

# **Ratification of inadequate surrogacy agreements and the best interest of the child: A critical analysis**

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Bekragting van onvoldoende surrogaatmoederskap-ooreenkomste en die beste belang van die kind: 'n kritiese analise

This study reflects the legal position in South Africa on 1 November 2016.<sup>1</sup>

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1 The study is in no way a reflection of the author's personal views on the legal status of the foetus and the underlying philosophical and religious beliefs that substantiate this view (opinion).

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## Summary

The use of surrogate motherhood agreements for reproductive purposes has increased recently. While an internationally binding instrument has yet to be produced, South Africa, among many other countries, has developed domestic legislation governing all surrogacy matters that take place within the country's jurisdiction. This provision is contained in Chapter 19 of the *Children's Act* 38 of 2005. Parties who are unable to conceive and carry a child of their own to term are now able to seek the assistance of a surrogate mother who will be willing to conceive and carry a child on their behalf for altruistic reasons.

The protocol prescribed for the use of a surrogate motherhood agreement has, however, become stricter. Section 1 of Chapter 19, accordingly, requires parties to enter into a written surrogate motherhood agreement and approach the High Court within their jurisdiction for the confirmation of the written agreement before the artificial fertilisation of the surrogate mother may take place.

In a recent court case the parties involved, though having undergone the legal procedure twice before, decided not to meet the requirement provided by Chapter 19 and 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 presiding officer decided to grant the parties application and in doing so ratified 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* 2014 2 All SA 312 (GNP) 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.

**Key words:**

Surrogate motherhood agreement, best interest of the child, child, confirmation (ratification)

**Opsomming**

Die gebruik van surrogaatmoederskap-ooreenkomste vir reprodktiewe doeleindes het die afgelope tyd toegeneem. Alhoewel daar tot op hede slegs sprake van 'n internasionaal bindende instrument is, het Suid-Afrika, en vele ander lande, reeds plaaslike wetgewing ontwikkel wat alle surrogasie-aangeleenthede reguleer wat binne die jurisdiksie van die land plaasvind. Hierdie bepaling is vervat in Hoofstuk 19 van die *Kinderwet* 38 van 2005. Partye wat dus nie in staat is om swanger te word en hulle eie kind vir die volle termyn te dra nie, het tans die opsie om die hulp te versoek van 'n surrogaatmoeder wat bereid is om namens hulle swanger te word en 'n kind weens altruïstiese redes te baar.

Die protokol vir die gebruik van surrogasie het egter strenger geword. Artikel 1 van Hoofstuk 19 vereis, dienooreenkomstig, dat partye 'n skriftelike surrogaatmoederskap-ooreenkoms moet aangaan en die Hoë Hof nader vir die bekragtiging van dié ooreenkoms voordat die kunsmatige bevrugting van die surrogaatmoeder mag plaasvind.

In 'n onlangse hofsaak het die partye, wat die wetlike prosedure twee keer vantevore moes deurloop, die vereiste wat in Hoofstuk 19 vervat is, nie nagekom nie deurdat hulle die kunsmatige bevrugting van die surrogaat toegelaat het voordat die surrogaatmoederskap-ooreenkoms deur die hof bevestig is. As gevolg van die oorweging van die beste belang van die gevolglike kind het die voorsittende beamppte besluit om die partye se aansoek toe te staan en sodoende 'n onvoldoende surrogaatmoederskap-ooreenkoms te bekragtig.

Hierdie bespreking is daarop gemik om te bepaal of die hof se beslissing *in Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) ooreenstem met die bepalings wat in huidige wetgewing en regspraak vervat is. Die bespreking poog om twee primêre vrae te beantwoord: eerstens of regters van die beste belang van die kind gebruik moet maak wanneer hulle onvoldoende surrogaatmoederskap-ooreenkomste evalueer, en tweedens op watter wyse die hof die beste belang van die kind moet toepas wanneer hul onvoldoende surrogaatmoederskap-ooreenkomste bekragtig.

**Trefwoorde:**

Surrogaatmoederskap-ooreenkomste, beste belang van die kind, kind, bevestiging (bekragtiging)



## 1 Introduction

The debate surrounding formal surrogacy has only recently become a focal point in legal research. It has become evident that the legislation governing surrogacy in South Africa has not proven to be the legal panacea that was hoped for. The presence of ambiguity regarding certain legislative provisions has raised concern among South African legal scholars.<sup>2</sup> Notwithstanding the objections raised by legal scholars this discussion focuses primarily on the court's interpretation and application of Chapter 19 of the *Children's Act* 38 of 2005. It furthermore considers the manner in which the court applies the best interest of the child in surrogacy matters where the parties involved did not adhere to the requirements prescribed in Chapter 19.<sup>3</sup>

The provisions contained in Chapter 19 were specifically formulated to address most of the core elements pertinent to formal surrogate motherhood agreements.<sup>4</sup> Chapter 19 accordingly makes provision for: the requirements for a valid surrogacy agreement;<sup>5</sup> matters pertaining to artificial insemination;<sup>6</sup> the conferring of parenthood on the

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2 Nicholson and Bauling 2013 *De Jure* 516.

3 Section 296(1)(a) of the *Children's Act* 38 of 2005. The content of this legislation is discussed in detail in Chapter 3 of this paper. The primary case that will be analysed in Chapter 4 of this discussion is *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 SA 312 (GNP). In her article Louw 2014 *De Jure* 110-118 provides a critical analysis and voices her opinion on the court's legislative interpretation during surrogacy matters. Further and more detailed reference to her criticism is provided in Chapter 4 of this discussion.

4 A distinction should be made between informal surrogacy and formal surrogacy. 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 surrogate motherhood agreement in terms of Chapter 19 of the *Children's Act* 38 of 2005.

5 Chapter 1 of the *Children's Act* 38 of 2005 provides that a surrogate motherhood agreement "means an agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent;" Surrogacy can for purposes of this discussion also be defined as "[an] arrangement in which a woman carries and delivers a child for another couple or person" *Ex parte application WH* 2011 4 SA 630 (GNP) para 1. Chapter 19 s 292 to s 303 of the *Children's Act* 38 of 2005 does not explicitly provide a definition for a surrogate motherhood agreement, but a definition can be compiled by considering the legislative provision.

6 Section 296 of the *Children's Act* 38 of 2005. Chapter 1 of the *Children's Act* 38 of 2005 defines artificial insemination as follows: "means the introduction, by means other than natural means, of a

commissioning parents as soon as the child is born, and the illegalisation of commercial surrogacy.<sup>7</sup> 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.<sup>8</sup> Contracting parties are furthermore instructed to approach the court for the confirmation of a surrogate motherhood agreement before the artificial insemination/fertilisation of the surrogate mother may take place. Section 296(1)(a) explicitly provides that

No artificial fertilization of the surrogate mother may take place before the surrogate motherhood agreement is confirmed by the Court.

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male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including- (a) the bringing together of a male and female gamete outside the human body with a view to placing the product of a union of such gametes in the womb of a female person; or (b) the placing of the product of a union of male and female gametes which have been brought together outside the human body, in the womb of a female person;" This procedure often involves medical assistance and in some instances the use of reproductive bodily material. This procedure may be performed on a female who decides to keep the child or one who intends on giving the child away. Brunet L et al 2012 <http://eprints.lse.ac.uk/51063/1/> 13. A distinction should be made between traditional (partial) surrogacy, where the surrogate mother's gametes are used, which makes her the genetic gestating birth mother, and gestational (full) surrogacy, which involves the use of foreign gametes, which does not allow for any genetic relation between the surrogate mother and the child she is carrying. Kruger *et al The Law of Persons in South Africa* 89.

- 7 Section 297 and 301 of the *Children's Act* 38 of 2005. Commercial surrogacy occurs where the surrogate mother receives remuneration that is beyond the reasonable expenses allowed for in s 301 of the *Children's Act* 38 of 2005. Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 13. An altruistic surrogate motherhood agreement requires that no form of unreasonable payment be made to the surrogate mother by the commissioning parents. This in turn means that the surrogate mother enters into the agreement *prima facie*.
- 8 Section 292 and 297(1) of the *Children's Act* 38 of 2005. Parental responsibilities and rights refer to those provided by s 18 of the *Children's Act* 38 of 2005. A surrogate mother is the woman who carries the child to term and gives birth to the child, in accordance with s 297 of the *Children's Act* 38 of 2005. Chapter 1 of the *Children's Act* 38 of 2005 defines her as "an adult woman who enters into a surrogate motherhood agreement with the commissioning parent". The commissioning parent/s is the individual/s who makes use of surrogacy as a way of exercising their reproductive right given their medically permanent and irreversible inability to carry a child to term, s 295 of the *Children's Act* 38 of 2005. Differently put Chapter 1 of the *Children's Act* defines him/her as "a person who enters into a surrogate motherhood agreement with a surrogate mother". The term born refers to children who are born alive in terms of the requirements provided by the Digesta Texts, which are discussed in Chapter 2 of this discussion.

This provision speaks to the mandatory nature of the surrogate motherhood agreement and the primary reason for drafting such an agreement as a means of protecting the best interests of all parties involved.<sup>9</sup>

When tasked with the interpretation of section 296(1)(a), courts are required to ensure that no fundamental rights have been violated by the legislator, that the decision made by the court furthers and promotes constitutionally expressed values and that the common law is developed in a manner that is consistent with the *Constitution of the Republic of South Africa* 1996 (the Constitution).<sup>10</sup> Courts are furthermore tasked with analysing the contextual meaning of certain words within the legislative provision, such as the prohibitive terminology contained in section 296(1)(a) of Chapter 19. This interpretation, analyses and application have to take place in adherence to the constitutional prescript that the best interest of the child is of paramount importance in every matter concerning the child.<sup>11</sup>

While it is clear that both the legislator and the court have the best interest of the child at heart, concern arises when the interpretation and application of Chapter 19 contradict the provisions of the chapter itself. This occurred in *Ex parte MS and Others*.<sup>12</sup> *In casu* due emphasis was placed on the complicated nature of surrogate motherhood agreement.<sup>13</sup> The court ascribed this complex nature to the intricate

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9 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 SA 312 (GNP) para 7.

10 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 181.

11 Section 28(2) of the Constitution. The primary role of the best interest of the child is reiterated in s 295(e) of Chapter 19, which provides that the court, having considered the family situation and personal circumstances involved, confirm the surrogate motherhood agreement where this would be in the best interest of the child. See s 298(2) of Chapter 19, which makes provision for the termination of the surrogate motherhood agreement by the court. Though this may be the case, there is still some ambiguity regarding whether or not the sections in Chapter 19 make provision for a right to be attributed to an unborn child. Further discussion pertaining to the best interest of the child is conducted in Chapter 2 of this discussion. It is emphasised that for purposes of this discussion the child referred to is regarded as the resultant and not existent (*in esse*) child, seeing as the child is yet to be born. This distinction highlights the central issue of this paper, which is the argument surrounding the legal position, if any, of the resultant child. Arguments for and against the reasonableness of the notion of the "rights" and "interest" of the unborn child are discussed in Chapters 2 and 3 of this discussion.

12 2014 2 All SA 312 (GNP) (*Ex parte Ms*).

13 *Ex parte Ms* para 34.

relationship of obligations, interests and rights among all the parties involved in surrogate motherhood agreement.<sup>14</sup> The court further maintained that the future rights and interests of the child to be born were the most important rights and interests in the agreement.<sup>15</sup> The court maintained the following:

In essence, surrogacy arrangements are all about the child to be born. Accordingly, although the hoped for child is not a party to the surrogate motherhood agreement, his or her future rights and interests are the most important of all the rights and interests involved.<sup>16</sup>

The issue surrounding this case pertains to the deviation from the provisions contained in section 296(1)(a) of Chapter 19. Notwithstanding their awareness of the requirement that a surrogate motherhood agreement be formally conducted, vetted and confirmed by the High Court before artificial fertilisation may take place, the commissioning parents in *Ex parte MS* neglected to act in accordance with the prescribed requirements when they authorised the artificial fertilisation of the surrogate mother before validation of the surrogate motherhood agreement had occurred.<sup>17</sup> Despite the commissioning parents' disregard for the requirements, the court, in considering the best interest of the unborn child, still validated the surrogate motherhood agreement.<sup>18</sup>

The reason for the North Gauteng High Court's decision to deviate from the legislative provisions contained in section 296(1)(a) was twofold. The first reason given by the court was largely based on the unique nature of the surrogate motherhood agreement, while the second reason was based on section 39(2) of the Constitution.<sup>19</sup> The court further maintained that the relief granted in matters pertaining to inadequate surrogacy

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14 *Ex parte Ms* para 35.

15 *Ex parte Ms* para 9.

16 *Ex parte Ms* para 9.

17 *Ex parte Ms* para 11-15.

18 *Ex parte Ms* para 74-77.

19 Louw 2014 *De Jure* 113. The court emphasised its obligation to interpret legislation in accordance with s 39(2) and in so doing to promote the Bill of Rights' objects, spirit and purport. A comprehensive discussion of the court's decision is conducted in Chapter 4 of this paper.

protocol, where parties have strayed from the requirements contained in Chapter 19, depends largely on the best interest of the unborn/resultant child.<sup>20</sup>

When considering the High Court's decision in *Ex parte MS*, two questions can be raised. Firstly, does the principle of the best interest of the child as it exists in legislation and other legal documents to date make provision for the best interest of the *unborn*? And secondly, in what manner should the court implement the best interest of the child when tasked with validating inadequate surrogate motherhood agreements (i.e. as a constitutional or substantive right *or* interpretive legal principle *or* a procedural rule)?<sup>21</sup>

Although this may not have been the court's desired aftermath, a possibility exists that the High Court's decision in *Ex parte MS* may result in the future misuse of the best interest of the child by commissioning parents who choose to circumvent the protocol provided in Chapter 19, and in doing so render certain provisions in the chapter moot. The existence of this possibility constitutes a need to reconsider the manner in which the High Court implements the best interest of the child when rectifying inadequate surrogate motherhood agreements.<sup>22</sup>

In this mini-dissertation a proposal for possible reconsideration is conducted by analysing legislative provisions and case law regarding the best interest of the child and revisiting the main purpose of Chapter 19. Having done so, a brief comparative discussion pertaining to 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 surrogate

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20 *Ex Parte Ms* editor's summary, summarised by DPC Harris. Unborn or resultant child will for purposes of this discussion be defined as the expected child, the child born from the surrogate motherhood agreement, a foetus that is conceived but not yet birthed, and the planned child (where conception has not taken place). Louw 2013 *THRHR* 568-573.

21 These terms as provided in General Comment 14 are discussed comprehensively in Chapters 2 and 4 of this discussion. It should be noted that while the author is aware of the fact that the General Comment provides that all three be implemented at the same time a proposition for a possible split and the explanation of this suggestion will be discussed in Chapter 4 of this paper.

22 An inadequate surrogate motherhood agreement is an agreement where the parties did not adhere to all the requirements provided in Chapter 19 of the *Children's Act* 38 of 2005.

mothers per year.<sup>23</sup> Legislation in the United Kingdom furthermore provides for the *ex post facto* adoption of children born from surrogate motherhood agreements, which proposes an adequate alternative to the issue that arose in *Ex Parte MS*.

