborn child who had already been conceived but was yet to be born at the time when confirmation of the surrogate motherhood agreement was sought.[52] The court therefore considered the provisions contained in section 295 to include matters where the child was *yet* to be conceived when the surrogate motherhood agreement was presented to the court for confirmation as well as those where the child had *already* been conceived but was yet to be born.[53]

In addition the court maintained that sections 292 and 295 do not require the High Court to be satisfied that the surrogate mother has not been artificially fertilised and is accordingly not pregnant at the time the court is approached for the confirmation of a surrogate motherhood agreement.[54] It was therefore held by the court that these provisions did not preclude it from confirming verbal surrogate motherhood agreements after the surrogate had been artificially fertilised.[55]

Finally, when considering the prohibitive legislation, the High Court held that the legislation primarily prohibited artificial fertilisation of the surrogate mother prior to the confirmation of the surrogate motherhood agreement.[56] It also maintained, however, that sections 296 and 303 do not prohibit commissioning parents from formally concluding a surrogacy agreement and approaching the High Court for confirmation *after* artificial fertilisation of the surrogate mother has occurred.[57] The court averred that the Legislature

48 *Ex parte MS* para 40.
49 *Ex parte MS* para 40.
50 *Ex parte MS* para 40.
51 *Ex parte MS* para 40.
52 *Ex parte MS* para 40.
53 *Ex parte MS* para 41.
54 *Ex parte MS* para 42.
55 *Ex parte MS* para 43.
56 *Ex parte MS* para 45.
57 *Ex parte MS* para 46.

would have expressly provided this additional limitation if this had been its intention.[58]

With regard to section 297(2) the court argued that a surrogate motherhood agreement will be deemed to be invalid only if it does not comply with the requirements provided in sections 292 and 295.[59] Since neither of these sections expressly prohibits commissioning parents from approaching the High Court *ex post facto,* the other requirements provided in these sections would be adhered to upon the confirmation of the surrogate motherhood agreement by the court, and this adherence and confirmation would in turn render the surrogate motherhood agreement valid:[60]

> As far as section 297(2) is concerned, this provision states that a surrogacy agreement that does not comply with the provisions of the Act is invalid. The Act spells out very clearly what is required for purposes of a valid surrogacy agreement, *viz* compliance with the requirements of section 292, and confirmation of the agreement by a court if it is satisfied that the requirements of section 295 have been met. If a surrogacy agreement meets these requirements, and is confirmed by the court, it will be valid.[61]

In its conclusion, the High Court emphasised the fact that although chapter 19 expressly prohibits the artificial fertilisation of the surrogate mother prior to the confirmation of the surrogate motherhood agreement, this does not impinge on the validity of surrogate motherhood agreements, nor does it prohibit the High Court from confirming such an agreement *ex post facto*.[62]

The court substantiated its interpretation of chapter 19 by maintaining that the parties' constitutional rights would be undermined if the legislation were interpreted in a prohibitive manner.[63] With regard to the commissioning parents, these rights would include the right to dignity, as they would be deprived of the opportunity to experience a fully subjective family life, as well as the right to make reproductive choices.[64] The surrogate mother would be imposed with full parental responsibilities and rights, which would subsequently infringe upon her right to make her own reproductive choices.[65] With regard to the unborn, the court maintained the following:

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58 *Ex parte MS* para 46.
59 *Ex parte MS* para 47.
60 *Ex parte MS* para 47.
61 *Ex parte MS* para 47.
62 *Ex parte MS* para 48.
63 *Ex parte MS* para 50.
64 *Ex parte MS* para 51. Here the court maintains that adoption would be the only alternative available to the commissioning parents.
65 *Ex parte MS* para 52.

> Above all else, it is the rights and interest of the 'sleeping partner' in the surrogacy relationship, i.e. the unborn child, that demand the most protection. Section 28(1)(b) of the Constitution guarantees to every child the right to family or parental care. In addition, section 28(2) specifies that: 'A child's best interests are of paramount importance in every matter concerning the child.'[66]

The High Court emphasised the detrimental effect that the non-confirmation and invalid status of the surrogate motherhood agreement would have on the child to be born from the surrogate motherhood agreement.[67] The child would be deprived of the family life and environment planned for him/her and would furthermore be forced to rely for parental care upon the surrogate mother, who expressly stated her decision not to fulfil this future role.[68] In its closing remarks the court warned against the use of this judgement as a way of circumventing the judicial procedure and instructed all future parties in surrogate motherhood agreements to adhere to all the requirements provided in chapter 19.[69]

