

**THE CONSTITUTIONAL AND CONTRACTUAL IMPLICATIONS OF THE  
APPLICATION OF CHAPTER 19 OF THE CHILDREN'S ACT 38 OF 2005**

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A thesis submitted in partial fulfilment of the requirements for the degree of  
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Supervisor: Professor Julia Sloth-Nielsen

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Compensation for reproductive services

Assisted reproduction



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## **ABSTRACT**

### **THE CONSTITUTIONAL AND CONTRACTUAL IMPLICATIONS OF THE APPLICATION OF CHAPTER 19 OF THE CHILDREN'S ACT 38 OF 2005**

S.V. Lewis

Thesis submitted in partial fulfilment of the degree Magister Legume, University of the Western Cape.

In this research, I carefully and coherently examine Chapter 19 of the Children's Act 38 of 2005 as the first legislation to afford surrogate motherhood agreements legal recognition in South Africa. I argue that the application of Chapter 19 imposes a number of unwarranted limitations on several of the constitutional rights of the parties to a surrogacy agreement. In addition, I propose that Chapter 19 is not in accordance with the principal of the best interests of the child.

I examine the history of surrogate motherhood in South Africa and establish that, prior to the enactment of Chapter 19, no legislation expressly afforded surrogate motherhood agreements legal recognition. Hence, prior to the enactment of Chapter 19, parties who entered surrogacy agreements could, first, not rely on the agreement to enforce contractual obligations, and secondly, the legal positions of the parties to the agreement were uncertain. Thirdly, a child born of a surrogacy agreement was seen as the child of the surrogate mother and not of the commissioning parents.

Thereafter, I critically investigate the 1999 recommendations of the Ad Hoc Parliamentary Committee on Surrogate Motherhood, in light of the Constitution and in light of the general law of contract. In this, I conclude that several of the recommendations of the Ad Hoc Parliamentary Committee are constitutionally suspect and may give rise to future constitutional and contractual implications. In light of these recommendations, I then direct the reader's attention to the impugned recommendations of the Ad Hoc

Parliamentary Committee which were incorporated into Chapter 19. This leads to a detailed examination of these provisions (and exclusions) and a determination of whether the application of these provisions (and exclusions) may impose an unreasonable and unjustifiable limitation on the rights of all the parties to the surrogacy agreement.

Whilst investigating surrogacy agreements in terms of the general law of contract, I establish that Chapter 19 of the Children's Act, although it affords expression to the right to make decisions regarding reproduction, limits the rights of persons who choose surrogacy as a form of assisted reproduction. Parties are not permitted to choose with whom they wish to contract and what obligations will arise as a result of the agreement. I conclude that breach of contract in the case of surrogacy agreements cannot be redressed by the primary remedies provided by the general law of contract.

In addition to this, I argue that commercial surrogacy, if adequately regulated, can be used to protect the interests of all the parties to a surrogacy agreement, as well as to economically uplift the life of the surrogate.

Lastly, I suggest recommendations for amendments to Chapter 19 which would create legislation which truly gives effect to the right to make decisions regarding reproduction, as well as providing greater contractual certainty for the parties to the surrogacy agreement.

May 2011

**DECLARATION**

I declare that *The constitutional and contractual implications of the application of Chapter 19 of the Children's Act 38 of 2005* is my own work, that it has not been submitted for any degree or examination at any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Samantha Vanessa Lewis

May 2011

Signed: \_\_\_\_\_

Supervisor: Professor Julia Sloth-Nielsen

Signed: \_\_\_\_\_



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I am indebted to a great number of people who have shared their wisdom, provided me with guidance and afforded me much patience in the 18 months which it has taken to complete this work.

First and foremost, my sincerest gratitude goes out to my supervisor Professor Julia Sloth-Nielsen, without whom this research would not have been possible. It was in her Advanced Family Law class in 2009 when I first found out about surrogacy in terms of Chapter 19 and it was within this class that I decided that I was going to undertake an investigation into the legal aspects of surrogacy. Little did I know that an examination of seven pages of legislation would amount to 300 pages of research and a year and a half of my life? But without her passion for the law, her patience and guidance towards me and her time, my thoughts which arose as a result of her class in 2009 would never have evolved into this research.