In order to accomplish these aims it is necessary to further discuss the current status of surrogacy in South Africa and the legal development of this phenomenon.

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23 Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 19, 38.

## 2 Historical background and the best interest of the child

### 2.1 Introduction

The necessity for considering the historical legal position of surrogacy in discussing the development of this reproductive practice is self-evident. When considering the discussion of this historical framework it should be noted that little to no reference is made to the resultant child's "right" to enjoy the protection provided by the principle of the best interest of the child by the legislator or by legal scholars during the legislative development process.

The use of surrogacy for reproductive purposes is not a foreign concept internationally. Recent statistics indicate an increase in the conclusion of surrogate motherhood agreements in a number of countries.<sup>24</sup>

The first informal surrogate motherhood agreement in South Africa was concluded in 1987.<sup>25</sup> In this informal surrogate motherhood agreement, Karen Ferreira-Jorge (the commissioning parent) asked her 48-year-old mother to act as her surrogate for reproductive purposes.<sup>26</sup> As she was unable to naturally conceive and carry her own child to term, she regarded surrogacy as a viable alternative option.<sup>27</sup> The fact that the 48-year-old surrogate mother gave birth to triplets who were born beyond the scope of legislative provision specifically governing surrogacy matters led to legal uncertainty.<sup>28</sup>

The only legislation that could indirectly govern surrogacy matters in 1987 was the *Human Tissue Act 65 of 1983 (Human Tissue Act)*. This Act fell short in a number of

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24 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/19>.

25 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 343. Without expanding its discussion to establish the legal nature of informal surrogate motherhood agreements the court in *Ex parte application WH 2011 4 SA 630 (GNP)* defined this form of surrogacy as a private verbal arrangement between friends and family members, para 2. The court emphasised the primitive nature of informal surrogate motherhood agreements by referencing specific Biblical scriptures, in essence Deuteronomy 25:5 and Ruth 4:7. A final assertion made by the court indicated its awareness of informal surrogate motherhood agreements that were being conducted in 2011 when the application was brought before the court, para 2.

26 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 343.

27 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 343.

28 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 343.

areas, most significantly in its inability to provide for the automatic transfer of parental authority (as it then was) from the surrogate mother to the commissioning parent once the child had been born and handed over (transferred) to the commissioning parent.<sup>29</sup> Due to the absence of a provision that allowed for the transfer of parental authority, and because of the further application of section 5(1)(a) of the *Children's Status Act* 82 of 1987, the triplets were legally regarded as the children of the surrogate mother.<sup>30</sup> However, in terms of regulation 8 of the Regulations Promulgated in terms of the *Human Tissue Act* 65 of 1983 the surrogate mother would only be permitted to act as a surrogate if she was married.<sup>31</sup> On the other hand, the commissioning parents could only attain parental authority by applying for adoption.<sup>32</sup> By making use of adoption the

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29 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 343.

30 Pretorius 1987 *De Rebus* 273 and Pretorius 1988 *De Rebus* 81. Also see Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 343. This was due to the fact that the artificial insemination did not make provision for the status of children born from surrogate motherhood agreements. Reference was, however, made to matters where children were carried by individuals with whom they shared a genetic link. In matters where this genetic link was evident, the child would be recognised as the child of the surrogate mother. In order to obtain parental authority (responsibilities and rights), the commissioning parent would have to apply for adoption.

31 *Regulations regarding the Artificial Insemination of Persons and Related Matters* R1182 GG 10283/20-6-1986 provided that artificial insemination or *in vitro* fertilisation only be performed on married women who had their husbands' consent. A similar limitation was imposed by the definition of the term "married". This term solely referred to and made provision for heterosexual marriages between a man and a woman and by doing so excluded all homosexual parties. On the matter pertaining to the interpretation of the word "marriage" Pretorius avers that this limitation may be justified by the limitation clause provided in the Constitution (s 33 of the interim Constitution), the justification being that "... children are better off in stable, heterosexual relationships...". It can be argued that a similar response can be given for the requirement that the woman be married before she may be artificially inseminated or fertilised. Pretorius 1996 *De Rebus* 117.

32 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 343; s 8(1) of the *Regulations of Artificial Insemination* 1986. And Pretorius 1988 *De Rebus* 81-82. In her discussion Pretorius refers to the Ferreira-Jorge triplets and assesses the legislative development based on this case study. According to s 5(3)(b) of the *Children's Status Act* 82 of 1987 the children born will be legally regarded as the children of the surrogate mother and her husband. This legal position followed from the *mater semper certa est* (the identity of the mother is always certain/indisputable) and *pater est quem nuptiae demonstrant* (the father is the individual to whom the marriage points). Due to the fact that there was no legislation governing the transferral of the rights and obligations (authority) vested in the legal parents, the only way in which these rights could be legally terminated was by way of a successful adoption. An anomaly came to the fore when s 17 of the *Child Care Act* 74 of 1983 prohibited parents from adopting children who were the result of their own genetic material, regardless of the fact that the children were carried and birthed by another woman. These parents could, however, still apply to the Supreme Court for custody. In addition to the fact that *Children's Status Act* 82 of 1987 and *Child Care Act* 74 of 1983 were not enacted to govern surrogacy matters, the process that has to be followed to gain custody also proved to be "unnecessarily costly, time consuming and agonising".



parties would encounter further complications, as the adoption law prohibited all forms of payment and surrogacy was regarded as being *contra bonos mores*, which rendered the contract concluded by the parties unenforceable.<sup>33</sup>

## 2.2 South African constitutional dispensation before 1994

As the indirect regulation of surrogacy by the *Human Tissue Act* 65 of 1983, the *Children's Status Act* 82 of 1987 and the *Child Care Act* 74 of 1983 proved to be inadequate for legally governing all surrogacy matters in South Africa, the need for the enactment of a singular statutory regulative scheme became evident.<sup>34</sup> In 1989 the South African Law Commission (SALC) accordingly conducted research in the field of surrogacy and produced the *Report on Surrogate Motherhood Project 65*, which was accompanied by a Draft Bill.<sup>35</sup> Due to the fact that the Draft Bill predated the

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33 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 343; s 24 of the *Child Care Act* 74 of 1983. Pretorius 1987 *De Rebus* 271-272. In order to better understand the legal climate surrounding the matter of payment and the *bonos mores* it needs to be emphasised that this matter occurred in 1988 in the absence of singular surrogacy governing legislation. Section 24 of the *Child Care Act* 74 of 1983 prohibited any form of compensation during adoption matters. This included payment rendered for medical, hospital and attorney fees. Due to the fact that there was no clear legal provision for surrogacy matters, the same prohibition was extended to surrogacy matters. Commissioning parents were accordingly prohibited under this section from paying for the surrogate mother's medical, hospital and attorney fees. Pretorius, however, averred that this section should not apply to surrogacy matters. She further opined that the surrogate mother should receive further remuneration for loss of income. Pretorius 1987 *De Rebus* 274-275. The matter surrounding the *bonos mores* primarily refers to the possibility of compensation, which is that the commissioning parents would provide financial remuneration to the surrogate mother, as this was not yet strictly forbidden in surrogacy matters, seeing as there was no legislation directly governing surrogacy matters, and the agreement surrounding the transferral of parental rights (authority). Another matter that seemed bothersome to the community was the necessary psychological analysis of the commissioning parents as well as the surrogate mother during the vetting process. Pretorius adds that the physical health of these individuals should also be established. She further asserts that surrogacy not be used in matters where children have already been born from the marriage, as well as matters where the commissioning parent is single (not married). In conclusion, Pretorius further opines that surrogacy not be used as a matter of convenience, where the commissioning parents want to avoid the bodily changes that accompany pregnancy and further avoid disrupting the woman's career.

34 Nicholson and Bauling 2013 *De Jure* 513. This insufficiency can be attributed to *inter alia* the lack of provision for the automatic transferral of parental authority and the complexity surrounding the legal status of the child, which could only be solved if the commissioning parents adopted the child.

35 Nicholson and Bauling 2013 *De Jure* 513.

Constitution the Draft Bill had to be assessed in order to establish its constitutionality.<sup>36</sup> Before the outcomes of this assessment and the further development of the Draft Bill are discussed, consideration should be given to the relevant commentary provided by legal scholars in order to better comprehend the legislative developmental process.

### *2.2.1 Scholarly commentary on the Draft Bill*

The proposed Draft Bill led to a number of responses by legal academics.<sup>37</sup> One legal scholar in particular, Pretorius, produced an elaborate commentary on certain clauses contained in the Draft Bill, as well as the legal implications of the Draft Bill in its entirety.<sup>38</sup> This discussion refers only to the more relevant clauses and the commentary provided by Pretorius with respect to them. These are the legal definition of the term "child", confirmation of the surrogate motherhood agreement by a court, the best interest of the child (welfare), and the clause regarding offences and penalties.

The first averment made by Pretorius was based on the distinction between private and public law issues that arise during surrogacy matters.<sup>39</sup> When legally defining the term "child" she referred to the first clause of the Draft Bill.

Child means a child born of a surrogate mother, conceived through assisted conception (artificial insemination and *in vitro* fertilisation).<sup>40</sup>

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36 Nicholson and Bauling 2013 *De Jure* 514. This was done with special reference to an individual's right to procreate as well as the right to make decisions regarding one's body and health.

37 Nicholson 2013 *De Jure* 514. Also see, *inter alia*, Clark 1993 *SALJ* 769.

38 Pretorius 1996 *De Rebus* 114-121.

39 Pretorius 1996 *De Rebus* 114. Regarding the public law branch Pretorius observed the compliance of the surrogacy process with the Constitution as well as the Bill of Rights (Chapter 3). Criminal and administrative law also played a role (as is still the case today) in the process. This was primarily due to the potential criminal and delictual liability medical professionals could incur should they refrain from complying with the legislative provisions. Surrogacy also raised issues in the private law branch. These arose due to the family law aspects that often accompany surrogacy matters. They include but are not limited to the transfer of parental authority (power), the parent-child relationship and the status of the child. The importance of the law of delicts is evident in the need for legal remedies in instances where the contract is breached. With regard to the ethical issues Pretorius once again refers to the *boni mores*/public policy on the matter of potential compensation – commercial surrogacy and the transfer of parental authority (power) from the surrogate mother (and her husband) to the commissioning parents.

40 Pretorius 1996 *De Rebus* 117.

With regard to this definition Pretorius suggested that the contracting attorney include the term "children" because of the possibility of multiple conceptions during the process. It is submitted that for purposes of this discussion emphasis be placed on the term "born". A more comprehensive discussion of this term is conducted in section 2.3 of this paper.<sup>41</sup> It is further submitted that the definition does not make provision for resultant children and that the legislator's intent in this regard was not questioned by Pretorius.

The second clause instructed the surrogate mother (her husband) and the commissioning parents (contracting parties) to enter into a written surrogate motherhood agreement.<sup>42</sup> According to Pretorius, the agreement had to be in writing so that the intent of the parties could be clarified and to ensure that their informed consent was obtained before any medical procedures occurred.<sup>43</sup> Here Pretorius emphasised the need to stipulate the intent and consent before the artificial insemination takes place in order to finalise all legal matters prior to the medical procedure, which would allow the medical practitioner to perform the insemination without reservation.<sup>44</sup>

It is submitted that the second clause be read together with the clause 8 and clause 12.<sup>45</sup> The latter discouraged the artificial insemination of a woman where the surrogate motherhood agreement had not been authorised by a court.<sup>46</sup> While clause 8(2) made provision for the status of the child in matters where the surrogate motherhood agreement did not comply with the provisions of the Draft Bill, in this situation the child would be regarded as the legal child of the surrogate mother.<sup>47</sup>

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41 Best interest of the child, paragraph 2.3 of this discussion.

42 Pretorius 1996 *De Rebus* 117.

43 Pretorius 1996 *De Rebus* 117.

44 Pretorius 1996 *De Rebus* 117.

45 Pretorius 1996 *De Rebus* 121. It should be noted that in her commentary Pretorius regards clause 12 as a means to prevent potential commercialisation.

46 Pretorius 1996 *De Rebus* 121.

47 Pretorius 1996 *De Rebus* 121.

When read together, clauses 2, 8(2) and 12 provide the protocol that should be followed by commissioning parents and the surrogate mother, while also making provision for instances where these parties do not comply with the protocol. The commentary provided by Pretorius on clause 8(2) clearly solidifies this submission.

This section should serve as a deterrent for childless couples who do not wish to comply with the more cumbersome procedures envisaged by the proposed Act.<sup>48</sup>

Pretorius made no assertions regarding the matter of the best interest of the child. The first reference made to the welfare of the child is embedded in her recommendation that the court use the Canadian contract law model as a possible regulatory option.<sup>49</sup> Pretorius further referenced the best interest of the child in her commentary on clause 6. Here she specifically referred to clauses 6(1)(e), (f) and (g) and asserted that these clauses were intended to "promote the best interest of the child".<sup>50</sup>

Throughout Pretorius's discussion little to no reference is made to the resultant child. It is submitted that most of her commentary was framed by her understanding of the term "child" as one who was already born.

Notwithstanding public opinion and the commentary of legal scholars, the completed report and Draft Bill were placed before the *ad hoc* parliamentary committee (AHPC),

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48 Pretorius 1996 *De Rebus* 121.

49 Pretorius 1996 *De Rebus* 115. According to Pretorius, the Canadian contract model could serve as an example due to its 1) "clear analogy between the regulatory scheme suggested by the commission and adoption" – she further commends the well-established nature of the procedure and its requirement for a careful suitability assessment (that is the suitability of the intending parents); 2) the paramountcy of the welfare of the child; 3) the similarity between the South African and Canadian courts' procedural and evidence rules (due to the influence of the English law in both countries' judicial system); 4) the possibility of procedures taking place in either the courts or the offices of the family law advocate, who is according to Pretorius a "well-established functionary"; and 5) the similarity between the Bill of Rights (Chapter 3) and the Canadian Charter of Rights and Freedoms, which could provide guidance regarding procreation matters.

50 Pretorius 1996 *De Rebus* 119. The Draft Bill did not make provision for a standardised contract, but these clauses required parties to make provision for the upbringing, general welfare, custody and care of the "child that is to be born", contingent upon the death of one or both of the commissioning parties and upon the further occasion where the commissioning parties decide to get a divorce before the child is born. The clauses furthermore instructed courts to take the potential prejudice that any adopted children or living decedents may have to the non-material interests of the child into account prior to the confirmation of the agreement. Schedule A to the South African Law Commission Report on Surrogate Motherhood (Project 65: 1993).

where deliberations ended in February 1999.<sup>51</sup> Having considered its contents and after scrutinising the provisions enshrined in the *Child Care Act* 2001, the AHPC produced Discussion Paper 103.<sup>52</sup> In this discussion paper the AHPC emphasised the uncertainty regarding the matter of legal parenthood when individuals make use of modern reproductive technologies, and specifically surrogacy.<sup>53</sup>

In attempting to meet the need emphasised by the AHPC's discussion paper, surrogacy was declared "[a]n alternative form of fertility treatment" in 2005 by the *Children's Act* 38 of 2005.<sup>54</sup> While the provisions made by the *Children's Act* 38 of 2005 contributed to the necessary legislative development, the need for comprehensive regulative legislation was met by Chapter 19 of the *Children's Act* 38 of 2005 (*Children's Act*) in 2010.<sup>55</sup> The provisions contained in Chapter 19 are discussed further in Chapter 3 of this mini-dissertation.