The High Court in *Ex parte MS* provided some guidelines for future confirmation of post-fertilisation surrogate motherhood agreement applications.[70] It maintained that parties should still be required to draft and sign a written surrogate motherhood agreement and to present it to the High Court for confirmation, and that post-fertilisation applications be regarded as an exception to the rule.[71]

Parties in exceptional circumstances will furthermore have to provide the court with sufficient reasons (facts) for their tardiness.[72] Because parental responsibilities and rights are vested in the parents once the child is born, the parties will have to ensure that the surrogate motherhood agreement is confirmed by the court prior to the birth of the child.[73] Once the child is born, the parties will have to rely upon alternative legal measures, *inter alia* adoption, a parental responsibilities and rights agreement as provided for

66 *Ex parte MS* para 53. It should be noted that while chapter 19 does refer to the best interests of the child, it does not use the term "rights" in s 295(e). This section clearly provides that the "interests" of the child are to be taken into consideration.

67 *Ex parte MS* para 54.

68 *Ex parte MS* para 54. It is submitted that this might still be the case due to the fact that the donor eggs of the surrogate mother were used in the matter before the court, which affords her the right to terminate the surrogacy agreement in accordance with s 298(2) of chapter 19. It should be noted that the surrogate also retains the right to terminate the pregnancy in accordance with s 300 of chapter 19 and the *Choice on Termination of Pregnancy Act* 92 of 1996.

69 *Ex parte MS* paras 57-58.

70 *Ex parte MS* para 59-71.

71 *Ex parte MS* para 61.

72 *Ex parte MS* para 62.

73 *Ex parte MS* para 67.

by section 22 of the *Children's Act*, or an application for guardianship under section 24 of the *Children's Act*.[74]

Being satisfied that the parties in *Ex parte MS* had explained their failure to follow the protocol provided in chapter 19, and furthermore considering the time and effort they had spent on compiling a fully motivated application while also adhering to the other requirements in sections 292 and 295, the High Court confirmed the surrogate motherhood agreement.[75]

In *Ex parte MS*, the court's interpretation and application of chapter 19 and other provisions contained in the *Constitution* raises concern.[76]

2.4 Critique

Surrogate motherhood agreements require meticulous regulation in order to protect the rights and interest of all the parties involved. In an attempt to regulate the interconnected relationships, chapter 19 prohibits the artificial fertilisation of a surrogate prior to the vetting and confirmation of a legally drafted surrogate motherhood agreement by the High Court.[77]

The commissioning parents' inability to adhere to the requirements in chapter 19 should be analysed within the aforementioned framework. It should accordingly be noted that the commissioning parents had already entered into two prior surrogate motherhood agreements and were therefore familiar with the protocol.[78] With regard to the court's application of section 39(2) of the *Constitution*, it could contextually be argued that the commissioning parents were aware of the importance of confirming a surrogate motherhood agreement. Furthermore, their deviation from the protocol was of their own volition and due to personal interest. This lack of adherence was therefore not in the interest of justice but rather due to personal preference and financial implications.

The commissioning parents' behaviour de-emphasises the imperative purpose of the surrogate motherhood agreement. It furthermore undermines the complex inter-relational nature of such agreements by merely taking their own rights and interests into consideration.

74 *Ex parte MS* para 69.
75 *Ex parte MS* para 72-77.
76 Louw 2014 *De Jure* 116-118.
77 Sections 296(1)(a) and 303(1) of chapter 19. Also see *Ex parte MS* para 8.
78 *Ex parte MS* para 13.

The court's three-pronged argument in *Ex parte MS* displays logical inconsistencies. While the court makes reference to certain provisions in chapter 19 it seems to interpret some of the provisions individually and not within the context of the entire chapter. This form of interpretation raises concern, given that misinterpretation often occurs when legislation is analysed in a vacuum.