In addition to my supervisor, my thanks go out to Doctor Bernard Martin who provided much needed assistance to both me and my supervisor regarding the general law of contract in South Africa. Furthermore my thanks go to Extraordinary-Professor Katharina Boele-Woelki who provided me with a European perspective on surrogate mother legislation.

I am also sincerely grateful to Lydia Turner who assisted with styling, referencing and my bibliography, and to my articles principal, Pieter Venter of VGV Incorporated, thank-you Sir for affording me the much needed time off to dedicate to this work.

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**ABBREVIATIONS**

AHPC	Ad Hoc Parliamentary Committee
CC	Constitutional Court
SALC	South African Law Commission



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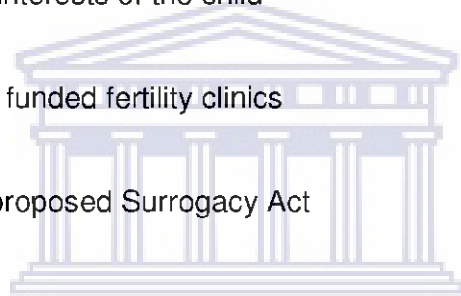
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**CHAPTER ONE:  
INTRODUCTION TO SURROGATE MOTHERHOOD IN SOUTH AFRICA**

1.1 Background to this research

When the Children's Act 38 of 2005 (hereinafter referred to as 'the Act') was promulgated into law, it introduced groundbreaking legislation. Provisions provided for the 'lowering of the age of majority, the outlawing of virginity testing, the introduction of a child abusers registry and more importantly, the Children's Act, in the form of Chapter 19, was the first legislation to openly regulate surrogate motherhood and establish surrogacy as a legally recognised procedure of assisted reproduction'.

Prior to the enactment of Chapter 19, surrogacy, as a form of assisted reproduction, had been available for many years in South Africa. The first publicised matter was that of Karen Ferreira-Jorge of Tzaneen in 1987. When a daughter found out that she was unable to bear children on her own, she was reluctant to enlist the services of another surrogate in fear that another surrogate may renege on her promise to give up the child at birth. Consequently, she approached her 48 year old mother to become her surrogate. Her mother accepted, and less than a year later, she gave birth to her daughters triplets.

At the point in time when the Ferreira-Jorge triplets were born, no specific legislation dealt with surrogacy. Previous legislation such as the 1986 Regulations Regarding the Artificial Insemination of Persons and Related Matters (in terms of the Human Tissue Act 65 of 1983) and the Children's Status Act 82 of 1987 did not make express provision for the practice of surrogacy as a form of legally assisted reproduction.<sup>1</sup> However both of these

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<sup>1</sup> The Human Tissue Act 65 of 1983 was amended by Act No. 106 of 1984, further amended by Act No. 51 of 1989 and repealed by Act No. 61 of 2003. Under section 5 of the Children's Status Act 82 of 1987, the definition of artificial insemination did not include the status of a child born of a surrogacy agreement. However, this specific Act did deal with the situation where the gametes donated were that of the woman carrying the baby i.e. the surrogate. Here the child was seen as the legitimate child of the surrogate (birth-giving) mother and her spouse or partner if they both consented to the artificial fertilisation. Thus, in terms of this Act,

Acts did include a definition for artificial fertilisation, which the SALC, in its Report on Surrogate Motherhood, submitted was capable of the inclusion of many of the procedures used to give effect to surrogate motherhood.<sup>2</sup>

After the circulation of the Questionnaire on Surrogate Motherhood in 1989, the SALC published a working paper on the topic of surrogacy (Working Paper 38: Surrogate Motherhood) and in 1993, a Report on Surrogate Motherhood. The published documents and draft legislation were tabled before the Ad Hoc Parliamentary Committee (hereinafter referred to as 'the AHPC').<sup>3</sup>

