IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

REPORTABLE
CASE NO: 11432/2021P

In the ex parte application of:

DW Applicant

ORDER

The application is dismissed.

JUDGMENT

Delivered on: 08 April 2022

Ploos van Amstel J:

[1] The applicant in this matter wants to have a child with the assistance of a surrogate mother, and seeks a declaratory order from this court with regard to what is permissible in terms of s 294 of the Children's Act 38 of 2005 (the Act) regarding the genetic origin of the child. He is a single man and is unable to contribute his own gamete, as he is for all practical purposes infertile. He seeks an order declaring that for purposes of his intended surrogate motherhood agreement he 'can use sperm from Donor 6293 of Fairfax Cryobank'. He seeks a further order declaring that the first order will relate 'only to this one aspect of the applicant's intended surrogate motherhood agreement, namely compliance with section 294 of the Children's Act...and that the applicant shall further be required

to bring an application to the. court to confirm the intended surrogate motherhood agreement'.

[2] Section 294 of the Act provides as follows:

'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,'

[3] On the face of it the declaratory order sought by the applicant is inconsistent with the wording of s 294. He however contends that the section, on a purposive interpretation, seeks to ensure that the child will in due course know its genetic origin. He accordingly wants the court to declare that he is entitled to use sperm from a donor who lives in the United States of America and who has agreed to his identity being disclosed to the child when it reaches 18 years of age. The applicant says this differs from the practice in South Africa, where sperm banks only offer anonymous donors.

[4] The applicant relies on the decision of the Constitutional Court in AB and another v Minister of Social Development, [1] where a single woman had applied for section 294 to be declared unconstitutional on various grounds, including that of irrationality. The majority judgment held that the rational purpose of the section was to create a bond between the child and the commissioning parent or parents, which is designed to protect the best interests of the child to be born so that it has a genetic link with its parent(s). The court held that the section was not irrational, or unconstitutional on any other basis.

[5] The applicant accepts that s 294 of the Act is not unconstitutional. He contends, however, that the purpose of the section is served if a gamete is used from a donor who has consented to his identity being revealed. He submitted that

[1] AB and another v Minister of Social Development 2017 (3) SA 570 (CC).

in those circumstances it does not matter that the child will not have a genetic link with the commissioning parent, because the child's genetic origin can be made known to it at the appropriate time. The applicant accepts that such an interpretation is contrary to the express wording of the section, and made it clear that he was not contending for a reading-in. [2] I am therefore concerned with the proper interpretation of the section as it stands.

[6] In Natal Joint Municipal Pension Fund v Endumeni Municipality, [3] Wallis JA said:

'... consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors.' (Footnote omitted.)

[7] Section 294 deals with three different scenarios in the context of a surrogate motherhood agreement. The first is where the conception of the child is to be effected by the use of the gametes of both commissioning parents; the second, where that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents; and the third, where the commissioning parent is a single person, the gamete of that person.

[8] The applicant contends that AB is authority for the proposition that the purpose of s 294 is to ensure that the child will be able to know its genetic origin, and, therefore, it does not proscribe the use of the gamete of a donor who has consented to his identity being revealed to the child.

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[2] Reading-in involves the addition to the section, by the court, of words in order to reflect the clear intention of the legislature. See Nedbank Ltd and others v National Credit Regulator and another 2011 (3) SA 581 (SCA) para 29; Durban City Council v Gray 1951 (3) SA 568 (A) at 580B.

[3] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18. Also see Kubyana v Standard Bank of South Africa Ltd 2014 (3) SA 56 (CC) para 18.

[9] The first difficulty with the submission is that it is based on a selective reading of the majority judgment in AB. Nkabinde J said,[4] 'the conditions in s 294 are the means to establishing a genetic link between the commissioning parents and the child to be born as contemplated in the surrogacy agreement'. She said establishing a genetic link is a legitimate government purpose, and the 'substance below the surface[5] is the need for a genetic link between a child and at least one parent'. Then followed the statement in the judgment that underlies the applicant's case, '[h]ence clarity regarding the origin of a child is important to the self-identity and self-respect of the child'. This was said in the context of a consideration of the rationality of s 294, which requires a genetic link between the child and at least one of the commissioning parents.