It is argued that a different conclusion could be reached when section 292(1)(e) is read together with the prohibitions in sections 296 and 303 as well as the provision in section 297(2). While sections 292 and 295 may not have required that the surrogate mother not be artificially inseminated prior to the confirmation of the agreement, sections 296 and 303 clearly prohibit such an act. Section 297(2) accordingly makes provision for the parties' non-compliance. Though this non-compliance affects the legal status of the child, the affect is not permanent and can be altered once the child is born. Commissioning parents could accordingly pursue alternative legal measures such as a section 22 Parental Responsibilities and Rights order and a section 28 Termination, Extension, Suspension or Restriction of Parental Responsibilities and Rights order. They could also change the status of the child by means of adoption, as provided for in chapter 15 of the *Children's Act*.[79]

The court's decision in *Ex parte MS* has furthermore set a dangerous precedent with regard to the discretion of the courts in surrogacy matters. This precedent was recently applied in *Ex parte: HPP; Ex parte: DME* 2017 JOL 37415 (GP) (*Ex parte HPP*). The High Court in *Ex parte HPP* acted discretionally when it confirmed a surrogate motherhood agreement which had resulted from an unlawful facilitation agreement.[80] Questionable wording was furthermore used by the court in *Ex parte HPP*, where the court made reference to the "rights of the unborn".[81]

Reference to the rights of a non-legal subject can in part be attributed to the court's interpretation and application of the principle of the best interests of the child in *Ex parte MS*. Keightley J maintained the following with regard to the best interests of that child:

> In essence, surrogacy agreements are all about the child to be born. Accordingly, although the hoped-for child is not a party to the surrogacy

79 These alternative legal measures will be further discussed in part 3 of this contribution.

80 *Ex parte: HPP; Ex parte: DME* 2017 JOL 37415 (GP) (hereafter *Ex parte HPP*) para 71.

81 *Ex parte HPP* para 61.

> motherhood agreement, his or her future rights and interests are the most important of all the rights and interests involved. To ensure that they are adequately protected, the law requires certainty and judicial scrutiny of the proposed surrogacy arrangement before there is even any prospect of a child coming into being.[82]

The legislator's and adjudicator's inability to expressly establish whether the principle of the best interests of the child should be applied as a substantive (constitutional) right in surrogacy matters, raises concern. The position held by the legislator of chapter 19 (with specific reference to sections 295(b)(ii)) and the High Court in *Ex parte MS* suggests a consensus with the position held *inter alia* by the Vatican, that life begins at conception, owing to the use by both entities of the principle of the best interests of the child prior to its birth.[83]

The court's use of the principle of the best interests of the child as a means to justifying its ruling has received criticism by Louw, who raises the important question, "When would it *not* be in the best interest of a child to confirm a surrogacy agreement once the child has been conceived?"[84]

Louw accordingly asserts that the court must follow the necessary protocol to invalidate provisions that it deems to be in conflict with the *Constitution*.[85] Following this statement she recommends that the solution would not be to "introduce a loop-hole" that "makes a mockery" of the provisions contained in chapter 19.[86]

In her recommendations Louw avers that the use of the principle of the best interests of the child as a supernatural problem solver (*deus ex machina*) merely confirms allegations of its manipulative nature.[87] She refers to *S v M (Centre for Child Law as Amicus Curiae*) 2008 3 SA 232 (CC) (hereinafter *S v M*) and argues that, while the principle of the best interests of the child may be paramount in all matters concerning the child, it is not decisive,

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82 *Ex parte MS* para 9.

83 Ratzinger and Bovone 1987 http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19870222_respect-for-human-life_en.html. "From the moment of conception, the life of every human being is to be respected in an absolute way because man is the only creature on earth that God has 'wished for himself' and the spiritual soul of each man is 'immediately created' by God; his whole being bears the image of the Creator. Human life is sacred because from its beginning it involves 'the creative action of God' and it remains forever in a special relationship with the Creator, who is its sole end. God alone is the Lord of life from its beginning until its end: no one can, in any circumstance, claim for himself the right to destroy directly an innocent human being."

84 Louw 2014 *De Jure* 116.

85 Louw 2014 *De Jure* 116.

86 Louw 2014 *De Jure* 116.

87 Louw 2014 *De Jure* 117.

because other factors should also be taken into consideration.[88] In closing, Louw criticises the arguments used by the court and further maintains that the court's decision undermines the value of the legislation and creates doubt in the fragile surrogacy process.[89]

All international, regional and national legal instruments define a child as any person born alive who is under a certain age, normally 18 years. In General Comment 14 on the *United Nations Convention of the Rights of Children* (1989) "Position on the best interest of the child", no reference is made to the rights of the unborn.[90] This gives rise to the question of whether or not the best interest of the child is applicable in matters where the child has yet to be born alive.