It is important to note that neither the legislator nor the legal scholars provided any clarity regarding the matter of the legal status of the unborn child in the surrogate motherhood agreement. However, what is evident is that both aimed to protect the future interest of the unborn child and explored various methods of accomplishing this objective.

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51 Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 343.

52 Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 343.

53 Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 343.

54 Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 343.

55 Louw 2013 *THRHR* 564. While Chapter 19 does not provide a definition for surrogacy, it does make provision for the agreement that arises between the commissioning parents and the surrogate mother. In this agreement the commissioning parents, together with the surrogate mother and her husband, must consent to the artificial insemination of the surrogate mother by using the gametes of one or both of the commissioning parents. In doing so the surrogate mother agrees to carry the child to term for altruistic reasons and ultimately hands the child over to the commissioning parents once the child has been born. The child will thereafter for all legal purposes be regarded as the child of the commissioning parents.

### **2.3 The role of international instruments**

The lack of sufficient international guidance with respect to the governing of surrogate motherhood agreements has inadvertently contributed to the rudderless state of countries attempting to regulate the increasing number of surrogacy matters within their jurisdiction.

Certain countries have drafted legislation specifically governing surrogacy matters within their regions.<sup>56</sup> Notwithstanding the countries' self-regulation of surrogacy matters, a convention on surrogacy has yet to be drafted.<sup>57</sup> The need for an internationally recognised convention has been noted and an effort to produce a regulatory document is in effect.<sup>58</sup> The Hague Conference on International Private Law has accordingly focused on surrogacy and sent out questionnaires to all states in an attempt to gather information about each state's current surrogacy-orientated practices and laws.<sup>59</sup> In the interim some relevant legislation can be found in existing international legal instruments.

While the *United Nations Convention on the Rights of the Child* 1989 (UNCRC) does not explicitly make provision for surrogacy matters, there are some provisions that clearly

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56 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 15-16. These countries are, *inter alia*: Canada, certain states in the United States, India, Greece, Israel, the Netherlands and Belgium, New Zealand, the Russian Federation, South Africa and the United Kingdom.

57 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 157.

58 A specialised group officially titled the "Experts' Group on Parentage/Surrogacy" (the group) met from 15 to 18 February 2016 in The Hague. Among the attendees at this meeting were observers and members of the Permanent Bureau (3), experts representing 21 states from all the regions, as well as individuals representing receiving as well as origin states in matters of international surrogacy. The group has been tasked with exploring the feasibility of advancing work "on the private international law issues surrounding the status of children" in matters of both domestic as well as international surrogacy. The Experts' Group on Parentage /Surrogacy "Report of the February 2016 Meeting" 2.

59 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 157. This project was launched in 2010. In February 2016 the appointed group compiled a report in which they expressed the intricate nature of surrogate motherhood agreements and the difficulties that drafting one universal declaration may hold. Further emphasis on the diverse practices of each state and the inevitable result they may have on international surrogate motherhood agreements were stressed in the report. The group, as referred to in the report, accordingly requested a continuance of their mandate. The Experts' Group on Parentage /Surrogacy "Report of the February 2016 Meeting" 2.

stipulate the rights that should be afforded to children who are already *in esse*.<sup>60</sup> There are three articles that provide a limited amount of protection to children born from surrogate motherhood agreements, i.e. articles 7, 6 and 21.<sup>61</sup> The *African Charter on the Rights and Welfare of the Child* 1990 (ACRWC) mirrors the provisions of the UNCRC in this regard.<sup>62</sup>

There has been little to no explanation provided for the UNCRC's and ACRWC's lack of legislative provision regarding the status of children yet to be born as a result of surrogate motherhood agreements.<sup>63</sup> Nevertheless, the legislative position regarding the term "child" is clearly portrayed in the UNCRC's and ACRWC's definitions, which specifically make use of the term "human being".<sup>64</sup> It can therefore be accepted that these legal instruments fundamentally apply to children who have been born alive in a legal technical sense. A child will accordingly be regarded as having been born alive once the two requirements stipulated in the Digesta Texts have been met.<sup>65</sup> According to the Roman Dutch law, these requirements will only have been met once the foetus has been separated from the mother and has lived independently after such separation has taken place.<sup>66</sup> Due to the fact that legal subjectivity comes into existence at birth, it

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60 The term *in esse* being interpreted as already born alive in accordance with the common law requirements. Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 158. Article 1 of the UNCRC clearly defines a child as any human being who is under the age of 18 years.

61 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 158. Article 7 provides the child with the right to a name, nationality and only as far as this may be possible, the right to having parents and being raised by these parents. Article 6 provides those children who are born with the right to life, and Article 21 deals with matters of adoption.

62 South Africa ratified the UNCRC in 1995, while ratification of the ACRWC occurred in 2000. Reference is made to these two instruments in accordance with s 39(1)(b) of the Constitution, which makes provision for the use of international instruments when interpreting the Bill of Rights. The ACRWC plays a further role with regard to the provision it makes as a regional instrument and its governance of current African matters.

63 South Africa ratified the UNCRC in 1995 and the ACRWC in 2000. African Commission on Human and People's Rights <http://www.achpr.org/>.

64 Article 2 of the ACRWC and article 1 of the UNCRC.

65 As discussed in Robinson *et al Introduction to the South African Law of Persons* 16.

66 As discussed in Robinson *et al Introduction to the South African Law of Persons* 16. The first requirement does not necessitate the severing of the umbilical cord, while the second requirement deems "any sign of life" as sufficient for this requirement to be fulfilled.

is only then that the child would be regarded as a bearer of legal rights and obligations where applicable.<sup>67</sup>

Emphasis is placed on the fact that international legal instruments solely refer to and make provision for children who have already been born alive. In order to better understand the legal position of the resultant child in surrogacy matters, it is important to first consider the concept/principle of the best interest of the child. When the meaning and or scope of best interest of the child is taken into consideration, it will provide the necessary assistance in determining whether the best interest of the child should solely be attributed to children who have already been *born alive* as a fundamental (substantive) right, or whether it can be implemented as an interpretive principle and procedural rule in surrogacy matters.<sup>68</sup>

### *2.3.1 The best interest of the existing child*

The concept/principle of the best interest of the child was first introduced in the *Declaration on the Rights of the Child*, 1924 and was reiterated in the *Convention on the Elimination of All Forms of Discrimination against Women*, 1979.<sup>69</sup> Since its enactment in these legislative documents the concept has undergone substantial transformation, mainly pioneered by the UNCRC.<sup>70</sup> Article 3(1) of the UNCRC accordingly provides that the best interest of the child be a primary consideration in all matters pertaining to the child.<sup>71</sup>

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67 This position was held in *Road Accident Fund v Mtati* 2005 (3) SA 340 (SCA), where the court referred to *Martell v Merton and Suttor Health Authority* 1992 (3) ER 833 (CA). In para 31 of the *Martell* case the court held that "In law and in logic no damage can have been caused to the plaintiff" prior to the moment in time that the plaintiff came into existence.

68 Note that the author is aware of the fact that General Comment 14 provides that all three be applied simultaneously. The explanation for the suggestion of a split will be discussed in Chapter 4 of this paper.

69 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 318.

70 Mahery "The United Nations Convention on the Rights of the Child: Maintaining its Value in International and South African Child Law" 318.

71 This provision is repeated in article 4 of the *African Charter on the Rights and Welfare of the Child*, 1990. Due emphasis should be placed on the fact that neither the UNCRC nor the ACRWC makes



In a recent report the Committee on the Rights of the Child (the Committee) released a general comment that provides a more detailed explanation of the provisions contained in article 3(1) of the UNCRC.<sup>72</sup> In its report the Committee declared that the best interest of the child be understood and interpreted as a threefold concept. During the adjudication process legal practitioners should therefore apply the best interest of the child firstly as a substantive (constitutional) right, secondly as a legal principle that should be implemented when interpreting fundamental law, and lastly as a procedural rule.<sup>73</sup>

The meaning and application of these three concepts determined by the Committee are as follows: according to the report, each state has an intrinsic obligation to ensure that the child's substantive right is implemented.<sup>74</sup> This should be accomplished by ensuring that a child's best interests are assessed and primarily considered in matters where diverse interests are being deliberated during the decision-making process.<sup>75</sup> Regarding the principle of interpretation the report provides that, when interpreting legislation that is open to multiple possibilities of interpretation, a court elect the interpretation that would be most effective in serving the child's best interest.<sup>76</sup>

State parties are further obligated to include an evaluation that stipulates the positive or negative impact that the decision made by the adjudicating court might have on the child. The adjudicating court's evaluation should be provided during the decision-making process. Certain procedural guarantees are required in order to assess and determine the best interest of the child.<sup>77</sup> For state parties these procedural guarantees

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any reference to the interest/"rights" of the unborn. This point is discussed further in section 2.3.3 of this paper.

72 Mills 2014 *SALJ* 847. The Committee is made up of 18 individuals who are all experts on children's rights. This Committee was created by the UNCRC and came into operation on 27 February 1991. The main function of the Committee is ensuring the effective implementation of the UNCRC.

Committee on the Rights of Children 2013 <http://www2.ohchr.org>.

73 Mills 2014 *SALJ* 847.

74 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 4.

75 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 4.

76 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 4. The report further states that the rights provided in the UNCRC and Optional Protocol be used as an interpretative framework.

77 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 4.

require them to stipulate to what extent the right has been respected during their decision-making process.<sup>78</sup> They are furthermore required to indicate what the adjudicating court considered to be the best interest of the child in the specific matter, the criteria that were implemented by the court in their determination, and the manner in which the best interest of the child was weighed against the other considerations in the matter.<sup>79</sup>

It should be noted that the Committee provides that all three concepts be applied *together*/simultaneously in all child-related matters.<sup>80</sup> South African legislation and jurisprudence have taken a similar approach when tasked with the interpretation and application of the best interest of the child.

### *2.3.2 Section 28(2) of the Constitution*

The best interest of the child was first established in South African law in the early 1940s.<sup>81</sup> While the influence that the principle had during that time did not exceed the scope of procedures pertaining to welfare and the family law, the provisions contained in section 28(2) of the Constitution aim to expand the meaning derived from the best interest of the child as well as the manner in which it is applied in all child law matters.<sup>82</sup> Section 28(2) has been described by some scholars as being "more emphatic" because of the wording contained in the provision.<sup>83</sup> This section provides that the child's best interests are of *paramount importance* in all matters pertaining to the child.<sup>84</sup>

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78 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 4.

79 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 4. The report stipulated that this be the case in terms of issues pertaining to policy or individual cases.

80 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 12. The recommendations of the Committee are clear in the following statement: "the 'best interest of the child' is a right, a principle and a rule of procedure based on the assessment of all the elements of a child's or children's interest in a specific situation." In Chapter 4 of this discussion a case is made for the possible separation and individual application of the threefold concept. This submission is also motivated in Chapter 4.

81 *Fletcher v Fletcher* 1948 (1) SA 130 (A).

82 Skelton "Constitutional Protection of Children's Rights" 280.

83 Skelton "Constitutional Protection of Children's Rights" 280.

84 Skelton "Constitutional Protection of Children's Rights" 280.

The provisions contained in section 28 have influenced the manner in which the other rights contained in the Bill of Rights are interpreted, the meaning derived from them, as well as the extent to which competing rights may be limited.<sup>85</sup> This is due to the fact that South African law explicitly provides that the best interest of the child be regarded as a constitutionally entrenched right.<sup>86</sup> This in turn creates the possibility of direct conflict between the best interest of the child and other constitutional rights.

The Constitutional Court of South Africa provided some much-needed clarity regarding the best interest of the child in *Minister of Welfare and Population Development v Fitzpatrick and Others* 2000 (3) SA 422 (CC) (*Fitzpatrick*). In this case the court was tasked with adjudicating over the provisions contained in section 18(4)(f) of the *Child Care Act* 74 of 1983. This section prohibited non-South African citizens from adopting South African children.<sup>87</sup> The court found these provisions to be invalid and further maintained that they were too restrictive due to the manner in which they limited the best interest of the child. During their deliberations the court recognised that the child's best interests could in certain instances be guaranteed by allowing non-South African parents to adopt a South African child.<sup>88</sup>

Goldstone J further emphasised that the provisions contained in section 28(2) require a child's best interest to have paramount importance in all child-related matters.<sup>89</sup> According to Goldstone J, the words contained in the provision clearly convey that the rights specified in section 28(1) cannot limit the reach of the provisions contained in section 28(2).<sup>90</sup> To summarise his point, Goldstone J concluded that the provisions

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85 Skelton "Constitutional Protection of Children's Rights" 280.

86 Skelton "Constitutional Protection of Children's Rights" 280.

87 Skelton "Constitutional Protection of Children's Rights" 280.

88 Skelton "Constitutional Protection of Children's Rights" 280.

89 *Fitzpatrick and Others* 2000 (3) SA 422 (CC) para 17.

90 *Fitzpatrick and Others* 2000 (3) SA 422 (CC) para 17. Section 28(1) of the Constitution provides a list of basic children's rights, while the provision of the best interest of the child is contained in s 28(2) of the Constitution. Considering Goldstone J's interpretation, it is submitted that the provision of s 28(2) not be regarded solely in the frame of specific rights provided in s 28(1), but that the provisions contained in s 28(2) go beyond the list provided in s 28(1) and should accordingly be seen as an independent right not encumbered by/restricted or limited to the provisions in s 28(1).

contained in section 28(2) created a right independent from those contained in section 28(1).<sup>91</sup>

In its judgement the Constitutional Court in *Fitzpatrick* firmly held that the provision contained in section 28(2) does not merely refer to those rights specified in section 28(1), but is a constitutionally entrenched right within itself.<sup>92</sup> The precedent that was developed by this decision enabled future courts to extend the best interest of the child to other cases.<sup>93</sup> These cases led to the further development of the common law. An example of this development is evident in *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC). In this matter the court maintained that the subsidiarity principle is secondary to the best interest of the child and that the best interests of the child should be examined on a case-by-case basis, and not be determined in an abstract manner.<sup>94</sup>

The wording contained in section 28(2) of the Constitution complicates the application of the best interest of the child to resultant children. This point was clarified in *Christian Lawyers Association of South Africa v Minister of Health*<sup>95</sup> (*Christian Lawyers*), where the court held that when interpreting the provisions contained in section 28(2) of the Constitution a clear distinction should be made between a foetus and a child.<sup>96</sup>

In *Christian Lawyers* the court was approached for an order declaring the *Choice on Termination of Pregnancy Act* 92 of 1996 to be invalid and unconstitutional.<sup>97</sup>

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91 *Fitzpatrick and Others* 2000 (3) SA 422 (CC) para 17.