[10] AB is not authority for the proposition that the purpose of s 294 is to ensure clarity regarding the origin of the child, and that the use of an identified donor other than a commissioning parent is therefore permissible in the case of a single parent. If that were the case, what would the position be of two commissioning parents who are both unable to contribute a gamete? The notion that they can then use the gametes of two identified donors flies in the face of the wording of the section, which expressly refers to the 'gamete of at least one of the commissioning parents'.

[11] The applicant, at my invitation, delivered comprehensive heads of argument after the hearing. His submissions with regard to the proper interpretation of s 294 were eloquently formulated, but in most instances relevant to a consideration of the rationality of the section, rather than establishing the meaning of its wording. Examples are the submissions with regard to 'the legal

[4] AB paras 293-295.
[5] An expression used in Head of Department, Department of Education, Free State Province v Welkom High School and others 2014 (2) SA 228 (CC) para 130, in the context of cases involving children.

preference for a parent-child genetic link'[6] and the 'socially dynamic, inclusive conception of the family'[7] espoused by the Constitution.

[12] The applicant's difficulty with regard to the interpretation that he contends for is twofold. Firstly, the purpose of the section is not what he contends it is, or at least not only what he contends it is. Secondly, the section does not have more than one possible meaning, which have to be weighed as explained in Endumeni. The clear meaning to my mind is apparent from the wording of the section. In the present context it is that no surrogate agreement is valid unless the conception of the child contemplated in the agreement is to be effected, where the commissioning parent is a single person, by the gamete of that person. The wording is not capable of another possible meaning.

[13] There is one further submission that I must deal with regarding the proper interpretation of s 294. It was that the words 'the gamete of that person', at the end of the section, can mean either the gamete genetically derived from the single commissioning parent, or a gamete owned by, or in control of, the single commissioning parent. The applicant used the examples, in everyday language, of 'the car of that driver' or 'the exam paper of that student'. There is nothing that can be said in favour of such an interpretation. It flies in the face of the wording of the section, which requires 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 them, or, where the commissioning parent is a single person, the gamete of that person. It also flies in the face of the purpose of the section as explained by the Constitutional Court in AB, as well as the purposive interpretation contended for by the applicant. The submission is without merit.

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[6] In the context of the rationality of s 294, as explained in the majority judgment in AB (supra).
[7] A submission in the applicant's heads of argument. Du Toit and another v Minister of Welfare and Population Development and others (Lesbian and Gay Equality Project as amicus curiae) 2003 (2) SA 198 (CC) concerned the constitutionality of sections in the Child Care Act 74 of 1983 and the Guardianship Act 192 of 1993 regarding the adoption and guardianship of children by two members of a same-sex life partnership jointly; Minister of Home Affairs and another v Fourie and others; Lesbian and Gay Equality Project and others v Minister of Home Affairs and others 2006 (3) BCLR 355 (CC) concerned the constitutionality of the common law definition of 'marriage'

[14] It follows that I do not agree with either of the interpretations contended for by the applicant.

[15] I should add that if I had concluded that the applicant's contentions were correct I would nevertheless have declined to make a declaratory order. In AB the Minister of Social Development participated in the proceedings and contended successfully that the section was not unconstitutional. A declaratory order by me regarding the proper interpretation of the section will not be binding on the Minister or other interested parties in a subsequent application for the confirmation of a surrogacy motherhood agreement, because they are not parties in the proceedings before me. They will be free to contend that the declaratory order was wrongly granted, and the judge hearing that application may disagree with my interpretation of the section. The position is different from that, for example, in Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd,[8] where both parties to the dispute participated in the proceedings for a declaratory order and were bound by the outcome. A declaratory order in the form sought by the applicant in an ex parte application will be worth no more than legal advice.

[16] The application for a declaratory order therefore cannot succeed. I empathise with the applicant's desire to have a child, and would have helped him if I thought I could. Regrettably, I do not think I can.

[17] The application is dismissed.

Ploos van Amstel J

Appearances:

For the Applicant:	D W in person.
	Robynne Friedman Attorneys
	c/o ER Browne Incorporated
	Pietermaritzburg
Date Judgment Reserved :	25 March 2022

[8] Lawson & Kirk (Pty) Ltd v Phil Morkel Ltd 1953 (3) SA 324 (A).

Date of Judgment : 08 April 2022