3 A way forward

3.1 Limiting the best interest of the child

Even if the best interests of the child were to be used as a constitutional right it is not absolute right and can be limited in accordance with section 36 of the *Constitution* and section 6(2)(a) of the *Children's Act*.[91]

In *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* 2004 1 SA 406 (CC) (*De Reuck*) the court maintained that the use in section 28(2) of the word "paramount" does not omit the possible limitation of the best interest of the child by other rights.[92] The approach adopted by the court in this case reiterated the view of constitutional rights as mutually "interdependent and interlinked", which allows them to form a singular constitutional value system.[93] The court further emphasised the possibility of limiting section 28(2) in situations where such limitations would be "reasonable and justifiable" in accordance with the provisions of section

88 Louw 2014 *De Jure* 118.

89 Louw 2014 *De Jure* 118.

90 CRC 2013 http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf 7.

91 Skelton "Constitutional Protection of Children's Rights" 280. S 36 of the *Constitution* provides the following: "(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including- (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

92 Skelton "Constitutional Protection of Children's Rights" 282.

93 Skelton "Constitutional Protection of Children's Rights" 282.

36 of the *Constitution*.[94] In reaching this decision the court maintained that even though the best interests of the child should be a paramount consideration in all matters pertaining to the child, this does not afford it the additional right to override other constitutional rights.[95]

The court's interpretation of the best interests of the child in *De Reuck* caused some uncertainty regarding the precise meaning of the term "paramount importance".[96] This uncertainty was deliberated further in *S v M*. In this case a single mother who had three children was found guilty of fraud and sentenced to prison. An appeal was brought before the court due to the fact that she was the primary caregiver. The court was urged to consider the effect that the possible imprisonment might have on the children.[97] During its decision-making process the court was tasked with weighing up the best interests of the children with the community's right to receive protection from the effects of criminal acts.[98] Attempting to derive meaning from the term "paramount importance" Sachs J commented on the expansive nature of the principle of paramountcy.[99] He indicated that while the principle seemed to promise everything, it didn't really deliver particularly much.[100] He drew attention to the indeterminate state of the concept of the best interest and the opportunity that this indeterminate state created for judges and legal professionals to understand the concept differently.[101]

The court in *S v M* further emphasised the need to determine each matter on a case by case basis and in doing so to ensure a genuine "child-centred approach".[102] This approach can be executed effectively only when the court determines the exact needs of the child in the particular case. A pre-determined formula would therefore not necessarily meet this standard in every case. Sachs J concluded that while the principle is not an "overbearing and unrealistic trump", the paramount nature of the best interests of the child does not render those interests absolute.[103]

94 Skelton "Constitutional Protection of Children's Rights" 282.
95 Skelton "Constitutional Protection of Children's Rights" 282.
96 Skelton "Constitutional Protection of Children's Rights" 282.
97 Skelton "Constitutional Protection of Children's Rights" 283.
98 Skelton "Constitutional Protection of Children's Rights" 283.
99 Skelton "Constitutional Protection of Children's Rights" 283.
100 Skelton "Constitutional Protection of Children's Rights" 283.
101 Skelton "Constitutional Protection of Children's Rights" 283.
102 Skelton "Constitutional Protection of Children's Rights" 283.
103 *S v M (Centre for Child Law as Amicus Curiae)* 2008 3 SA 232 (CC) (hereafter *S v M*) para 26.

With regard to the matter of paramountcy, the court in *S v M* furthermore held that when reading the principle together with the right to family care one ought to duly consider the best interests of the children before the court and how these interests may be affected.[104] According to the court this does not necessarily mean that all the other considerations should be overridden but rather necessitates a proper weighing of the considerations in each case.[105] Having weighed up these respective considerations, the court should then attribute the most weight to the consideration to which the "law attaches the highest value", which is the best interests of the children in the matter.[106]

A further insight pertaining to the possible limitation of the best interests of the child was added by Cameron J in *Centre for Child Law v Minister of Justice and Constitutional Development (National institution for Crime Prevention and Reintegration of Offenders as Amicus Curiae*) 2009 2 SACR 477 (CC). This case dealt with the matter of sentencing children to imprisonment.[107] Cameron J held that the term "paramountcy" meant that while a child's interests are "more important than anything else" this did not render everything else unimportant.[108]

In all the above-mentioned cases the children whose best interests were limited were already born alive and were bearers of subjective rights when the matters were placed before the court. However, surrogacy matters can be regarded as essentially different in that there not only is no guarantee that the child will be born alive, but furthermore, the surrogate mother still reserves the right to terminate either the pregnancy before the child is born or the surrogate motherhood agreement after the child has been born.[109]

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104 *S v M* para 25.