In 1999, the Report of the AHPC on the Report of the SALC on Surrogate Motherhood was completed and referred to the Department of Justice. In the interim, the SALC had commenced its enquiry into the Child Care Act 74 of 1983, and when the First Issue Paper of the Review of the Child Care Act was published in 1998, it openly acknowledged that surrogacy agreements had not in the past been sufficiently regulated.<sup>4</sup> In 2001, the Issue Paper was followed by the Discussion Paper 103 on the Review of the Child Care Act, which recognised that the determination of legal parenthood, especially in the case of surrogate motherhood, had grown additionally challenging.<sup>5</sup>

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the result thereof would be directly opposed to the purpose of the surrogacy agreement, which is to give birth to a child for commissioning parents who are unable to do so themselves. The issue of surrogacy not being directly regulated resulted in the fact that the status of a child born of such agreement had to be determined in terms of laws which did not give effect to the desired intention of the parties: the desire of the commissioning parents to be vested with the legal parenthood of the child. This resulted in leaving a lacuna in the law of parentage of children born of surrogate motherhood agreements. S5(3) of the Children's Status Act 82 of 1987 was repealed by the Children's Act 38 of 2005. Carnelley M and Soni S 'A tale of two mummies. Providing a womb in South Africa: surrogacy and the legal rights of the parents within the Children's Act 38 of 2005. A brief comparative study with the United Kingdom' (2008) 22 *Speculum Juris*, 36; Jordaan RA and Davel CJ *Law of Persons* (2005), 106; Boezaart T *Law of Persons 5ed* (2010), 97.

<sup>2</sup> Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010), 4.

<sup>3</sup> The Ad Hoc Committee was made up of representatives of the African National Congress, Democratic Party, Freedom Front, Inkatha Freedom Party, National Party and the Pan Africanist Congress of Azania. The Committee was chaired by Ms Priscilla Jana MP. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 331.

<sup>4</sup> Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009) 332; Carnelley M and Soni S (2008) 22 *Speculum Juris*, 37.

<sup>5</sup> Carnelley M and Soni S (2008) 22 *Speculum Juris*, 37.

In 2003, the Children's Bill was tabled in parliament and was followed by the finalisation of the Children's Act in 2005. With this, Chapter 19 of the Act became the first South African legislation to expressly recognise surrogacy as a form of assisted reproduction.

With reference to the history of surrogate motherhood in South Africa, the author intends to determine whether the drafters of Chapter 19 expended sufficient time on research whilst investigating surrogate motherhood agreements. Having regard to this, it will be determined whether Chapter 19 provides adequate regulation affording all the parties to a surrogacy agreement sufficient legal protection.

## 1.2 Explanation of surrogate motherhood as a form of assisted reproduction

Surrogate motherhood is a form of assisted reproduction. Assisted reproduction refers to a number of medical techniques that aid fertilisation, most of which are used to treat infertility.<sup>6</sup> In vitro fertilisation is a form of assisted reproduction which is used to fertilise surrogate mothers.<sup>7</sup>

A surrogate motherhood agreement is an agreement between a surrogate mother and a commissioning parent where 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

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<sup>6</sup> Slowik G 'What is assisted reproduction' (January 2011) available at [http://www.ehealthmd.com/library/infertility/INF\\_assisted.htm](http://www.ehealthmd.com/library/infertility/INF_assisted.htm) (accessed on 28 April 2011); Centre for genetics and society 'About assisted reproduction' (March 2010) available at <http://www.geneticsandsociety.org/section?php?id=89> (accessed on 28 April 2011).