92 Skelton "Constitutional Protection of Children's Rights" 280.

93 Skelton "Constitutional Protection of Children's Rights" 280. This judgement paved the way for the Constitutional Court to extend the best interest of the child to a wide array of cases, *inter alia* matters pertaining to parental care or family care, child pornography, child adoption by unmarried homosexual couples, international child abduction, foreign and same-sex adoption matters, customary law and inheritance, access to healthcare, the right to dignity and privacy, child detainment, the right to social assistance and child testimonies both as a witness and victim.

94 *AD and Another v DW and Others (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* 2008 (3) SA 183 (CC) para 55.

95 1998 (4) SA 1113 (T).

96 *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T) 1121.

97 Naudé 1999 SAJHR 541.

McCreath J made a judgment by considering the meaning of the word "everyone", contained *inter alia* in section 11 of the Constitution, while also exploring the common law status of the foetus.<sup>98</sup> Having established the inconclusive nature of the common law regarding the legal position of the foetus, further regard was given to relevant constitutional provisions.<sup>99</sup> The court accordingly held that the Constitution does not contain any expressed provisions that afford legal personality or protection to a foetus.<sup>100</sup> It was furthermore held by the court that if it were to extend the term "everyone" to include fetuses, this would "enlarge other rights" that cannot apply to fetuses.<sup>101</sup> The court accordingly maintained that for legislative interpretive purposes a foetus does not qualify as a child.<sup>102</sup> The same holds true when interpreting and applying the provisions contained in the *Children's Act* where the Act defines a child as any *person* under 18 years.<sup>103</sup>

It is clear that South African courts fully regard the best interest of the child as a constitutional right. It accordingly follows that this right only be attributed to children who have been born alive. Hence, an inherent problem lies in the application of the best interests of a child when confirming a surrogate motherhood agreement. This is mainly due to the fact that firstly, the child has yet to be born (which may not realise due to *inter alia* medical complications), and secondly, the court is required to determine the best interest of a child who has yet to be conceived.<sup>104</sup> Given the provisions of section 296(1) of the *Children's Act*, this conception could be postponed

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98 Naudé 1999 *SAJHR* 542.

99 Naudé 1999 *SAJHR* 546. These provisions included but were not limited to s 12(2)(a) regarding the rights to freedom and security of person, and more specifically the right to psychological and bodily integrity with reference to an individual's reproductive rights; s 28, which contains the rights specifically provided for children; and s 172(1) of the Constitution, which governs a court's functions. Reference was also made to *S v Makwanyane* 1995 (2) SACR, a case that dealt with the death penalty.

100 Naudé 1999 *SAJHR* 547. McCreath J averred that should the Constitution have endeavoured to provide such protection, it would have explicitly made provision for this in s 28.

101 Naudé 1999 *SAJHR* 547. According to the court the foetus would be entitled to all the other fundamental rights, including the right to life to the detriment of the woman and her reproductive rights.

102 Louw 2013 *THRHR* 568.

103 Louw 2013 *THRHR* 568. Also see s 1(1) of the *Children's Act* 38 of 2005.

104 Louw 2013 *THRHR* 568.

up to 18 months after the confirmation of the surrogate motherhood agreement.<sup>105</sup> These two points give rise to a legal as well as a pragmatic issue.

### *2.3.3 Best interest of the resultant child*

While there is no dispute that the vesting of parental rights and responsibilities in the mother by the High Court after the child has been conceived but before it has been born falls within the ambit of the court's competencies, it is trite that the High Court cannot act as the upper guardian of minors who have not yet been born.<sup>106</sup> Notwithstanding the notion that the child be *in esse* before the court can act as its upper guardian, Wepener J explained the role of the judge as upper guardian of all minors in surrogacy matters in *In re Confirmation of Three Surrogate Motherhood Agreements*.<sup>107</sup> He maintained that there rests an obligation on all judges to ensure that the surrogate motherhood agreement's content serves the best interests of the child once the child has been born.<sup>108</sup> However, *in casu* the court refrained from elaborating on the manner in which the best interest of the child should be considered in surrogacy matters, where the child is resultant and not *in esse*, which in turn means that he or she is not yet a legal subject and can accordingly not be a bearer of any rights.<sup>109</sup> Not being a legal subject, the foetus may therefore not enjoy the protection provided by the constitutionally entrenched (substantive) right of the best interest of the child.

Louw explains the implications of the South African legislation on surrogacy and its requirement of the pre-validation of a surrogate motherhood agreement by the High Court.<sup>110</sup> This requirement prompts South African courts to anticipate the child's future best interests, which will only become applicable once the child has been born, during

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105 Louw 2013 THRHR 568.

106 Louw 2013 THRHR 568. Also see *Ex parte Odendaal* 1928 OPD 218 219; *Ex parte Swanepoel* 1953 1 SA 280 (A) 286D-E; *Ex parte Leandy* 1973 4 SA 363 (N) 366E and *Ex parte Watling* 1982 1 SA 936 (C) 942F-G.

107 2011 6 SA 22 (GSJ); see also Louw 2013 THRHR 568.

108 Louw 2013 THRHR 568.

109 Louw 2013 THRHR 569.

110 Louw 2013 THRHR 572. This is in accordance with s 296 of the *Children's Act* 38 of 2005.

the processes of confirming the surrogate motherhood agreement.<sup>111</sup> According to Louw, the predetermination of the future best interest of the child would not allow the court to implement a traditional child-centred approach as required by the Constitutional Court.<sup>112</sup> This is primarily due to the fact that the child-centred approach requires the court to take an in-depth look at the individual "real-life situation" of the particular child.<sup>113</sup> Courts have further maintained that the child's best interests could not be determined "in advance" or "in an abstract manner".<sup>114</sup> Given this predicament it would be practically impossible for the court to implement the checklist provided to determine the best interests of the child in section 7 of the *Children's Act* with respect to surrogacy matters.<sup>115</sup>

Louw asserts that the court would, however, be able to apply an adapted/ modified child-centred approach in surrogacy matters.<sup>116</sup> The only practical manner in which this can be accomplished would, according to Louw, require the courts to ensure the suitability of all the parties to the surrogate motherhood agreement.<sup>117</sup> This suitability will pertain to the surrogate mother as well as the commissioning parents and their

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111 Louw 2013 *THRHR* 572.

112 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 24. Also see Louw 2013 *THRHR* 573.

113 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 24.

114 Louw 2013 *THRHR* 573.

115 Section 7 of the *Children's Act* 38 of 2005 provides a comprehensive list of factors that should be taken into consideration when determining the best interest of the child. These include but are not limited to: the nature of the relationship between the child and his/her parents; the parent's attitude towards the child and the exercising of their parental rights and responsibilities; the parent's capacity to make provision for any emotional, intellectual and other needs of the child; any possible effects that a change in circumstances may have on the child (this includes the possible effect of separation); all expenses and potential practical difficulties that may occur regarding parental contact and maintaining such contact; the need for a child to remain in parental care and maintain the established relationships; the child's age, gender, background, and any other characteristics that may be relevant to the particular child; the physical and emotional security of the child as well as his/her intellectual, social, cultural and emotional development; any disabilities the child may have; possible chronic illnesses suffered by the child; the child's need to be raised and grow up in a stable family-orientated environment where the child is cared for; the protection of the child from any psychological or physical harm which may be caused by abuse, neglect, exploitation, maltreatment, degradation; family or other child-related violence; actions and decisions that would minimise potential administrative and/or legal child-centred proceedings.

116 Louw 2013 *THRHR* 573.

117 Louw 2013 *THRHR* 573.

ability to fulfil their roles in a proper manner throughout the surrogacy process.<sup>118</sup> A further requirement rests on all parties to the agreement as well as the High Court to ensure that all possible eventualities are provided for in the surrogate motherhood agreement.<sup>119</sup> The provisions contained in the surrogate motherhood agreement have to be sufficient and cater for all reasonably foreseeable occurrences.<sup>120</sup> In ensuring the sufficiency of the surrogate motherhood agreement, parties will have to make provision for the possibility of divorce, separation or death of one/both commissioning parents or the surrogate mother, and further establish what would happen if the child were born with a disability.<sup>121</sup>

While acknowledging the difficulty that may arise in applying a child-centred approach in matters where the child does not yet exist, Louw emphasises that the court would have to aspire towards ensuring the best interests of the child by reasonably considering the information placed before it during the confirmation process.<sup>122</sup>

In her conclusion on this point Louw refers to the judgement held in *Ex parte application WH*.<sup>123</sup> *In casu* the court maintained that the best interests of the child may not be used by courts to infringe upon the individual's procreative rights.<sup>124</sup> The court must therefore refrain from unjustly or unreasonably restricting commissioning parents by placing unnecessary obstacles in their path while basing its decision to do so on the court's presumption of the possible best interests of the child.<sup>125</sup> The restriction placed on the court is somewhat ambiguous and does not stipulate the extent to which the court may interfere in surrogacy matters without it being interpreted as placing unnecessary obstacles before the commissioning parents.

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118 Louw 2013 *THRHR* 573.

119 Louw 2013 *THRHR* 573

120 Louw 2013 *THRHR* 573.

121 Louw 2013 *THRHR* 573.

122 Louw 2013 *THRHR* 573.

123 2011 4 SA 630 (GNP).

124 *Ex parte application WH* 2011 4 SA 630 (GNP) para 63.

125 Louw 2013 *THRHR* 573.



The fact that a foetus is not strictly regarded as a legal subject has not prevented certain adjudicators from applying the best interest of the child in all matters pertaining to the resultant child. While the court in *Ex parte application WH*<sup>126</sup> refrained from making a decision or remark regarding the manner in which the best interest of the child should be implemented in the case of inadequate surrogate motherhood agreements, the court in *Ex parte Ms; In re: Confirmation of surrogate motherhood agreement* 2014 2 All SA 312 (GNP) (*Ex parte Ms*) endeavoured to provide a comprehensive guideline/framework regarding the matter.<sup>127</sup>

In order to better understand the court's point of departure in *Ex parte Ms* it is necessary to consider the exact provisions contained in Chapter 19 and the manner in which they govern all surrogacy matters in South Africa.

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126 2011 4 SA 630 (GNP).

127 A comprehensive discussion of this court case is conducted in Chapter 4 of this paper.

### **3 Chapter 19 of the *Children's Act* 38 of 2005**

#### **3.1 Introduction**

Chapter 1 of the *Children's Act* defines the surrogate motherhood agreement as:

... [a]n agreement between a surrogate mother and a commissioning parent in which it is agreed that the surrogate mother will be artificially fertilised for the purpose of bearing a child for the commissioning parent and in which the surrogate mother undertakes to hand over such a child to the commissioning parent upon its birth, or within a reasonable time thereafter, with the intention that the child concerned becomes the legitimate child of the commissioning parent;<sup>128</sup>

This definition of surrogacy is further contained within the provisions of Chapter 19 of the *Children's Act*.<sup>129</sup> Chapter 19 is the first legislation that provides a statutory scheme that regulates and governs all surrogacy matters in South Africa.<sup>130</sup>

#### **3.2 The nature of the surrogate motherhood agreement**

Chapter 19 contains an extensive list of provisions that appertain to surrogacy matters in South Africa.<sup>131</sup> While all these provisions play a vital role in formal surrogacy matters, this discussion primarily focuses on the provisions that regulate the surrogate motherhood agreement, as well as those provisions that govern the artificial insemination of the surrogate mother (the protocol).

The multi-faceted nature of the surrogate motherhood agreement has contributed to the intricate surrogacy application process. This is due to the surrogate

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128 *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* [2015] 4 All SA 24 (GP) para 1, as provided for in Chapter 19 of the *Children's Act* 38 of 2005.

129 38 of 2005.

130 Louw 2013 *THRHR* 564.

131 Section 293 of the *Children's Act* 38 of 2005 makes further provision for obtaining consent from the husband, partner or wife of the person wishing to enter into the surrogate motherhood agreement. Section 294 further stipulates the necessity for a genetic link. Although this may be the case, it is important to note that this provision was declared unconstitutional by the court in *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* [2015] 4 All SA 24 (GP) para 100. Section 301 prohibits any and all forms of commercial surrogacy and s 302 provides for the protection of the identity of the donors and the surrogate mother.

motherhood agreement's somewhat controversial nature,<sup>132</sup> which is essentially the combination of the traditional "age-old rules relating to motherhood" with the law of contract and the legal implications that accompany it.<sup>133</sup> While it is true that a surrogate motherhood agreement is a "contract of a special kind", it still requires parties to enter into a written agreement.<sup>134</sup> Section 292 of the *Children's Act* provides that this written agreement be signed by all the parties, and furthermore that the agreement be conducted and entered into in the Republic of South Africa (the Republic).<sup>135</sup> As with any other South African contractual matter, section 292(1)(c-d) requires that the parties entering into the agreement be domiciled within the Republic at the time the agreement is entered into. More importantly, section 292(1)(e) provides that this agreement be confirmed by a High Court situated in the jurisdiction where the commissioning parent/s are domiciled or habitually resident.

In addition to these procedural requirements, Chapter 19 also provides for the exact contents of the surrogacy requirements.

### *3.2.1 Surrogate motherhood agreement requirements*

A court may only validate a surrogate motherhood agreement that adheres to all the requirements set out in Chapter 19.<sup>136</sup> These requirements can broadly be divided into five overarching categories, namely infertility, suitability, reasons for entering into the contact, competence and understanding or consensus.<sup>137</sup> With regard to the matter of infertility, section 295(a) provides that the court may only confirm a surrogate motherhood agreement where surrogacy is the only option

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132 Kruger *et al The Law of Persons in South Africa* 94. This nature can also be attributed to the unconventional departure that society has taken from the traditional understanding of motherhood and the values attributed to motherhood.

133 Kruger *et al The Law of Persons in South Africa* 94.

134 Section 292(1)(a) of the *Children's Act* 38 of 2005. *Ex Parte application WH* 2011 4 SA 630 (GNP) para 71.

135 Section 292(1)(a) – (e) of the *Children's Act* 38 of 2005.

136 Section 297(2) of the *Children's Act* 38 of 2005.

137 Kruger *et al The Law of Persons in South Africa* 91.

available to the commissioning parents that allows them to give birth to a child that is biologically related to either one or both of them.<sup>138</sup> In this situation the parties are unable to conceive and birth children on their own due to a "permanent and irreversible" condition.<sup>139</sup> Secondly, section 295(b)(ii) and section 295(c)(ii) require that both the commissioning parents and the surrogate mother be suitable parties. With regard to the former this requires the commissioning parents to accept their parenthood in a suitable manner, and pertaining to the surrogate mother that she be a person suitable to act as a surrogate mother.<sup>140</sup>

Read together with section 301(1) and (2), section 295(c)(iv-v) prohibits all forms of commercial surrogacy and stipulates that the surrogate mother may only consent and agree to entering into the agreement for altruistic reasons. Parties to the agreement are further required to indicate their complete understanding and acceptance of any consequences that may flow from the agreement.<sup>141</sup> In an attempt to ensure that the surrogate mother understands the gravity of pregnancy as well as the natural and emotional results thereof, section 295(c)(vii) requires the surrogate mother to have at least one living biological child. The reasoning behind this requirement pertains to the improbability of a surrogate mother who is a biological parent herself changing her mind after having birthed the surrogate child and deciding to keep the child instead.<sup>142</sup>

As upper guardian of all minor children the High Court is obligated to ensure that the written surrogate motherhood agreement drafted by the parties makes provision for the general welfare, contact, upbringing and care of the child.<sup>143</sup> The agreement must also confirm that the home environment into which the child will

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138 Section 295(a) of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 91.

139 Section 295(a) of the *Children's Act* 38 of 2005.

140 Section 295(b)(ii) and s 295(c)(ii) of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 91. The exact characteristics that establish the criteria by which the parents' suitability is measured have yet to be provided.

141 Section 295(b)(iii) and s 295(c)(iii) of the *Children's Act* 38 of 2005.

142 Kruger *et al The Law of Persons in South Africa* 91.

143 Kruger *et al The Law of Persons in South Africa* 92.

be born will be stable, and make further provision for the child in the matter of death or divorce.<sup>144</sup> In addition to these requirements the court may, where it deems it fit to do so, require the parties to provide additional information in the form of an affidavit.<sup>145</sup>

The extensive requirements regarding the content, legal and social status of the parties and the manner in which the surrogate motherhood agreement is concluded provide a vital framework for a successful surrogate motherhood agreement. The importance of a legally drafted and validated surrogate motherhood agreement becomes evident when the legal and social implications of a valid surrogate motherhood agreement are considered.

### *3.2.2 Effects of a surrogate motherhood agreement*

One of the main consequences a legally vetted and confirmed surrogate motherhood agreement has is the manner in which it alters the common law dictums *mater semper certa est* and *pater est quem nuptiae demonstrant*.<sup>146</sup> This evidentially leads to a shift in the earlier common law and rules of legislation

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144 Kruger *et al* *The Law of Persons in South Africa* 92.

145 *Ex Parte application WH 2011 4 SA 630 (GNP)* para 77. This affidavit should contain the following information: all the requirements listed in the *Children's Act* 38 of 2005 and any supplementary documentation where necessary. The affidavit should further stipulate how the commissioning parents and the surrogate mother are acquainted and her reasons for agreeing to be their surrogate mother. The background and financial situation of the surrogate mother should also be stipulated. In order to ensure the suitability of the surrogate mother, the affidavit should contain a complete psychological report that speaks to this matter. The contents of the psychological report should include assessed details pertaining to the background of the surrogate mother, her psychological profile, as well as the potential effect that the surrogacy might have on her after the relinquishing of all parental rights regarding the child. A full medical report regarding the surrogate mother's physical, HIV and any transmissible diseases status should also be included. Contracting parties should also disclose any former surrogacy applications and the court's findings and reasons pertaining to those applications. A further document containing all payments made and agreements entered into by the parties should also be disclosed. Should the parties make use of an agency, the extent of the agent's involvement as well as their compensation, if any, should be disclosed. Commissioning parties are further required to provide the court with all, if any, criminal convictions on the grounds of violence or any crimes of a sexual nature.

146 Nicholson and Bauling 2013 *De Jure* 516. The mother is always certain and the father is always he towards whom the marriage points.

regarding families and the children who are born in those families.<sup>147</sup> The first material alteration pertains to the status of the child born from the surrogacy. This child will, in accordance with the surrogate motherhood agreement, be deemed the child of the commissioning parents for all legal and other purposes once the child has been born.<sup>148</sup>

The surrogate mother is required to hand over the child to the commissioning parents once the child has been born and also to relinquish all parental responsibilities and rights towards the child.<sup>149</sup> Once these rights have been relinquished, neither the surrogate mother nor her husband or partner or any other family members will have any rights towards the child. These rights include the right to care and parenthood, as well as the right to contact.<sup>150</sup>

The consequences of the valid surrogate motherhood agreement also deprive the child of all maintenance claims and succession rights against the surrogate mother and her partner or husband as well as their family members.<sup>151</sup> It is clear that the consequences of a valid surrogate motherhood agreement affect all the parties involved and have far-reaching consequences for the child born from a surrogate motherhood agreement.

It should, however, be noted that any surrogate motherhood agreement that does not comply with and adhere to all the requirements stipulated in Chapter 19 will be invalid.<sup>152</sup> With regard to an invalid surrogate motherhood agreement the child born from the surrogate motherhood agreement will be deemed the child of the

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147 Nicholson and Bauling 2013 *De Jure* 516.

148 Section 297(1)(a) of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 92.

149 Section 297(1)(b) – (d) of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 92.

150 Section 297(1)(f) of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 92. This will be the case unless the parties have agreed to different terms within the surrogacy agreement.

151 Kruger *et al The Law of Persons in South Africa* 92. This will be the case regardless of the genetic makeup of the child born from the surrogacy agreement.

152 Section 297(2) of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 92.

surrogate mother and her partner/husband.<sup>153</sup> Even though the surrogate motherhood agreement has some attributes similar to those of a formally concluded contract, the manner in which it is enforced differs from the general manner in which contracts are enforced under South African law.

### *3.2.3 Enforceability and termination of a surrogate motherhood agreement*

Due to the special nature of the surrogate motherhood agreement, commissioning parents cannot rely on most of the remedies available under the law of contract, such as the remedy of special performance, where the surrogate mother will be ordered by a court to carry the child to term and hand the child over to the commissioning parents.<sup>154</sup> Some authors are of the opinion that not even a claim of damages could serve as adequate compensation for the loss that was suffered by the commissioning parents.<sup>155</sup> Other authors have conducted lengthy debates on whether or not the contract should be enforced at all on the grounds of public policy.<sup>156</sup> Notwithstanding the severe impact that this might have on the commissioning parents, the issue of contractual remedies does not in any way diminish the right of the surrogate mother to choose to terminate the pregnancy.<sup>157</sup>

The surrogate mother can also choose to terminate the agreement.<sup>158</sup> Though the Act provides that the surrogate motherhood agreement may not be terminated once the surrogate mother has been artificially inseminated, it does make provision for termination of the surrogate motherhood agreement by the surrogate mother.<sup>159</sup> According to the Act, this option is only available in matters where the surrogate

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153 Section 297(2) of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 92.

154 A woman's right to reproductive autonomy is provided for in the preamble of the *Choice on Termination of Pregnancy Act* 92, 1996.

155 Lupton 1988 *De Jure* 55. In his article Lupton opines that not even the remedy of damages is a viable remedy for a breach within a surrogate motherhood agreement where the surrogate mother refuses to hand over the child once she has given birth, as no monetary compensations could ever make up for the loss incurred by the commissioning parents.

156 Kruger *et al The Law of Persons in South Africa* 90.

157 Section 2 of the *Choice on Termination of Pregnancy Act* 92, 1996. Also see s 300 of the *Children's Act* 38 of 2005.

158 Section 298 of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 93.

159 Section 298(1) of the *Children's Act* 38 of 2005. Kruger *et al The Law of Persons in South Africa* 93.

mother is also the biological parent of the child. This would occur in instances where the surrogate mother's gametes were used during the fertilisation process.<sup>160</sup> The surrogate mother would be required to file a written notice with the court within a period of sixty days post birth.<sup>161</sup> In the event where the surrogate motherhood agreement is terminated by the surrogate mother, parental responsibilities and rights will be vested in the surrogate mother and her husband or partner.<sup>162</sup>

Given the far-reaching effect that both valid and invalid surrogate motherhood agreements have on the best interests of all the parties involved, it is clear that legislative regulation regarding the complete and comprehensive content, formal conclusion and legal confirmation of the surrogate motherhood agreement is vital in all surrogacy matters.<sup>163</sup> Whether or not the resultant child should also be regarded as a "party" whose "rights" should be protected in the agreement is discussed further in Chapter 4 of this paper.

### ***3.3 Artificial insemination and confirmation***

As is discussed in section 3.2.2 of this paper, it is clear that a valid surrogate motherhood agreement materially impacts *inter alia* the best interest of the resultant child and the minimisation of any risks that may occur and often accompany the surrogate motherhood agreement and the manner in which the wishes of all the parties are executed. This agreement further provides clarity on the matter of parental responsibilities and rights as well as the responsibilities of

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160 Kruger *et al The Law of Persons in South Africa* 93. This is also known as partial surrogacy.

161 Kruger *et al The Law of Persons in South Africa* 93.

162 Kruger *et al The Law of Persons in South Africa* 93. These individuals will have to accept the parental rights pertaining to the child. The child will, however, not have any maintenance or succession rights against the commissioning parents unless they decide to adopt the child.

163 Nicholson and Bauling 2013 *De Jure* 517.



other relevant parties.<sup>164</sup> It is submitted that it is within this context that the provisions of section 296 and section 303 of the *Children's Act* should be read.

This legislation provides the following:

296 Artificial fertilisation of surrogate mother

- (1) No artificial fertilisation of the surrogate mother may take place-
- (a) before the surrogate motherhood agreement is confirmed by the court;

and

303 Prohibition of certain acts

- (1) No person may artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation, unless that artificial fertilisation is authorised by a court in terms of the provisions of this Act.

While both section 296(1)(a) and section 303(1) are clear in their requirements of the commissioning parents, they also respect and rely on the High Court and its role as upper guardian of all minor children.<sup>165</sup>

### 3.3.1 *The role of the court*

When interpreting legislation most adjudicators' general point of departure stems from the notion that the enacted text carries meaning.<sup>166</sup> While this may be the case, it does not prevent the adjudicator from interpreting the provisions contained in section 296(1)(a) and section 303(1) of Chapter 19 in their own manner. When interpreting legislation the adjudicator is obligated to ensure that no fundamental rights were

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164 Nicholson and Bauling 2013 *De Jure* 517. The other parties, referring to the surrogate mother and her partner as well as their relatives.

165 With regard to the High Court's role as upper guardian of all minor children due acknowledgement should be given to the contributions of Grotius, Van Leeuwen, Van der Linden and Voet to the development of this rule as discussed by Van Heerden and Boberg in *Boberg's Law of Persons*. The application of this rule can be dated to cases as early as 1963: *Mashaoane v Mashaoane* 1963 3 All SA 204 (N), and is still prevalent in child-related matters in 2016: *Mahomed v Mohamed* 2016 JOL 35523 (GJ).

166 Du Plessis *SALJ* 2005 593. The aggressive and literal interpreter may be of the further opinion that the text need not be interpreted and not only carries a meaning, but the decisive one, and should therefore be applied as is. This point of departure may also lean more towards the legal positivistic and centralistic philosophic beliefs.

violated by the legislator, while also ensuring that his interpretation furthers the constitutional values and develops the common law.<sup>167</sup> This task becomes more complex in child-related matters where family dynamics are involved.

The important role of the High Court as upper guardian of all minor children was emphasised by the court in *Ex Parte application WH*<sup>168</sup> (*Ex parte WH*).<sup>169</sup> In this case the court maintained that while it should aim towards advancing the objectives and the spirit contained in the Act, it should not burden relief-seeking litigants with additional obstacles. An obligation also rests on the court to refrain from simply serving as a "rubber stamp" that validates the private law agreements that arise between contracting parties.<sup>170</sup> The court furthermore maintained that it was the duty of the High Court to ensure that all the requirements, both formal and substantial, contained in the Act are complied with.<sup>171</sup>

The *Children's Act* further provides that a surrogate motherhood agreement may only be confirmed by a court if the court is satisfied with the individual circumstances and situation of the family.<sup>172</sup> Here the Act specifically emphasises the best interest of the "child that is to be born" from the surrogate motherhood agreement.<sup>173</sup> It is clear from this that the best interest of the resultant child in the surrogate motherhood agreement should be taken into consideration.<sup>174</sup> However, the ambiguity in this provision lies in

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167 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) para 181.

168 2011 4 SA 630 (GNP).

169 *Ex Parte application WH* 2011 4 SA 630 (GNP). In this case a homosexual couple approached the court for the validation of a surrogate motherhood agreement in terms of s 295 of the *Children's Act* 38 of 2005. Although the commissioning parents were not citizens (one was a Danish citizen and the other a Dutch citizen) of the Republic, they were domiciled in South Africa and had the intention of staying in the country permanently. In an attempt to birth a child who was genetically related to them, the commissioning parents sought the help of a surrogacy agency called Baby-2-Mom. In this case the court also discussed the dangers that accompany surrogacy and emphasised the prohibition of commercial surrogacy. The court primarily aimed towards establishing a guideline that could be used in all future surrogacy matters.

170 *Ex Parte application WH* 2011 4 SA 630 (GNP) para 72.

171 *Ex Parte application WH* 2011 4 SA 630 (GNP) para 73.

172 Section 295(e).

173 Section 295(e).

174 *Ex parte Ms* para 9. In this paragraph the court held that: "Accordingly, although the hoped-for child is not a party to the surrogate motherhood agreement, his or her future rights and interest are the most important of the rights and interest involved." Also see s 28(2) of the Constitution, 1996.

the legislator's inability to explicitly state whether the best interest of the child in surrogacy matters should be regarded as a constitutional (substantive) right, which would essentially attribute a constitutional right to the unborn child.

It is submitted that the effectiveness of the legislation providing for all surrogacy matters in South Africa is largely, if not solely, dependent on the proper interpretation and application thereof by the courts. In order to demonstrate this point a critical discussion of *Ex parte MS* is conducted in Chapter 4. The adjudication process of the court is scrutinised in order to determine the manner in which the court applied the best interest of the child in surrogacy matters, as well as its reason for doing so.

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

### **4.1 *Introduction***

In *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) (*Ex parte MS*) the court was approached by three applicants. The first and second applicants were the commissioning parents and the third the surrogate mother.<sup>175</sup> The *ex parte* application brought before Keightley J for the confirmation of a surrogate motherhood agreement in accordance with Chapter 19 was heard in chambers.<sup>176</sup>

Having received the requested written submissions from Ms Retief, the applicants' counsel, and after hearing the oral submissions made by Ms Retief, an order was granted by Keightley J on 1 November 2013. This resulted in the legal confirmation of the surrogate motherhood agreement entered into by the applicants.<sup>177</sup>

While standard protocol in *ex parte* confirmation applications does not habitually necessitate a written judgement, Keightley J stated that the codification of this judgment could be justified by the unusual nature of the matter placed before the court.<sup>178</sup> Keightley J averred that the "novel issue" raised by this matter did not enjoy legislative provision.<sup>179</sup> Put differently, that the provisions contained in Chapter 19 of the *Children's Act* do not explicitly make provision for the predicament that occurs when commissioning parents enter into a verbal surrogate motherhood agreement which results in the artificial fertilisation and eventual pregnancy of the surrogate mother

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175 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 1. The application was brought before the court in accordance with s 292 read together with s 295 of the *Children's Act* 38 of 2005.

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

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

178 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 3.

179 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 3.

*before* approaching the court for the confirmation of a legally concluded (written and signed) surrogate motherhood agreement.<sup>180</sup>

Keightley J emphasised two characteristics that form the framework of a surrogate motherhood agreement. The first of these is the multifaceted nature of the agreement.<sup>181</sup> The nature of surrogate motherhood agreements can be attributed to the personal manner in which some of the parties involved are affected by the contents of the surrogate motherhood agreement.<sup>182</sup> Surrogate motherhood agreements are therefore required to make provision for and govern the complexly interconnected relationships that pertain to the various parties' obligations, interest and rights.<sup>183</sup> In an attempt to regulate these interconnected relationships in the best possible manner Chapter 19 prohibits the artificial fertilisation of a surrogate mother prior to the vetting and confirmation of a legally drafted surrogate motherhood agreement by the High Court.<sup>184</sup> A further complexity is encountered when the fact is considered that all the provisions in the agreement need to fully provide for the best interest of the resultant child.<sup>185</sup> Keightley J maintained the following with regard to the best interest of the resultant 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 motherhood agreement, his or her future rights and interests are the most important of all the rights and interest involved. To ensure that they are adequately protected, the law requires

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180 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 4 and 5.

181 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 7.

182 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 7.

183 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 7.

184 Section 296(1)(a) of Chapter 19; also see *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 8.

185 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 7. In this matter the resultant child had been conceived but was not yet born.

certainty and judicial scrutiny of the proposed surrogacy arrangement before there is even any prospect of a child coming into being.<sup>186</sup>

It is against this backdrop that the court attempted to answer the two legal questions that arose in *Ex parte MS*. The first legal question pertained to the competency of the court to confirm surrogate motherhood agreements that are in breach according to the provisions contained in Chapter 19.<sup>187</sup> The court furthermore aimed to establish the proper interpretation of Chapter 19 and in doing so determine the protocol that should be implemented in matters of this nature.<sup>188</sup> Stated differently, the court aimed to clarify what presiding officers could expect from parties who enter into verbal surrogate motherhood agreements with the further intent of applying to the High Court for the confirmation of those agreements.<sup>189</sup> The court also sought to address the basis on which it may apply its discretion when confirming inadequate surrogate motherhood agreements.<sup>190</sup>

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

#### **4.2 Facts of the case**

The commissioning parents in this matter were both South African citizens resident in Gauteng and married in 1991.<sup>191</sup> The married couple attempted to conceive a child on their own but the commissioning mother received a chronic medical diagnosis which

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186 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 9.

187 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 10.1.

188 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 10.2.

189 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 10.2.

190 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 10.2.

191 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 11.

"interfered with her ability to fall pregnant".<sup>192</sup> Upon receiving this news, the commissioning parents sought the advice of numerous fertility specialists and underwent medical treatment and procedures, including *in vitro* fertilisation, to no avail.<sup>193</sup> After suffering through two miscarriages the commissioning parents were informed that the first applicant suffered from secondary infertility, a condition which is permanent and irreversible.<sup>194</sup> According to medical experts the commissioning parents could only realise their desire to have a child of their own by making use of an egg donor and a surrogate mother.<sup>195</sup>

Having decided to take the medical experts' advice, the commissioning parents entered into their first surrogate motherhood agreement. Notwithstanding the court's confirmation of the surrogate motherhood agreement on 8 September 2010, the surrogate mother decided not to honour the agreement and by doing so prevented the fertilisation process.<sup>196</sup> The commissioning parents entered into a second surrogate motherhood agreement with a different surrogate mother.<sup>197</sup> The court confirmed the second surrogate motherhood agreement on 8 June 2011 and the surrogate mother was subjected to the artificial fertilisation procedure twice, to no avail.<sup>198</sup>

Having endured both emotional and financial loss, the commissioning parents were reluctant to enter into a third surrogate motherhood agreement with a different surrogate mother.<sup>199</sup> However, they decided to try for the third time after having been

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192 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 11.

193 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 11.

194 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 12.

195 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 12.

196 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 13.

197 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 13.

198 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 13.

199 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 14.

approached by a surrogate mother who was a "good friend of the second surrogate mother", and furthermore well aware of the difficulty they had experienced during their first two attempts.<sup>200</sup> After giving due thought to the inevitable process and given their past disappointment the commissioning parents decided to refrain from contacting their attorney until they were certain of the surrogate mother's commitment and her successful pregnancy.<sup>201</sup> The parties consequently entered into a verbal surrogate motherhood agreement during September 2012 and only sought the assistance of their attorney after the successful pregnancy of the surrogate mother following the first artificial fertilisation procedure and the stabilisation of the pregnancy.<sup>202</sup>

According to the High Court the commissioning parents were not legal experts and, being laymen, did not fully appreciate or even anticipate the eventual consequences of their actions.<sup>203</sup> This explains their commencement with the artificial fertilisation of the surrogate mother prior to the legal confirmation of the surrogate motherhood agreement by the High Court.<sup>204</sup> Upon discovering that their inability to meet the requirements set out in Chapter 19 would influence the status of the unborn child and furthermore place a burden on the surrogate mother to support another child, the parties acted according to the legal advice provided by their attorney and completed the necessary formalities.<sup>205</sup> Having done so, the parties applied for the confirmation of their surrogate motherhood agreement in order to rectify their respective positions. At this point the surrogate mother was already 33 weeks pregnant.<sup>206</sup> The surrogate mother confirmed to the court that she had entered into the agreement with the

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200 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 14.

201 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 15.

202 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 15.

203 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 16.

204 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 16.

205 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 16.

206 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 16.



commissioning parents for purely 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.<sup>207</sup>

During its decision-making process the High Court made specific reference to relevant sections in Chapter 19, which were read together.<sup>208</sup>

### **4.3 Legislative provisions considered by the court**

According to section 292 all parties are required to legally draft and sign a written surrogate motherhood agreement, which must be presented to the High Court for confirmation. While section 295 prohibits the High Court from confirming a surrogate motherhood agreement where the comprehension of the legal consequences of such an agreement were not understood and appreciated by the parties,<sup>209</sup> in considering the provisions of section 295 the High Court emphasised the provisions contained in subsection (d) and (e):

(d) the agreement includes adequate provisions for the contact, care, upbringing and general welfare of *the child that is to born* in a stable home environment, including the child's position in the event of the death of the commissioning parents or one of them, or their divorce or separation *before the birth of the child*; and

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207 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 16.

208 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 19 – 23.

209 The High Court is further prohibited from confirming a surrogate motherhood agreement in matters where the suitability of the parties is in question. Section 295 of Chapter 19. With regard to the commissioning parents this pertains to their irreversible and irreversible medical condition to conceive a child. The commissioning parents are further required to be competent and fully accept the consequences of the agreement pertaining to the future rights and obligations they will acquire once the child is born. Section 295(c)(i-vii) makes provision for the suitability required of the surrogate mother. In addition to her full understanding and acceptance of the legal consequences of the agreement, the surrogate mother is further required to enter into the surrogate motherhood agreement for purely altruistic reasons and not receive any form of compensation. She is also required to have one living child of her own as a result of a successful pregnancy and delivery. The surrogate mother may have to provide the historical documentation to assist her in meeting this requirement.

(e) in general, having regard to the personal circumstances and family situations of all the parties concerned, *but above all the interests of the child that is to be born*, the agreement *should* be confirmed (emphasis added).<sup>210</sup>

Notwithstanding the provisions made in section 295, section 296(1)(a) clearly prohibits the artificial insemination of the surrogate mother prior to the confirmation of the surrogate motherhood agreement by the High Court. The prohibition provided in section 296 is reiterated in section 303(1):

No person may artificially fertilise a woman in the execution of a surrogate motherhood agreement or render assistance in such artificial fertilisation, *unless that artificial fertilisation is authorised by a Court* in terms of the provisions of this Act (emphasis added).<sup>211</sup>

The obligation to rigorously adhere to section 303(1) is substantiated by the provisions of section 305(1)(b), read together with section 305(6) and (7). These sections render any individual who contravenes the provisions made in section 303(1) guilty of an offence and potentially liable to imprisonment or a fine.<sup>212</sup>

The final legislative reference made by the court is section 297 of Chapter 19. This section makes provision for the legal status of the child in valid as well as invalid surrogate motherhood agreements. Regarding the former, section 297(1)(a) provides that the child be deemed the child of the commissioning parents once the child is born. In order for this to be accomplished, the surrogate mother would hand over the child to the commissioning parents once the child has been born, and in doing so relinquish any rights and obligations she may have towards the child.<sup>213</sup> While subsection (e) prohibits the termination of the surrogate motherhood agreement after the surrogate mother has been artificially inseminated, this contravention is, however, subject to the provisions

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210 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 19.

211 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 21.

212 According to s 305(1)(b), read together with s 305(6) and (7), this imprisonment must not exceed 10 years or, in cases where this a second or further offence, 20 years. Also see *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 21.

213 Section 297(1)(a)-(c). Subsections (d) and (f) further prohibit any contact with the child unless alternative arrangements were made by the parties, and terminates any maintenance claims that the child may want to instigate against the surrogate mother, her spouse or any of their relatives.

contained in section 292 and section 293 of Chapter 19.<sup>214</sup> With regard to invalid surrogate motherhood agreements, article 297(2) provides that:

*Any surrogate motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.* (emphasis added)

It is clear from the above-mentioned sections contained in Chapter 19 that no person may assist in the artificial insemination of the surrogate mother before the High Court has been approached to confirm the surrogate motherhood agreement. Furthermore, that upon the contravention of any of the requirements provided in the respective sections of Chapter 19, the surrogate motherhood agreement be regarded as invalid, which will in turn substantially affect the status of the child born from the surrogacy.

#### ***4.4 Application and interpretation of the legislation***

After providing the legal framework for the matter placed before the court, Keightley J addressed the first legal question, which pertained to the High Court's competency to validate surrogate motherhood agreements *ex post facto*.

As a point of departure Keightley J highlighted the absence of expressed legislative provision by Chapter 19 regarding the competency of the High Court and its discretion in matters where it is approached to confirm surrogacy matters after the surrogate mother has been artificially fertilised.<sup>215</sup>

The High Court correctly identified the artificial fertilisation of the surrogate mother prior to the confirmation of a surrogate motherhood agreement by the High Court as

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<sup>214</sup> Section 292 makes provision for the validity of a surrogate motherhood agreement. Such validity is present in matters where the agreement entered into by the parties is in written form and contains the signatures of all parties involved, the agreement has been entered into in the Republic, at least one of the commissioning parents is domiciled in the Republic, the surrogate mother and her partner are domiciled in the Republic at the time that the contract is concluded and that the agreement is confirmed by the High Court, who is within the jurisdiction of the commissioning parents.

<sup>215</sup> *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 29.

being an unlawful act.<sup>216</sup> In establishing this the court referred to the common law principle which holds that any agreement to commit an unlawful act be deemed unenforceable.<sup>217</sup> This includes those acts that are "unlawful in terms of a statute".<sup>218</sup> According to the High Court, any indirect or direct act that contributes to another committing or encourages another to commit an unlawful act may also be regarded as being unenforceable, depending on the existence of a sufficiently close connection.<sup>219</sup> The court not only acknowledges this common law principle, but also maintains the following regarding the application thereof:

In the absence of clear provisions to the contrary, a court would normally be slow to interpret a statute so as to give the court power to condone, and even to encourage, unlawful and criminal conduct by giving retrospective effect to an agreement linked to a prohibited act.<sup>220</sup>

However, the court maintained that the common law principle not be applied in a determinative manner with regard to the issues that arose in *Ex parte MS*.<sup>221</sup> In this regard the court referred to *Ex parte WH*, where the adjudicator in this matter emphasised the unique nature of surrogate motherhood agreements and their ultimate purpose to secure the best interests of the child to be born.<sup>222</sup> In addition to *Ex parte WH*, the High Court also referred to the provisions contained in section 39(2) of the Constitution. This section places an obligation on courts to interpret legislation in a manner that would promote the object, spirit and purport of the Bill of Rights.<sup>223</sup> Courts are furthermore encouraged to adopt the most reasonably

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216 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 32.

217 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 31.

218 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 31.

219 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 31.

220 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 33.

221 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 34.

222 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 34.

223 Section 39(2) of the Constitution.

plausible/possible interpretation.<sup>224</sup> In an attempt to reach a reasonably plausible interpretation that still complies with the Constitution, a court must read legislation in a purposeful and contextual manner.<sup>225</sup> This may necessitate a more generous statutory interpretation in some instances, which will furthermore ensure the court's constitutional compliance.<sup>226</sup>

It is within this framework that the court made its three-pronged argument regarding the interpretation and application of Chapter 19 with regard to the first legal question in *Ex parte MS*.

The first argument made by the court is based on the ambiguity of Chapter 19 with respect to the power attributed to the High Court when confirming a surrogate motherhood agreement.<sup>227</sup> Here the court highlighted what it considered to be a contradiction between the provisions in section 295(b)(ii) and section 295(d) and (e) of Chapter 19. According to the court, the contrast can be found in the wording of the provisions.<sup>228</sup> On the one hand section 295(b)(ii) requires the court to be satisfied that the commissioning parents are on all accounts suitable to accept "the parenthood of the child that is to be conceived".<sup>229</sup> Section 295(d) and (e) then require the court to be satisfied that due provision has been made for the future care, welfare, interests and upbringing of the child to be born.<sup>230</sup> According to the court, the category provided in section 295(d) and (e) seems to be broad enough to encompass the unborn child who has already been conceived but is yet to be born

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224 Currie and De Waal *The Bill of Rights Handbook* 61.

225 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 36.

226 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 36.

227 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 40.

228 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 40.

229 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 40.

230 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 40.

at the time when confirmation of the surrogate motherhood agreement is sought.<sup>231</sup> The court therefore considered the provisions contained in section 295 to include matters where the child is *yet* to be conceived when the surrogate motherhood agreement is presented to the court for confirmation, as well as those where the child has *already* been conceived but is yet to born.<sup>232</sup>

In the second instance the court maintained that section 292 and section 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 when the court is approached for the confirmation of a surrogate motherhood agreement.<sup>233</sup> It was therefore held by the court that these provisions do not preclude it from confirming verbal surrogate motherhood agreements after the surrogate mother has been artificially fertilised.<sup>234</sup>

When considering the matter of the prohibitive legislation provided in Chapter 19 the court raised the following question in its final argument:

[w]ether these prohibitory provisions were intended by the Legislature to have the effect of rendering a post-fertilisation surrogacy agreement invalid and incapable of subsequent validation through confirmation by a court under sections 292 and 295.<sup>235</sup>

The High Court held that the legislation primarily prohibited the artificial fertilisation of the surrogate mother prior to the confirmation of the surrogate motherhood agreement.<sup>236</sup> However, according to the High Court, section 296 and section 303 do not prohibit commissioning parents from formally concluding a surrogate

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231 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 40.

232 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 41.

233 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 42.

234 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 43.

235 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 44. The respective prohibitive legislation being provided by s 296 and s 303 of Chapter 19.

236 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 45.

motherhood agreement and approaching the High Court for confirmation *after* the artificial fertilisation of the surrogate mother has occurred.<sup>237</sup> The court averred that the legislature would have expressly provided this additional limitation if this were its intention.<sup>238</sup>

Further reference was made to section 297(2), which provides the following:

Any surrogacy motherhood agreement that does not comply with the provisions of this Act is invalid and any child born as a result of any action taken in execution of such an arrangement is for all purposes deemed to be the child of the woman that gave birth to that child.<sup>239</sup>

Here the court maintained that a surrogate motherhood agreement will only be deemed to be invalid if it does not comply with the requirements provided in section 292 and section 295.<sup>240</sup> Since neither of these sections expressly prohibits the commissioning parents from approaching the High Court *ex post facto*, the other requirements provided in these sections will be adhered to upon the confirmation of the surrogate motherhood agreement by the court, which will in turn render the surrogate motherhood agreement valid.<sup>241</sup> The court maintained the following:

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.<sup>242</sup>

The High Court concluded this matter by emphasising the fact that though Chapter 19 expressly prohibits the artificial fertilisation of the surrogate mother prior to the

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237 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 46.

238 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 46.

239 Section 297(2) of Chapter 19.

240 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 47.

241 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 47.

242 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 47.

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*.<sup>243</sup>

In substantiating the court's justification for the aforementioned interpretation, the High Court in *Ex parte MS* maintained that a prohibitive interpretation of the legislation "would undermine the constitutional rights of the parties involved".<sup>244</sup> With regard to the commissioning parents these constitutional 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.<sup>245</sup> On the other hand, the surrogate mother would be imposed with full parental responsibilities and rights, which subsequently infringes upon her right to make her own reproductive choices.<sup>246</sup> Notwithstanding the previously mentioned rights of the parties already born alive, i.e. the commissioning parents and the surrogate mother, the court maintained the following with regard to the resultant child.

Above all else, it is the rights and interest of the 'sleeping partner' in the surrogacy relationship, ie 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'.<sup>247</sup>

The High Court went on to emphasise the detrimental effect that the non-confirmation and invalid status of the surrogate motherhood agreement would have on the child to

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243 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 48.

244 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 50.

245 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 51. Here the court maintains that the adoption would be the only alternative available to the commissioning parents.

246 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 52.

247 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 53. It should be noted that while Chapter 19 does refer to the best interest of the child, it does not use the term "rights" in s 295(e). This section clearly provides that the *interests* of the child be taken into consideration.



be born from the surrogacy.<sup>248</sup> According to the court, the child would be deprived of the family life and environment planned ahead for him/her and would furthermore be forced to rely upon the parental care of the surrogate mother, who expressly stated her decision not to fulfil this future role.<sup>249</sup> In the conclusion of its argument 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 proved in Chapter 19.<sup>250</sup>

As a closing remark the High Court in *Ex parte MS* provided some guidelines for future post-fertilisation confirmation applications of surrogate motherhood agreements.<sup>251</sup> The court maintained that the parties should still be required to draft and sign a written surrogate motherhood agreement which will be presented to the High Court for confirmation, and that post-fertilisation applications be regarded as an exception to the rule in this regard.<sup>252</sup> Parties will furthermore have to provide the court with sufficient reasons (facts) for their tardiness.<sup>253</sup> Due to the fact that parental responsibilities and rights are vested upon the parents once the child has been born, parties will have to ensure the surrogate motherhood agreement is confirmed by the court prior to the birth of the child.<sup>254</sup> Once the child has been born, parties will have to rely upon alternative legal measures, *inter alia* adoption, a parental responsibilities and rights agreement as

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248 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 54.

249 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) 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 surrogate motherhood agreement in accordance with s 298(2) of Chapter 19. It should be noted that the surrogate mother also retains the right to terminate the pregnancy in accordance with s 300 of Chapter 19 and the *Choice of Termination of Pregnancy Act* 92 of 1996.

250 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 57-58.

251 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 59-71.

252 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 61.

253 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 62.

254 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 67.

provided for by section 22 of the *Children's Act* or, alternatively, an application for guardianship under section 24 of the *Children's Act*.<sup>255</sup>

Being satisfied that the parties in *Ex parte MS* 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 section 292 and section 295, the High Court confirmed the surrogate motherhood agreement.<sup>256</sup> The court emphasised the best interest of the child once more by maintaining the following:

Further, I have no doubt that it is in the best interests of the child soon to be born out of this surrogacy arrangement that the agreement be validated through confirmation by this Court.<sup>257</sup>

Louw criticises the decision reached in *Ex parte MS* and raises a number of concerns regarding the precedent that has been set by this judgement.<sup>258</sup>

#### **4.5 Critique**

An important question is raised by Louw with regard to the court's use of the best interest of the child as a means to justify its (the court's) discretion:

The immediate question that arises is when would it *not* be in the best interest of a child to confirm a surrogacy agreement once the child has been conceived?<sup>259</sup>

Louw accordingly asserts that if the judiciary finds the *Children's Act* (Chapter 19) provisions to be in direct conflict with the Constitution with regard to the requirement that the best interest of the child be established prior to the artificial fertilisation of the surrogate mother, it (the court) has to follow the necessary

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255 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 69.

256 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 72-77.

257 *Ex parte MS; In re: Confirmation of Surrogate Motherhood Agreement* 2014 2 All SA 312 (GNP) para 75.

258 Louw 2014 *De Jure* 116-118.

259 Louw 2014 *De Jure* 116.

protocol to invalidate this provision.<sup>260</sup> Following this statement Louw opines that the solution would not be to "introduce a loop-hole" that "makes a mockery" of the provisions contained in Chapter 19, more specifically those provisions that prohibit artificial fertilisation prior to the legal confirmation of the surrogate motherhood agreement.<sup>261</sup>

In her recommendations Louw avers that the use of the best interest of the child as a supernatural problem-solver (*deus ex machina*) merely enhances allegations "of its manipulative character".<sup>262</sup> She refers to *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) and opines that while the best interest of the child may be paramount in all matters concerning the child, it is not decisive, as other factors should also be taken into consideration.<sup>263</sup> In closing Louw criticises the arguments used by the court in justification of its intervention and further maintains that in doing so the court has undermined the legislation's value, while also creating doubt in the fragile surrogacy process.<sup>264</sup>

It is submitted that the confusion surrounding surrogacy matters can to some extent be attributed to the legislator as well as the adjudicator's inability to expressly establish whether the principle of the best interest of the child should be applied as a substantive (constitutional) right.

Reference should be made to General Comment 14 with regard to the UNCRC's position on the best interest of the child. According to the guiding provisions made in the general comment, a child is seen as "all persons under the age of 18", and little (if any) reference is made to the unborn child.<sup>265</sup>

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260 Louw 2014 *De Jure* 116.

261 Louw 2014 *De Jure* 116.

262 Louw 2014 *De Jure* 117.

263 Louw 2014 *De Jure* 118.

264 Louw 2014 *De Jure* 118. "The courts should definitely do better."

265 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 7.

The position held by the legislators of Chapter 19 of the *Children's Act* as well as the High Court in *Ex parte MS* seems to suggest a consensus, to some extent, with the position held by the Vatican that life begins at conception.<sup>266</sup> This is submitted with respect to both entities' use of the best interest of the child prior to the birth of the child. As is discussed in Chapter 2 of this paper, constitutional rights cannot be attributed to a "non-person", as this is inconsistent with the position held by domestic as well as international instruments. Even if the best interest of the child were to be used as a constitutional (substantive) right, it is not absolute and can be subject to limitation.<sup>267</sup>

#### 4.5.1 Limitation of the substantive right

In *Sonderup v Tondelli* 2001 (1) SA 1171 (CC) section 28(2) of the Constitution was used to limit other constitutional rights. In this case the Constitutional Court dealt with the "peremptory return" rule as provided for in the *Hague Convention on the Civil Aspects on International Child Abduction*, 1980.<sup>268</sup> Having found that the rule best served the child's long-term best interests, the court held that the limitation of the child's short-term best interest was justifiable in accordance with the provisions of section 36 of the Constitution.<sup>269</sup>

The best interests can furthermore be used to limit the constitutional rights of another. A limitation of this nature took place in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) (De Reuck)* 2004 (1) SA 406 (CC). In this case the court

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266 Ratzinger and Bovone 1987 date of web publication unknown <http://www.vatican.va/> accessed 18 September 2016. "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."

267 Section 36 of the Constitution; also see Skelton "Constitutional Protection of Children's Rights" 280.

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

269 Skelton "Constitutional Protection of Children's Rights" 282. The court maintained that this was largely due to the fact that the Hague Convention primarily aims towards negating all negative effects that occur when children are unlawfully transferred "across international borders".

found the limitation of the applicants' rights to freedom of expression and privacy which was caused by the law prohibiting child pornography justifiable due to the essential purpose that the law served in protecting the best interests of the child.<sup>270</sup> The court in *De Reuck* further maintained that section 28(2)'s use of the word "paramount" did not exclude the possible limitation of the best interest of the child by other rights.<sup>271</sup> The general approach adopted by the court in this regard reiterated the view of constitutional rights as being mutually "interdependent and interlinked", which allows them to form a singular constitutional value system.<sup>272</sup> 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 36 of the Constitution.<sup>273</sup> In reaching this decision the court maintained that even though the best interest 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 or trump other constitutional rights.<sup>274</sup>

The court's interpretation of the best interest of the child in *De Reuck* caused some uncertainty regarding the precise meaning of the term "paramount importance".<sup>275</sup> The issue of the uncertainty that arose was deliberated in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC). In this case a single mother who had three children was found guilty of fraud and accordingly facing a prison sentence. An appeal

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

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

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

273 Skelton "Constitutional Protection of Children's Rights" 282. Also see s 36 of the Constitution which provides the following:

"36. (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."

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

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

was brought before the court regarding the consideration that must be given when sentencing a primary care-giver. The court was urged to consider the effect that the possible imprisonment might have on the children.<sup>276</sup> During its decision-making process the court was tasked with weighing up the best interest of the children with the community's right to receive protection from the effects of criminal acts.<sup>277</sup> In an attempt to derive meaning from the term "paramount importance" a comment was made by Sachs J regarding the expansive nature of the principle of paramountcy.<sup>278</sup> In his comment Sachs J mentioned that while the principle seemed to promise everything, it did not really deliver particularly much.<sup>279</sup> Attention was drawn to the indeterminate state of the concept of the best interest and how this created an opportunity for judges and legal professionals to understand the concept differently.<sup>280</sup> Notwithstanding the indeterminate nature of the concept, it was maintained by Sachs J that the source of strength of section 28 was established by the "contextual nature and inherent flexibility" of the section.<sup>281</sup>

The court in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) further emphasised the need to determine each matter on a case-by-case basis and, in doing so, ensure a genuine "child-centred approach".<sup>282</sup> This approach can only be effectively executed when the court determines the exact needs of the child in the particular case. Put differently, if the court were to merely implement a "pre-determined formula", it would in fact be acting contrary to the child's best interests in that particular matter.<sup>283</sup> Sachs J concluded by maintaining that while the principle was not an "overbearing and unrealistic trump", the paramount nature of the best interests of the child did not render them absolute.<sup>284</sup>

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276 Skelton "Constitutional Protection of Children's Rights" 283.

277 Skelton "Constitutional Protection of Children's Rights" 283.

278 Skelton "Constitutional Protection of Children's Rights" 283.

279 Skelton "Constitutional Protection of Children's Rights" 283.

280 Skelton "Constitutional Protection of Children's Rights" 283.

281 Skelton "Constitutional Protection of Children's Rights" 283.

282 Skelton "Constitutional Protection of Children's Rights" 283.

283 Skelton "Constitutional Protection of Children's Rights" 283.

284 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 26.

With regard to the matter of paramountcy the court in *S v M* 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.<sup>285</sup> According to the court this does not necessarily mean that all the other considerations should be overridden, but rather necessitates a proper weighting of the considerations in each case.<sup>286</sup> 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 interest of the children in the matter.<sup>287</sup>

A further insight pertaining to the possible limitation of the best interest 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.<sup>288</sup> 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.<sup>289</sup>

Emphasis should be placed on the fact that all the children whose best interest was limited in the above-mentioned court cases had already been born alive when the matters were placed before the court. This is essentially different from surrogacy matters, where the existence of the child is still in question. Differently put, there is no guarantee that the child will eventually be born alive. Furthermore, the surrogate

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285 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 25.

286 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 25.

287 *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC) para 25.

288 *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). Needless to say that this degree of sentencing should only be implemented as "a measure of last resort".

289 *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.

mother reserves the right to terminate either the pregnancy or the surrogate motherhood agreement once the child has been born.<sup>290</sup>

It is therefore submitted that if courts insist on applying the best interest of the child to future surrogacy matters where they are approached with inadequate surrogate motherhood agreements, they apply it as a rule of procedure or as a means of interpreting legislation (fundamental, interpretative legal principle).<sup>291</sup> 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.<sup>292</sup> The latter affords courts the opportunity to interpret legislation in a manner that would be most beneficial to the resultant child. It is furthermore submitted that in order for this to occur, a clear separation be made between the three concepts provided by General Comment 14.

With regard to the decision reached by the court in *Ex parte MS* it is submitted that an alternative adjudicative procedure could have been followed by the court in order to

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290 Section 298 of Chapter 19 makes provision for the termination of the surrogate motherhood agreement by the surrogate mother 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 within sixty days after the birth of the child. In order to follow this procedure, the surrogate mother will have to file a notice with the respective court. A court may only terminate the agreement in terms of s 295 of Chapter 19 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 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 interest 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 respect to those payments made by the commissioning parents that are not listed in s 301 of Chapter 19. Section 301 prohibits all forms of compensation, but provides the commissioning parents with the right to claim back 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. On the other hand, s 300 of Chapter 19 provides the surrogate mother with the right to terminate the pregnancy in terms of the *Choice of Termination of Pregnancy Act 92, 1996*. The surrogate mother is, however, obligated to inform the commissioning parents of her decision before terminating her pregnancy and consult them before the procedure is carried out. Again the surrogate mother will have liabilities towards the commissioning parents, save those expenses provided for in s 301 of Chapter 19.

291 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 4.

292 Committee on the Rights of Children 2013 <http://www2.ohchr.org> 4.



avoid inadvertently opening Pandora's Box. In order to elaborate on this alternative approach, the current status of surrogacy in the UK is briefly considered.

## 5 Surrogacy in the UK<sup>293</sup>

### 5.1 Introduction

There are two pieces of legislation explicitly governing surrogacy matters in the UK.<sup>294</sup> The *Surrogacy Arrangement Act* 1985 makes provision for the unenforceability of surrogacy contracts, while also criminalising acts of commercial surrogacy.<sup>295</sup> The second piece of legislation is the *Human Fertilisation and Embryology Act* 2008, which serves as the basis for the following discussion in relation to its provision for the Parental Order.<sup>296</sup>

In 1992 a UK Member of Parliament led a campaign on behalf of a married couple who resided within his voting area and had to establish their parenthood by adopting their genetic children following a surrogate motherhood agreement.<sup>297</sup> This campaign led to the Parental Order provision, provided for in section 54 and section 55 of the *Human Fertilisation and Embryology Act* 2008 (HFE). The aforementioned sections in the HFE provide for the post-birth transferral of legal parenthood, subject to the parties' adherence to certain conditions.<sup>298</sup>

A Parental Order has been defined as a "fast-track adoption order", in that it allows the commissioning parents to obtain legal parenthood of the child resulting from the surrogate motherhood agreement after the child has been born (*ex post facto*).<sup>299</sup> The

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293 The UK enacted legislation governing surrogacy matters in 1985, while legislation which makes provision for a parental order was enacted in 2008. Though certain objections have been raised against these two pieces of legislation respectively, it is submitted that the approach taken by the UK in surrogacy matters provides an alternative solution to the issues that arose in *Ex Parte MS*.

294 Smit *et al* Surrogacy in the UK 11. Also see Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 38. For purposes of this discussion the term "the UK" will refer to the following countries: England, Scotland, Wales and Northern Ireland.

295 Section 2 of the *Surrogacy Arrangements Act*, 1985 prohibits commercial activities that amount to negotiating or acting as a stockbroker in surrogacy arrangements. Also see Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 38.

296 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.

297 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 58.

298 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 58.

299 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 58.

process is initiated by a formal application that must be made to the court, vetted and approved by a judge if he is satisfied that all the criteria have been met.<sup>300</sup> Prior to the approval of the Parental Order, the surrogate mother will be regarded as the legal mother once the child has been born, and if she has a partner, s/he (the partner) may be the second legal parent of the child.<sup>301</sup> The consent of both of the parents is required for the Parental Order to be approved.<sup>302</sup> In order to ensure the approval of their Parental Order application, commissioning parents (the applicants as referred to by legislation) need to sufficiently meet the requirements provided by section 54 of the HFE.<sup>303</sup>

## **5.2 Requirements in section 54**

Both applicants must be 18 years or older before applying for a Parental Order, and at least one of the two parties has to be domiciled in the UK at the time the application is made.<sup>304</sup> Section 54 makes provision for applicants who are married, in a permanent living situation or a civil partnership, but prohibits singles from making use of this process as it requires "two people" to make the application.<sup>305</sup>

Regarding the mode of conception, section 54(1)(a) requires that the surrogate mother be artificially inseminated and that there be a genetic link between the applicants and the embryo.<sup>306</sup> Here it should be noted that the surrogate mother (who gives birth to

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300 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 58. The criteria are discussed below.

301 Section 33(1) of the HFE 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 L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 58.

302 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 58.

303 Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 60-62.

304 Section 54(5) makes provision for the age requirement. It should be noted that no provision is made for an upper age limit. Section 54(4)(b) makes provision for the domicile requirement.

305 Section 54(1) makes provision for the "two people" requirement. Also see Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 60. Section 54(2) makes provision for the types of relationships mentioned. Here it should be noted that the section specifically provides for two people who are living in an "enduring family relationship".

306 Section 54(1)(a) makes provision for artificial insemination by placing an embryo or sperm and egg cells in the surrogate mother, while s 54(1)(b) provides the genetic link requirement. Should the surrogate mother conceive through intercourse the common law rules regarding legal parenthood will be applied. Brunet L *et al* 2012 <http://eprints.lse.ac.uk/51063/1/> 60. With regard to the genetic link

the child) will be regarded as the legal parent of the child, regardless of whether she has a genetic link with the child.<sup>307</sup> An application for a Parental Order has to be conducted within six months after the child's birth, and the child's home at the time of application should be with the applicants.<sup>308</sup>

As with any other adoption matter, consent is required from the surrogate mother as well as her partner where this is applicable.<sup>309</sup> In the event where these individuals cannot be located or are incapable of providing their consent, this requirement may be waived.<sup>310</sup> The court must furthermore be satisfied that there were no forms of commercial surrogacy present in the application presented.<sup>311</sup> While the paramountcy of the child's welfare is not mentioned in the HFE, provision for this has been made in the *Human Fertilisation and Embryology (Parental Order) Regulations 2010*.

Notwithstanding the importance of the HFE, some problematic areas have been identified with regard to the current Parental Order requirements.<sup>312</sup>

### **5.3 Problems with current requirements**

The first identified problem pertains to the court's retrospective authorisation of payments in accordance with section 54(8) of the HFE.<sup>313</sup> According to this provision, the court has to be satisfied that the surrogate mother has not received any monetary

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requirement it should be noted that there is no requirement in the HFE that the intended mother be medically unable to carry a child to term and give birth to such a child. However, this may be required. A medical professional may require proof of this prior to commencing with a medical fertility treatment. Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 60.

307 This is due to the provisions made in s 33 of the HFE, which provide the woman carrying (who has carried) the child to be treated as the mother of the child that she birthed.

308 Section 54(3) 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 making of the order. This means that the child will stay with individuals who are not his/her legal parents or, put differently, do not have a legal relationship with him/her.

309 In accordance with s 54(6) 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.

310 In accordance with s 54(7).

311 Section 54(8) does make provision for "expenses reasonably incurred".

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

313 Smit *et al*/Surrogacy in the UK 30. Also see Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 62.

or benefit other than for reasonably incurred expenses.<sup>314</sup> This consideration by the court only takes place *ex post facto*, and at this point the surrogate mother may have not only willingly received but also spent the compensation given to her by the applicants.<sup>315</sup> It should be noted that there has to date not been a case in the UK where the court refused an order on the basis of an unreasonable amount of the expenses compensated by applicants.<sup>316</sup> Courts have, however, indicated their discomfort with this provision, as it places them in a position where they may be obligated to refuse an order in a situation where such refusal might be to the child's detriment.<sup>317</sup>

Problems surrounding the time limit provided by the applicants in section 54(3) came to the fore in *X (A Child) (Surrogacy: Time Limit)* 2014 EWHC 3135. In this matter the court held that the parties could apply for a Parental Order even after the six-month 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.<sup>318</sup>

The third problem pertains to the single-parent requirement, as provided for by section 54.<sup>319</sup> 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 solely based his decision for doing so on the words contained in section 54.<sup>320</sup>

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314 Smit *et al*/Surrogacy in the UK 30.

315 Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 62.

316 Smit *et al*/Surrogacy in the UK 30. In the report the authors refer to *Re X and Y (Foreign Surrogacy)* 2008 EWHC 3030 to indicate that this is the case even in cases where the applicants gave the surrogate mother 25 000 euros in addition to their monthly payment of 235 euros. It later became known that the 25 000 euros served as the surrogate mother's flat deposit. This clearly exceeds s 54(8) of the HFE's reasonable expenses requirement.

317 Brunet L *et al*/2012 <http://eprints.lse.ac.uk/51063/1/> 62.

318 *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.

319 Smit *et al*/Surrogacy in the UK 32.

320 Smit *et al*/Surrogacy in the UK 32.

According to the presiding officer, this section requires an application to be made by "two people", and in doing so does not make provision for single-parent applications.<sup>321</sup>

The requirement for a genetic link has also been identified as a problematic area in UK surrogacy matters.<sup>322</sup> This seems to be a problem that transcends borders, as this exact issue was brought before a South African court in 2015. The court in *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* [2015] 4 All SA 24 (GP) found the requirement for a genetic link unconstitutional in terms of the South African Constitution.<sup>323</sup>

The final problem pertains to the surrogate mother's lack of consent.<sup>324</sup> Section 54(6) requires the surrogate mother to give her consent with regard to the Parental Order, while subsection (7) provides that this need not be the case where the surrogate mother cannot be traced.<sup>325</sup> Recently courts have, however, decided to dispense with this requirement, firstly because of the unavailability of the surrogate mother, and also due to the fact that it would in most cases be in the best interest of the child to grant the Parental Order.<sup>326</sup>

While it is evident that the UK surrogacy legislation discussed above also contains certain areas of concern, it is submitted that it, or a derivative thereof, could have served as a viable alternative in *Ex parte MS*.<sup>327</sup> When considering the facts *in casu*, it

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321 *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 that this provision was contrary to the right to a private and 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.

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

323 *AB and Another v Minister of Social Development As Amicus Curiae: Centre for Child Law* [2015] 4 All SA 24 (GP) para 100.

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

325 Section 54(6) and s 54(7); also see Smit *et al* Surrogacy in the UK 34.

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

327 Such referencing by the court would also have been consistent with the provisions made in s 39 (1)(c) of the Constitution. This section provides courts with the ability to consider foreign law when interpreting the Bill of Rights.

appears as though none of the concern areas mentioned above would have inhibited the court from invoking a Parental Order after the child had been born.

It is noted that some objection to this recommendation may arise, as one of the primary reasons why commissioning parents choose to make use of surrogate motherhood agreements can be attributed to the fact that adoption may not always cater for their specific needs.<sup>328</sup> It is, however, submitted that provision can accordingly be made for those parties, *provided* they adhere to all the requirements contained in Chapter 19. If the requirements are not met, the initial results (validation of a surrogate motherhood agreement) cannot follow, as this would lead to a logical (reasonable) contradiction. Parties who do not meet the requirements set out in Chapter 19 should not be rewarded for their lack of compliance.

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328 Louw 2013 *THRHR* 571.

## 6 Conclusion

It is common knowledge that all children occupy special places within the cultural, legal and social spheres of many societies.<sup>329</sup> This general notion is better understood when one recognises the vulnerable state of most children and the need that arises in every community to not only champion the well-being of the child, but also provide them with protection when and wherever necessary.<sup>330</sup>

It is only with the full cooperation of each individual that the child's best interest can be pursued and advanced in an attempt to secure each child's self-development and future social integration.<sup>331</sup> This theorem is further emphasised in the preamble to the UNCRC, which provides for the complete and harmonious development of each child and further provides that this development take place in a "family environment, in an atmosphere of happiness, love and understanding".<sup>332</sup> Following the provisions of the UNCRC it becomes evident that the family unit plays a fundamental role not only in society, but also in each child's personal development.<sup>333</sup> It is submitted that though surrogacy may be regarded as an unconventional manner of reproduction, it still be seen within this family context.

While it is important to provide the necessary support to the family context, it is submitted that this be done in a clear and transparent manner. However, concern arises when possible ambiguity becomes evident with regard to the meaning of the best interest of the child and the manner in which this principle is applied in surrogacy matters, let alone those matters where parties did not fully adhere to the prerequisites.

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329 *Ex Parte application WH 2011 4 SA 630 (GNP) para 4.*

330 *Ex Parte application WH 2011 4 SA 630 (GNP) para 4.*

331 *Ex Parte application WH 2011 4 SA 630 (GNP) para 4.* This will further result in the attainment of full legal subjectivity, which will in turn provide the citizen with legal rights and obligations.

332 UNCRC preamble.

333 This point is further emphasised by the provisions of article 16(3) of the *Universal Declaration of Human Rights*, 1948 (UDHR). Also see article 23(1) of *The International Covenant on Civil and Political Rights*, 1976 (CCPR) and article 18(1) of the *African Charter on Human and People's Rights*, 1986 (ACHPR).



The role of the court should be clearly stipulated in this regard. Courts are not to be seen as inerrant authorities, but should rather be acknowledged and respected as legislative application agents who also retain the ability to develop and create legally binding precedent. Problematic, albeit well-intended, errors in reason should therefore be brought to the fore in order to secure a coherent and logically developed common law.<sup>334</sup>

An example of a fallacious argument is evident in *Ex parte MS*, where the court suggested that the child would be deprived of a stable family environment if the court were to deny the parties' application. This argument is unsound in that it creates a false dilemma. The court is essentially maintaining that there would be no other viable alternative options. However, this is not true, as the parties could have sought alternatives such as adoption. A second error can be noted in the fact that the court held that the act does not make provision for instances where the parties neglected to adhere to the requirements and seek *ex post facto* confirmation of the surrogate motherhood agreement. In this regard Chapter 19 clearly provides that all surrogate motherhood agreements which do not comply with the provisions set out in the act be regarded invalid.<sup>335</sup> The act furthermore provides a clear set of requirements for the enactment of a valid surrogate motherhood agreement as well as the overarching consequences that non-compliance may have on the legal status of the child.

The use of surrogacy as a reproductive method carries enough complications as it is. It is submitted that this procedure should not be further complicated by creating doubt with regard to the implementation of the right of the best interest of the child where the child is yet to be born and may furthermore never be born.

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334 The court in *Ex parte MS* should however be commended for emphasising what some groups of people from all cultures and societies hold to be true, even if this is merely in a moral sense, that the human essence has inherent value. Furthermore, that this value exists within the smallest life form regardless of where this life form is geographically situated. Notwithstanding the fact that this mini-dissertation set out to provide a pragmatic solution it accordingly acknowledges this underlying moral philosophical argument.

335 Section 297 (2) of the *Children's Act* 38 of 2005.

In an attempt to answer the two questions posed in the introduction to this discussion it is submitted that legislation and current case law have not afforded courts or any other legal entity the ability to prescribe rights to the unborn. It is, however, proposed that the court consider splitting the guiding principles provided in General Comment 14 and refrain from applying the best interest of the child as a constitutionally entrenched right. In applying this alternative approach courts would still be able to use the principle of the best interest of the child as a guiding principle and/or an interpretative rule. This will in turn enable courts to consider and make provision for the resultant child without providing the foetus with constitutionally entrenched rights.

The fundamental reason why the attribution of constitutionally entrenched rights to the foetus in the surrogate motherhood agreement may be problematic is that once multiple rights are being weighed up, the courts will be confronted with the obligation to weigh the rights of a non-existing person (e.g. the right to life) against those of a person already *in esse*. This would in turn materially affect the multiple other constitutional rights of the person already *in esse*, *inter alia* the right to terminate a pregnancy.

It is further submitted that an alternative was available to the court in *Ex Parte MS* in the form of a parental order similar to the one invoked in the UK. This proposal does not infer that the courts should apply the parental order as is, but does submit that some further developed or customised form thereof could have served as a possible alternative.

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## **LIST OF ABBREVIATIONS**

ACHPR	African Charter on Human and People's Rights
ACRWC	African Charter on the Rights and Welfare of the Child
AHPC	<i>ad hoc</i> parliamentary committee
CCPR	International Covenant on Civil and Political Rights
DPC	Department of Premier and Cabinet
HFE	Human Fertilisation and Embryology
SALC	South African Law Commission
SAJHR	South African Journal on Human Rights
UDHR	Universal Declaration of Human Rights
UNCRC	United Nations Convention on the Rights of the Child



I hereby certify that I have edited the language of a master's degree mini-dissertation by Mathabo Baase entitled *Ratification of inadequate surrogate motherhood agreements and the best interest of the child: a critical analysis*.

I am Wilna Liebenberg, a freelance translator and editor, accredited by the South African Translators' Institute (SATI). Yours faithfully

A handwritten signature in black ink that reads "Wilna Liebenberg". The signature is written in a cursive style with a small dash above the 'i' in "Liebenberg".

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MA Applied Linguistics  
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