105 *S v M* para 25.

106 *S v M* para 25.

107 *Centre for Child Law v Minister of Justice and Constitutional Development (National Institution for Crime Prevention and Reintegration of Offenders as Amicus Curiae)* 2009 2 SACR 477 (CC). It is needless to say that this degree of sentencing should be implemented as "a measure of last resort" only.

108 *Centre for Child Law v Minister of Justice and Constitutional Development (National Institution for Crime Prevention and Reintegration of Offenders as Amicus Curiae)* 2009 2 SACR 477 (CC) para 29.

109 Section 298 of chapter 19 makes provision for the termination of the surrogacy agreement by the surrogate in matters where she is also the genetic parent of the child. This occurs in instances where the surrogate mother also acted as the egg donor during the surrogacy process. This termination may take place within sixty days after the birth of the child. The surrogate mother will have to file a notice with the respective court. A court may terminate the agreement in terms of s 295 of chapter 19 only once it is satisfied that all parties have been notified of the surrogate mother's intentions and after the court hearing. The court should furthermore be

The fact that the resultant child in surrogacy matters has yet to be born leads to the consideration of whether the limitation of the best interests of the unborn child would accord with section 36 of the *Constitution*. Given the facts in *Ex parte MS* it seems as though such a limitation would be justifiable and reasonable, as it would prevent future legal uncertainty regarding the legal status of the unborn and his/her ability to bear constitutionally entrenched rights, and in particular the right of the best interests of the child as provided in section 28(2) of the *Constitution*. This right would furthermore be limited only until the child is born alive.

Courts could, however, still justify their use of the principle of the best interest of the child in surrogate motherhood agreements where parties adhered to all the requirements, by applying it as a rule of procedure or a fundamental interpretative legal principle but not a constitutionally entrenched right.[110] The former approach would allow courts to follow a judiciary procedure in which they can assess the positive and negative outcomes of their decision and choose the one less likely to affect the resultant child negatively.[111] The latter, in turn, would afford courts the ability to interpret legislation in a manner that would be most beneficial to the resultant child. In order for this to occur a clear separation ought to be made between the three concepts provided by general comment 14.

It is submitted that, for the sake of legal certainty and consistency, courts should refrain from using the best interests of the child in matters where the commissioning parties did not adhere to the requirements prescribed in chapter 19. The court in *Ex parte MS* correctly identified a section 22

satisfied that the surrogate mother terminated the agreement voluntarily and that she understands the legal and social implications of her decision. Having considered the best interests of the child the court may then make a valid order. It is important to note that the surrogate mother will not incur any liability to the commissioning parents if she decides to terminate the pregnancy in terms of this provision. This provision is made with regard to those payments made by the commissioning parents that are not listed in s 301 of chapter 19. S 301 prohibits all forms of compensation but provides the commissioning parents with the right to reclaim the payments made with respect to expenses that are directly related to the medical procedures, the surrogate mother's loss of earnings and insurance costs. S 300 of chapter 19 provides the surrogate with the right to terminate the pregnancy in terms of the *Choice on Termination of Pregnancy Act* 92 of 1996. The surrogate mother is obliged, however, to inform the commissioning parents of her decision before terminating her pregnancy and to consult them before the procedure is carried out. The surrogate will have no liabilities towards the commissioning parents, save those expenses provided for in s 301 of chapter 19.

110 CRC 2013 http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf 4.

111 CRC 2013 http://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf 4.

parental responsibilities and rights agreement as a possible alternative in matters where parties have not met the requirements provided in chapter 19. A section 22 agreement may be insufficient, however, as it does not terminate the responsibilities and rights of the surrogate mother or change the status of the child. Commissioning parents who may want to terminate the parental responsibilities and rights of the surrogate mother would be able to do so in accordance with section 28 of the *Children's Act*.[112] Should the parties want to legally alter the status of the child born from a surrogate motherhood agreement, they would be able to do so by means of adoption, in accordance with chapter 15 of the *Children's Act*.

To elaborate on these alternative approaches, the current status of surrogacy in the United Kingdom will briefly be considered.