<sup>7</sup> In vitro fertilisation refers to the joining of the ovum and the sperm outside of the body of the gestational carrier. The ovum is retrieved from the non gestational mother with a minor surgical procedure, and then the ovum is mixed with the sperm and then inserted into the uterus of the gestational mother. Slowik G 'What is assisted reproduction' (January 2011) available at [http://www.ehealthmd.com/library/infertility/INF\\_assisted.htm](http://www.ehealthmd.com/library/infertility/INF_assisted.htm) (accessed on 28 April 2011); Centre for genetics and society 'About assisted reproduction' (March 2010) available at <http://www.geneticsandsociety.org/section?php?id=89> (accessed on 28 April 2011); Zelinski-Wooten M *Assisted fertilization and nuclear transfer in mammals* (2001) Humana Press, USA, 3; Patrizio P, Tucker MJ and Guelman V *The color atlas for human assisted reproduction: Laboratory and clinical insights* (2003), Lippincott, Williams & Wilkins, 24, 25.

over such 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>8</sup>

The term surrogate refers to the substitute or 'stand-in' mother who is implanted with the embryo and who takes on the role of mother until birth.<sup>9</sup> The commissioning parent or parents are the individual or the couple who intend(s) to raise the child after birth.<sup>10</sup>

Despite the fact that surrogate motherhood has been provided legal recognition as a form of assisted reproduction, and with that, the reproductive rights of many have been afforded expression, this research aims to show that Chapter 19 of the Act does not permit parties to a surrogacy agreement to fully exercise their right to make decisions regarding reproduction.

### 1.3 Reproductive rights and surrogate motherhood

When an individual or a couple choose to make use of a surrogate mother to give them a child that they would not ordinarily be able to have, such individual or couple exercise their right to make a decision regarding reproduction. The right to make decisions regarding reproduction is codified in the form of section 12(2) of the Constitution.

In affording the right to make decisions regarding reproduction, section 12(2) effectively acknowledges that the power to make decisions concerning reproduction is a crucial aspect of one's control over one's own body.<sup>11</sup> Section 12(2) gives women control over their own fertility and provides a

<sup>8</sup> Section 1 of the Act.

<sup>9</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-3; Kisoonduth K 'Egg donation and surrogacy' available at <http://www.infertility-support.org.za/surrogacy.htm> (2007) (accessed on 16 November 2009).

<sup>10</sup> O' Sullivan, M and Bailey, C 'Reproductive Rights, Revision Service 2' available at [www.chr.up.ac.za/centre-publications/constitulaw/pdf/16-reproduction%20rights.pdf](http://www.chr.up.ac.za/centre-publications/constitulaw/pdf/16-reproduction%20rights.pdf) (2008) (accessed on 28 February 2010).

<sup>11</sup> 'Section 12(2) affords recognition to reproductive autonomy: the right to reproductive self-governance'. Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 308.

framework within which women will actually be able to enjoy the freedom to choose how and when to have children. The rationale behind the inclusion of section 12(2) of the Constitution is that the legislature recognised 'that some of the most devastating and socially entrenched forms of physical and psychological oppression and exploitation relate to reproduction and sexuality'.<sup>12</sup> For example, often the circumstance in which a woman becomes pregnant is beyond her control.<sup>13</sup> Consequently, section 12(2) expressly recognises reproductive choice.<sup>14</sup>

Hence, as a result of the application of section 12(2) of the Constitution, parties to a surrogacy agreement have the right to choose surrogacy as a form of reproduction. Nonetheless, this research will show that Chapter 19 of the Act does not afford full recognition to the right to make decisions regarding reproduction.

#### 1.4 Contractual freedom and compensation for reproductive services

Surrogacy agreements are valid and enforceable contracts once they are sanctioned by the High Court. The effect of such confirmation is that the parties to the agreement are obligated to perform in terms of their contractual obligations. Nonetheless, surrogacy agreements will be shown not to be, in the ordinary sense of contractual law, enforceable as a result of the distinction which the legislation has made regarding full and partial surrogacy agreements.<sup>15</sup>

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<sup>12</sup> The effect of the inclusion of section 12(2) is that it recognises the reality that many women do not enjoy security in and control over their bodies – the exceptionally high rate of rape, sexual abuse, forced sexual intercourse, domestic violence and femicide in South Africa is evidence of this. Bishop M and Woolman S *Constitutional Law of South Africa: Freedom and security of the person* 2ed (2007), 40-81; O' Sullivan M *Constitutional Law of South Africa: Reproductive Rights* 2ed (2007), 37-17.

<sup>13</sup> O'Sullivan M *Constitutional Law of South Africa: Reproductive Rights* 2ed (2007), 37-17.

<sup>14</sup> O'Sullivan M *Constitutional Law of South Africa: Reproductive Rights* (2007), 37-18; Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 274.

<sup>15</sup> In a full surrogacy agreement, the surrogate mother is only the gestational mother. In the case of partial surrogacy, the surrogate takes on the role of both the gestational and genetic mother of the child to be born of the surrogacy agreement. This distinction will receive greater examination throughout the course of this research.

Having regard to this, it will be shown that commercial surrogacy and the right to be compensated for reproductive services should be permitted by the Act. Despite the fact that the parties to a surrogacy agreement enter the agreement freely with the intention to be bound by its obligations, circumstances may change where the parties no longer want to fulfil their contractual obligations. Hence, financial compensation may sometimes become necessary in assuring that the positions of the parties to *any* contract are secured.

With this in mind, this research will determine if commercial surrogacy is a viable option that can be adequately regulated. In addition to this, this research will determine if the prohibition of commercial surrogacy amounts to an unwarranted limitation on the freedom to contract, on the right to occupational freedom and on the right to make decisions regarding reproduction.

#### 1.5 Aim of this Research

The primary aim of this research is to clarify, examine and assess Chapter 19 of the Children's Act relating to surrogate motherhood agreements in South Africa. This research will show that Chapter 19, in its current form, raises several constitutional and contractual implications for the parties to a surrogate motherhood agreement.

This research will contribute towards the realisation that Chapter 19, in its current form, does not sufficiently realise the right to make decisions regarding reproduction, the right to equality, the right to culture, and the right to economic activity, and is not in accordance with the principal of the best interests of the child. In addition to this, this research will contribute to the realisation that differentiating on the basis of genetic relation is not in the interests of all the parties concerned and does not provide contractual clarity and protection to all the parties to the agreement.

In addition to the above, this research will contribute towards illustrating, with reference to the laws of surrogacy in Israel, that adequately regulated commercial surrogacy does not inevitably give rise to exploitation of the parties to the surrogacy agreement and can be used for the economic upliftment surrogate mothers as well as to create surrogacy agreements that favour all positions of the parties to the agreement.

With this in mind, this research will provide recommendations regarding amendments to Chapter 19, which if taken into consideration, will have the effect that surrogate motherhood agreements can be sufficiently regulated so as to provide adequate legal certainty for all the parties concerned.

#### 1.6 Significance of this research

This research will draw attention to specific provisions of the Act which impose unwarranted limitations on the rights of parties to a surrogacy agreement.

While previous papers on Chapter 19 have examined Chapter 19 as a whole, this research will identify several provisions which, the author submits, are candidates for future constitutional challenges. In addition to this, this research will devote an entire chapter to the contractual implications of the application of Chapter 19 of the Act. Hence, this research will be the first to examine each suspect provision in great detail and illustrate the impact such provision has on the both the constitutional rights of the parties as well as the impact that Chapter 19 has on the freedom to contract and the principle of *pacta sunt servanda*.

#### 1.7 Research Question

Chapter 19 of the Children's Act 38 of 2005 provides for surrogate motherhood as a legally recognised method of assisted reproduction. The research question posed is whether the application of Chapter 19 of the Act



imposes unreasonable and unjustifiable limitations on the rights of the parties to the surrogacy agreement?

## 1.8 Literature review

The method which was employed to undertake this research was primarily through an extensive literature review. However, where necessary, some practical work was carried out in the form of discussions with legal practitioners, legal academics as well of people who had been/were parties to a surrogacy agreement.

There is only one piece of legislation which expressly deals with surrogate motherhood in South Africa, and as a result, Chapter 19 of the Act formed the primary source of information relating to the legalisation of surrogate motherhood in South Africa. Chapter 19 of the Act is annexed to this research and marked 'A1' for ease of reference.

Another source which was vital to this research was the 2007 Commentary and 2009 Doctoral thesis of Professor Anne Louw of the University of Pretoria. Both the 2007 Commentary and the 2009 Doctoral thesis provided great assistance in understanding the purpose, intentions and content of Chapter 19.<sup>16</sup>

Lastly, journals, articles, textbooks, theses and dissertations also formed a large part of this research, and where it became necessary, international conventions, foreign legislation and foreign case law was also referred to.

## 1.9 Chapter outline

### 1.9.1 Chapter one: Introduction to surrogate motherhood in South Africa

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<sup>16</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 380 of 2005* (2007); Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009).



The introduction sets out the background to this research, the important concepts as well as the aims and significance of this research. In addition to this, chapter one identifies the problem statement and provides for an overview of forthcoming chapters.

#### 1.9.2 Chapter two: Legislative history of surrogacy in South Africa

The purpose of chapter two of this research is to provide a foundation upon which the constitutional and contractual issues of Chapter 19 of the Act can be examined. Chapter two will commence with the terminology of a surrogacy agreement and thereafter, previous surrogate motherhood regulatory policies will be examined.

The bulk of chapter two will take the form of a comprehensive examination of the 1999 recommendations of the AHPC. The examination will be three fold, first the purpose for the inclusion (or exclusion) of the recommendation for be examined and secondly, it will be stipulated whether the recommendation was wholly or partially incorporated into Chapter 19 of the Act, or whether the recommendation was excluded as a whole by the legislature. Thirdly, the recommendations will be briefly analysed in light of the rights as enshrined in the Constitution, and an initial submission will be presented regarding whether such recommendation may amount to an infringement of the constitutional rights and contractual liberties of the parties to a surrogacy agreement.

#### 1.9.3 Chapter three: The constitutionality of Chapter 19

This focus of chapter three is the constitutional implications which may arise out of the application of Chapter 19 on the rights of the potential parties to the surrogacy agreement.

This chapter will commence with an introduction to the Constitution with particular attention being afforded to the rights to equality, human dignity and the right to make decisions regarding reproduction. These rights will be shown to be the three primary rights which are implicated through the operation of

the provisions of Chapter 19 of the Act, and ultimately, this chapter aims to determine if Chapter 19 gives effect to these above-mentioned rights, or if the respective provisions of Chapter 19 place a constitutionally unacceptable limitation on the exercise of these rights.

Having regard to the above, the chapter will then re-examine the provisions of the Act which were identified as being constitutionally impugned in chapter two, in light of the constitutional implications that their application may have on the rights of the potential commissioning parents, the rights of the potential surrogate mother, and lastly, on the principle of the best interests of the child. In addition to this, the chapter will also examine the implications of the non-recognition of cultural surrogacy on the rights of parties to cultural surrogacy agreements, and the implications of omitting to include a maximum age bar for potential surrogate mothers.

In conclusion, this chapter will show that, despite the fact that Chapter 19 has afforded legal recognition to surrogacy as a form of assisted reproduction, many of the provisions of Chapter 19 impose unjustifiable restrictions on the rights of all the parties to a surrogacy agreement which do not serve constitutionally acceptable purposes.

#### 1.9.4 Chapter four: The contractual issues of Chapter 19

This chapter will provide a comprehensive investigation into the contractual implications of the application of Chapter 19 of the Act. The chapter will commence with brief discussion of the principles of the freedom of contract and *pacta sunt servanda*, and subsequent to this, the seven requirements of a valid contract will be examined.

Having regard to the fact that a surrogacy contract is deemed to be valid and enforceable from the moment the agreement has been confirmed by the High Court, the three forms of breach of contract will then be discussed. Within this discussion, hypothetical situations of breach of surrogacy agreements will be presented.

Thereafter, the chapter will then discuss the primary remedies available to innocent contractants in the case of breach, and the remedies will be applied to breach of surrogacy agreements. With this in mind, it will be shown that the primary remedies which are available for contractants in the general law of contract will be neither plausible in the case of breach of a surrogacy agreement, nor will provide sufficient redress for the innocent party to a surrogacy agreement.

Subsequently, this chapter turns to the issue of enforceability. Focusing on section 297, 298 and 299 of the Act, a determination will be made as to what contractual implications arise out of the application of the Act, and whether Chapter 19 affords recognition to the principles of the freedom of contract and the principle of *pacta sunt servanda*.

Lastly, chapter two investigates the practice of commercial surrogacy. First, a determination is made as to whether section 22 of the Constitution (the right to occupational freedom) can be interpreted to mean that women are entitled to be compensated for their reproductive services, and secondly, after having submitted the affirmative, the chapter will reflect on the practice of commercial surrogacy in Israel and illustrate that commercial surrogacy is legally viable when adequately regulated.

#### 1.9.5 Chapter five: Conclusions and recommendations

The final chapter discusses the conclusions drawn from the research and provides recommendations regarding the amendment of Chapter 19 of the Act. Finally, the author will respond to the research question.

## CHAPTER TWO: LEGISLATIVE HISTORY OF SURROGACY IN SOUTH AFRICA

*'Now Sarai Abram's wife bare him no children; and she had an handmaid, an Egyptian, whose name was Hagar. And Sarai said unto Abram, Behold now, the Lord has restrained me from bearing: I pray thee, go in unto my maid; it may be that I may obtain children from her. And Hagar bare Abram a son: and Abram called his son's name, which Hagar bare, Ishmael'.*

*Genesis 16:1-2 and 15*

### 2.1 Introduction

The purpose of this chapter is to lay a foundation regarding surrogate motherhood practice and legislation in South Africa. A brief discussion regarding the relevant terminology will be presented, and thereafter the historical background of surrogacy in South Africa will be examined in light of the Reports of the South African Law Commission (hereinafter referred to as the SALC) and the Ad Hoc Parliamentary Committee (hereinafter referred to as the AHPC).<sup>17</sup> Subsequently, the author will look at Chapter 19 of the Act and the respective provisions which form the basis of the constitutional investigations which will occur in all of the following chapters.

#### 2.1.1 Terminology

Section 1(1) of the Act defines a surrogate motherhood agreement as 'an agreement between a surrogate mother and a commissioning parent whereby it is agreed that the surrogate mother will be artificially fertilised<sup>18</sup> for the

<sup>17</sup> Despite the fact that the author makes reference to the South African Law Commission and the SALC, the name of the SALC has changed as a result of the promulgation of section 4 and section 5 of The Judicial Matters Amendment Act 55 of 2002. The SALC was originally established in terms of the South African Law Commission Act 19 of 1973. *SALRC Bulletin Vol 8: 1* (January 2003) available at [http://www.justice.gov.za/salrc.bltns2003\\_voln1\\_jan.pdf](http://www.justice.gov.za/salrc.bltns2003_voln1_jan.pdf) (accessed on 1 June 2010), 1.

<sup>18</sup> Artificial fertilisation is defined in section 1 of the Children's Act 38 of 2005 as '[T]he introduction, by means other than natural means, of a male gamete into the internal reproductive organs of a female person for the purpose of human reproduction, including the bringing together of a male and female gamete outside the human's body with a view to placing the product of a union of such gametes in the womb of a female person; or 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'. In the case of artificial fertilisation, differentiation is made between AID and AIH children. In the latter case, AIH children are

purpose of bearing a child for the commissioning parent, and according to the agreement, the surrogate mother undertakes to hand over such 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>19</sup>

The commissioning parent or parents are the individual or the couple who intend(s) to raise the child after birth. The term 'surrogate' refers to the substitute or 'stand-in' mother who is implanted with the embryo and who takes on the role of mother until birth.<sup>20</sup>

Two forms of surrogacy practice are recognised in South Africa, namely partial and full. Full surrogacy is where the surrogate has no biological relationship with the commissioning parent whereas, in the instance of partial surrogacy, some form of biological relationship exists.<sup>21</sup>

#### 2.1.2 Legislative background of surrogate motherhood agreements in South Africa

Surrogacy has been available for many years in South Africa, the first recognised case being that of Karen Ferreira-Jorge of Tzaneen in 1987 where a 48 year old mother carried her daughter's triplets to term. The daughter was unable to bear children of her own and had been discouraged from enlisting the services of an unknown surrogate in fear that the surrogate may renege on her promise to give up the baby at birth. Her own mother, after offering her

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conceived with the gametes of the husband or partner with that of a female spouse or partner. In the case of AID children, the gametes of a third party donor are used in the process of artificial fertilisation. Jordaan RA and Davel CJ *Law of Persons* (2005), 105.

<sup>19</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 7.

<sup>20</sup> A surrogate mother is defined in section 1(1) of the Act as 'an adult woman who enters into a surrogate motherhood agreement with the commissioning parent'. It is submitted that the surrogate mother is 'the woman who agrees to gestate and bear the child rather than the woman who intends to rear the child'. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 335; Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010), 5 - 6.

<sup>21</sup> Carmelley M and Soni S (2008) 22 *Speculum Juris*, 37.

assistance and after the process of having her own ova stimulated, gave birth to triplets.

In South Africa surrogacy, as a form of assisted reproduction, is legally recognised and regulated by Chapter 19 of the Act. In short, Chapter 19 provides that:

- i surrogacy agreements which are sanctioned by the High Court are valid and enforceable between parties;<sup>22</sup>
- ii the commissioning parent(s) are recognised as the legal parent(s) from date of birth;<sup>23</sup>
- iii the child born of the agreement is for legal purposes the child of the commissioning parents; and<sup>24</sup>
- iv surrogacy in exchange for commercial gain is prohibited.<sup>25</sup>

### 2.1.3 Previous regulatory policies

Prior to the Act, no specific legislation dealt with surrogacy. The 1986 Regulations Regarding the Artificial Insemination of Persons and Related Matters (in terms of the Human Tissue Act 65 of 1983<sup>26</sup>) and the Children's Status Act 82 of 1987 did not explicitly provide for surrogacy agreements; however neither expressly prohibited the practice either and both Acts did have an implicit impact on the practice.<sup>27</sup> The Children's Status Act defined

<sup>22</sup> Section 292(1)(e) provides that no surrogacy agreement is valid unless confirmed by the High Court (subject to the parties meeting the other requirements specified in section 295).

<sup>23</sup> In other countries such as the UK there is a default legal assumption that the woman giving birth to that child is the child's legal mother.

<sup>24</sup> Section 297(1)(a) of the Act provides that 'any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of birth of the child concerned'. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 356.

<sup>25</sup> Section 301 of the Act prohibits payment in respect of surrogacy agreements. Section 305 stipulates the possible offences and respective punishments. The surrogate may only enter the agreement for purely altruistic reasons and the only compensation she is entitled to receive from the commissioning parents is compensation in respect of reasonable expenses. Carnelley M and Soni S (2008) 22 *Speculum Juris*, 41; Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, 2009), 350, 355, 361, 368.

<sup>26</sup> The Human Tissue Act 65 of 1983 was amended by Act No. 106 of 1984, further amended by Act No. 51 of 1989 and repealed by Act No. 61 of 2003.

<sup>27</sup> Under section 5 of the Children's Status Act 82 of 1987, the definition of artificial insemination did not include the status of a child born of a surrogacy agreement. However,

artificial insemination “as the introduction by other than natural means of male gamete or gametes into the reproductive organs of a woman or by placing the product of a union of a male and female gamete or gametes which have been brought together outside the human body in the womb of that women”.<sup>28</sup> As the SALC noted in its 1997 Report on Surrogate Motherhood, legally, this was an all encompassing definition which was capable of the inclusion of many of the procedures used to give effect to surrogacy agreements.<sup>29</sup>

In 1987, the absence of specific legislation governing surrogacy as well as the highly publicised nature of the Ferreira-Jorge case led the SALC to begin investigating the matter. