



# Recent developments in reprolaw

Professor Donrich Thaldar



# agenda



Surrogacy Advisory Group v  
Minister of Health 1

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Ex Parte JCR;  
Three surrogacy applications

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KB v Minister of Social  
Development

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VJV v Minister of Social  
Development

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Ex Parte MCM; the WC cases;  
Surrogacy Advisory Group v  
Minister of Health 2

# Surrogacy Advisory Group v Minister of Health 1

Challenged three aspects of the 2012 Regulations:

1. Known donor psych evaluation requirement
2. Preimplantation sex selection prohibition
3. Disclosure prohibition

# Surrogacy Advisory Group v Minister of Health 1

Some definitions...

“recipient” means a female person in whose reproductive organs a male gamete or gametes are to be introduced by other than natural means; or in whose uterus/womb or fallopian tubes a zygote or embryo is to be placed for the purpose of human reproduction;

# Surrogacy Advisory Group v Minister of Health 1

Some definitions...

“gamete donor” means a living person from whose body a gamete or gametes are removed or withdrawn, for the purpose of artificial fertilisation;

# Surrogacy Advisory Group v Minister of Health 1

Note: 'gamete donor' *includes* a husband who donates his sperm for the artificial fertilisation of his wife.

18.(1) Before artificial fertilisation, the ownership of a gamete donated for the purpose of artificial fertilisation is vested – (a) ... (b) in the case of a male gamete donor for the artificial fertilisation of *his spouse*, in that male gamete donor; ...

# Surrogacy Advisory Group v Minister of Health 1

7. A competent person who intends to remove or withdraw a gamete, or cause a gamete to be removed or withdrawn from the body of a gamete donor, shall, before such removal or withdrawal –

[...]

(j) shall, in the event of a request in respect of which the donor and recipient are known to each other, ensure that there is –

[...]

(ii) psychological evaluation of both parties.

# Surrogacy Advisory Group v Minister of Health 1

7. A competent person who intends to remove or withdraw a gamete, or cause a gamete to be removed or withdrawn from the body of a gamete donor, shall, before such removal or withdrawal –

[...]

(j) shall, in the event of a request in respect of which the donor and recipient are known to each other, ensure that there is –

[...]

(ii) psychological evaluation of both parties, **except where such donor and recipient are a couple that is married or in a permanent domestic life-partnership**



# Surrogacy Advisory Group v Minister of Health 1

## Pre-implantation and prenatal testing for sex selection

13. Pre-implantation and prenatal testing for selecting the sex of a child is prohibited except in the case of a [sic] serious sex linked or sex limited genetic conditions.

# Surrogacy Advisory Group v Minister of Health 1

~~Pre-implantation and prenatal testing for sex selection~~

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# Surrogacy Advisory Group v Minister of Health 1

## Prohibition of Disclosure of certain facts

19. No person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders.

# Surrogacy Advisory Group v Minister of Health 1

## Prohibition of Disclosure of certain facts

19. No person shall disclose the identity of any person who donated a gamete or received a gamete, or any matter related to the artificial fertilisation of such gametes, or reproduction resulting from such artificial fertilisation except where a law provides otherwise or a court so orders.

Interpreted not to include persons themselves



Ex Parte JCR;  
Three surrogacy applications

**The best interest of the child  
(of the surrogate mother)**



## Ex Parte JCR

Court made it a general requirement  
that surrogate mothers' children  
muct be psychologically assessed



Three surrogacy applications

Full Court struck out this general requirement. Replaced with: Only if merited by the individual circumstances

# KB v Minister of Social Development

## Genetic origin of child

294. No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid reasons, the gamete of at least one of the commissioning parents or, where the commissioning parent is a single person, the gamete of that person.



# VJV v Minister of Social Development

40. (1) (a) Whenever the gamete or gametes of any person other than a married person or his or her spouse have been used with the consent of both such spouses for the artificial fertilisation of one spouse, any child born of that spouse as a result of such artificial fertilisation must for all purposes be regarded to be the child of those spouses as if the gamete or gametes of those spouses had been used for such artificial fertilisation.....

# VJV v Minister of Social Development

“

Dignity is about acknowledging the value and worth of individuals. It is about agency – the ability to make meaningful choices about your life.

”

# Ex Parte MCM

Is the act of creating *in vitro* embryos through IVF for reproductive purposes by health care professionals on instruction of persons who intend to use surrogacy as their reproductive avenue, but who have not yet obtained a court order that confirms their surrogate motherhood agreement—

- lawful,
- only lawful if confirmed by the court in terms of Chapter 19 of the Children's Act 38 of 2005, or
- unlawful?

# Ex Parte MCM

10(2)(a) provides as follows:

A competent person shall not effect in vitro fertilisation except for embryo transfer to a specific recipient ...

# Ex Parte MCM

Oxford English Dictionary: 'Exactly named or indicated, or capable of being so'.

Cambridge Dictionary: 'relating to one thing and not others'.

Merriam-Webster Dictionary: 'constituting or falling into a specifiable category'.

# Ex Parte MCM

Court: Recipient must already be identified.

Consequence: IVF for commissioning parents before a surrogacy application not allowed.

# Western Cape applications

Withdrawn

Costs outstanding

# Surrogacy Advisory Group v Minister of Health 1

Is it constitutional to require commissioning parents to first have a surrogate mother before they can access IVF?





thank you

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