3.2 Surrogacy in the UK[113]

Two pieces of legislation govern surrogacy in the UK.[114] This article focusses on the *Human Fertilisation and Embryology Act*, 2008 (*HFE Act*) as the basis for the following discussion in relation to its provision for a Parental Order.[115]

A Parental Order has been defined as a "fast-track adoption order" as it allows the commissioning parents to obtain parental responsibilities and rights after the child resulting from the surrogate motherhood agreement has been born.[116] The process is initiated by a formal application made to the court that must be vetted and approved by a judge once s/he is satisfied that all the criteria have been met.[117] The surrogate mother and her partner

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112 The commissioning parents would be able to make use of a section 28 application in their capacity as individuals who have an interest in the care, well-being and development of the child as provided for by subsection 1(b) of s 22 and s 28 of the *Children's Act*.

113 The UK enacted legislation governing surrogacy matters in 1985. Legislation which makes provision for a parental order was enacted in 2008.

114 Smit *et al Surrogacy in the UK* 11. Also see Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 38. For purposes of this discussion the term "the UK" will refer to England, Scotland, Wales and Northern Ireland.

115 Smit *et al Surrogacy in the UK* 11. Provision for the parental order is provided for in ss 54 and 55 of the *Human Fertilisation and Embryology Act*, 2008 (hereafter the *HFE Act*).

116 Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 58.

117 Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20

are regarded as the legal parents of the child after the child is born and prior to the approval of the Parental Order.[118] Both the surrogate mother and her partner are required to provide their consent in order for the Parental Oder to be approved.[119] The Parental Order is approved only once the commissioning parents (the applicants) have sufficiently met all the requirements provided in section 54 of the *HFE Act*.[120]

3.2.1 Requirements in section 54 of the HFE Act

Both applicants must be 18 years or older and at least one of the two parties has to be domiciled in the UK at the time that the application is made.[121] Section 54 makes provision for applicants who are married, in a permanent living situation or in a civil partnership, but prohibits singles from making use of this process.[122]

Section 54(1)(a) further requires that the surrogate be artificially inseminated and that there be a genetic link between the applicants and the embryo.[123] The surrogate mother is regarded as the legal parent of the child

surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 58. The criteria will briefly be discussed below.

118 Section 33(1) of the *HFE Act* provides that: "The woman who is carrying or has carried a child as a result of the placing in her of an embryo or of sperm and eggs, and no other woman, is to be treated as the mother of the child." The common law rule may also apply depending on the nature of the surrogacy agreement. Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 58.

119 Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 58.

120 Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 60-62.

121 Section 54(5) of the *HFE Act* makes provision for the age requirement. It should be noted that no provision is made for an elderly age limit, while s 54(4)(b) makes provision for the domicile requirement.

122 Section 54(1) of the *HFE Act* makes provision for the requirement of "two people". Also see Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 60. S 54(2) makes provision for the types of relationships. Note that the section specifically provides for two people who are living in an "enduring family relationship".

123 Section 54(1)(a) of the *HFE Act* makes provision for artificial insemination by placing an embryo in the surrogate or sperm and egg cells, while s 54(1)(b) provides the genetic link requirement. Should the surrogate conceive though intercourse, the common law rules regarding legal parenthood will be applied. Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 60. With regard to the genetic link requirement it should be noted that there is no requirement in the *HFE Act* that the intended mother be

regardless of whether or not she has a genetic link with the child.[124] An application for a Parental Order has to be conducted within six months after the child's birth and the child should be residing with the applicants when the application is made.[125] As with any other adoption matter, consent is required from the surrogate mother as well as her partner, where applicable.[126] This requirement may be waived in the event that these individuals cannot be located or are incapable of providing their consent.[127] The court must furthermore be satisfied that there were no forms of commercial surrogacy in the presented application.[128] The paramountcy of the child's welfare is not mentioned in the *HFE Act* but provision for it is made in the *Human Fertilisation and Embryology (Parental Order) Regulations*, 2010.

Notwithstanding the importance of the *HFE Act,* some difficulties with it have been identified.[129] It is therefore necessary to duly consider these problems in order to establish whether or not an application akin to a parental order could serve as an acceptable alternative.

3.2.2 Problems with the current requirements

The first challenge pertains to the court's retrospective authorisation of payments in accordance with section 54(8) of the *HFE Act*.[130] According to this provision the court has to be satisfied that the surrogate has received

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medically unable to carry a child to term and give birth to such a child, although a medical professional may require proof of this prior to commencing with a medical fertility treatment. Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 60.

124 This is due to the provisions made in s 33 of the *HFE Act,* which are that the woman carrying (who has carried) the child be regarded as the mother of the child to whom she gave birth.

125 Section 54(3) of the *HFE Act* makes provision for the time frame in which the application should be conducted while s 54(4)(a) requires that the child reside with the applicants at the time of the application and the making of the order. This means that the child will stay with individuals who are not his/her legal parents, or differently put, individuals who do not have a legal relationship with him/her.

126 In accordance with s 54(6) of the *HFE Act* the court should be satisfied that this consent was given freely and with the parties' full understanding of the legal and social consequences of their decision.

127 In accordance with s 54(7) of the *HFE Act*.

128 Section 54(8) of the *HFE Act* does make provision for "expenses reasonably incurred".

129 Smit *et al Surrogacy in the UK* 30-34.

130 Smit *et al Surrogacy in the UK* 30. Also see Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 62.

no monetary benefit other than for reasonably incurred expenses.[131] This consideration by the court takes place only *ex post facto* and at this point the surrogate may not only have willingly received but also have spent the compensation given to her by the applicants.[132] To date there has been no case in the UK where the court has refused an order based on the unreasonableness of the amount provided by the applicants to cover expenses.[133] Courts have, however, indicated discomfort with this provision as it places them in a position where they may be obliged to refuse an expense order where such a refusal might be to the child's detriment.[134]

The second problem concerns the time limit provided to the applicants in section 54(3). In *X (A Child) (Surrogacy: Time Limit)* 2014 EWHC 3135 the court held that the parties could apply for a Parental Order even after the six-month time-frame provided by section 54. The court reached this decision having considered the long-term detrimental effect that the non-obtainment of a Parental Order may have on the applicants as well as on the child in question.[135]

The third problem relates to the single-parent requirement as provided for by section 54.[136] In *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* 2015 EWFC 73 the presiding officer refused to grant a single male his Parental Order and based his decision for doing so solely on the words contained in section 54.[137] According to the presiding officer, this section requires that an application be made by "two people" and therefore does not make provision for single-parent applications.[138]

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131 Smit *et al Surrogacy in the UK* 30.

132 Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 62.

133 Smit *et al Surrogacy in the UK* 30. In their report the authors refer to *Re X and Y (Foreign Surrogacy)* 2008 EWHC 3030 to indicate that this is the case even in matters where the applicants gave the surrogate 25,000 Euros in addition to their per month payment of 235 Euros. It later became known that the 25,000 Euros served as a deposit for the surrogate's flat, which clearly exceeds the requirement of "reasonable expenses" in s 54(8) of the *HFE Act*.

134 Brunet *et al* 2012 http://eprints.lse.ac.uk/51063/1/__libfile_REPOSITORY_Content_Davaki%2C%20K_Comparative%20study%20regime%20surrogacy_Davaki_Comparative_study_regime_surrogacy_2013.pdf 62.

135 *X (A Child) (Surrogacy: Time Limit)* 2014 EWHC 3135 para 55. A similar position was held by the court in *A & B (No 2 - Parental Order)* 2015 EWHC 2080. Also see Smit *et al Surrogacy in the UK* 31.

136 Smit *et al Surrogacy in the UK* 32.

137 Smit *et al Surrogacy in the UK* 32.

138 *Re Z (A Child: Human Fertilisation and Embryology Act: Parental Order)* 2015 EWFC 73 para 5. Also see Smit *et al Surrogacy in the UK* 33. The applicant implored the court to interpret the legislation more flexibly, to no avail. The applicant further held

The fourth problem applies to the requirement for a genetic link between the applicant and the embryo.[139] This issue transcends borders, as a similar case was brought before a South African court in 2015 in *AB v Minister of Social Development as Amicus Curiae: Centre for Child Law* 2015 4 All SA 24 (GP). The matter of a genetic link is still heavily contested, with scholars on both sides advocating their position.[140]

The final problem pertains to a lack of consent on the part of the surrogate.[141] Section 54(6) of the *HFE Act* requires the surrogate mother to consent to the Parental Order while subsection (7) provides that this need not be the case where the surrogate cannot be located.[142] Courts have, however, recently decided to dispense with this requirement because of the unavailability of the surrogate and in accordance with the need to promote the welfare of the child.[143]

The Parental Order process as used in the UK provides an example of how South African commissioning parents could utilise the provisions in section 22 and section 28 of the *Children's Act* in inadequate surrogacy matters. Even though the parties may have to wait until the child is born, they would still be responsible for the daily care and well-being of the child once the child is born, as the child would reside with them during the application process. This approach would not only create a suitable alternative for parties who do not meet the requirements provided in chapter 19, but it would also deter future applicants from circumventing the requirements in chapter 19. By referring the parties to inadequate surrogate agreements to section 22 and section 28, courts would furthermore be acting in the best interests of the child on a case by case basis, while not rendering moot the relevant provision in chapter 19. This option would provide more legal certainty regarding the principle of the best interests of the child and how it ought to be applied in inadequate surrogacy agreements where the unborn is not a bearer of subjective constitutional rights.

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that this provision was contrary to the right to a private family life as provided for under the *Human Rights Act*, 1998. This averment was made in the light of the fact that single women and men are allowed to become legal parents by means of adoption, conception by a donor, and *in vitro* fertilisation.

139 Smit *et al Surrogacy in the UK* 33.

140 *AB v Minister of Social Development as Amicus Curiae: Centre for Child Law* 2015 4 All SA 24 (GP) para 100.

141 Smit *et al Surrogacy in the UK* 34.

142 Sections 54(6) and 54(7) of the *HFE Act*. Also see Smit *et al Surrogacy in the UK* 34.

143 Smit *et al Surrogacy in the UK* 34. Reference is also made to *D and L (Surrogacy)* 2012 EWHC 2631.

It is noted that some objections to this recommendation may arise, as one of the primary reasons why commissioning parents choose to make use of surrogate motherhood agreements, is that adoption does not necessarily cater to their specific needs.[144] It is submitted, however, that the Parental Order application is similar to adoption only in terms of protocol/process. Stated differently, due to the requirement for a genetic link, the child who will be "adopted" would still genetically be the child of either one or both of the commissioning parents. This process is furthermore substantially different from the traditional adoption process with regard to the waiting period and the certainty of receiving a child.

Provision can, however, be made for parties who adhere to all the requirements contained in chapter 19. If these requirements are not met the initial result (the validation of a surrogate motherhood agreement) cannot follow, as this would lead to a logical contradiction. Ignorance is not a defence and parties who do not meet the requirements set out in chapter 19 should not be rewarded for their lack of compliance.

4 Conclusion

The support given to applicants who make use of surrogacy should be provided in a clear and transparent manner. Concern arises when ambiguity causes confusion regarding the interpretation and application of the principle of the best interests of the child in inadequate surrogacy matters.

Having considered the legislation contained in chapter 19, the role of the court in interpreting and applying the legislation, and the responsibility of all the parties involved in the surrogate motherhood agreement, it is clear that urgent reconsideration is necessary.

It is accordingly submitted that commissioning parents are under a legal obligation to adhere to all the requirements provided in chapter 19. In the event where the commission parents fully adhere to these requirements, it is fitting that the best interests of the unborn be considered and protected. Courts would be able to ensure that this occurs by interpreting general comment 14 in a limited manner and applying the best interests of the child principle as an interpretative tool and a guiding principle. Should legal reform regarding surrogacy insist on the *rights* of the unborn, the necessary legal steps should be taken to amend all applicable legislation.

144 Louw 2013 *THRHR* 571.

Where the commissioning parents refrain from adhering to the requirements, it is submitted that the surrogate motherhood agreement not be confirmed. Parties should rather make use of alternative legal means once the child is born alive, in terms of the Digesta Texts. Such alternatives include a parental order as provided in section 22, a termination order (section 28), or adoption in terms of chapter 15 of the *Children's Act*.

While the court in *Ex parte MS* can be commended for its identification of a potential lacuna with regard to surrogacy matters as well as its positive interpretation of the legislation, it is also clear that a dangerous precedent has been set. This paper presents an alternative to the impending legal and moral consequences that may follow if non-legal subjects should be afforded constitutional rights.

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List of Abbreviations

CRC	Committee on the Rights of Children
HFE Act	Human Fertilisation and Embryology Act
SALC	South African Law Commission
SALJ	South African Law Journal
THRHR	Tydskrif vir Hedendaagse Romeins-Hollandse Reg
UK	United Kingdom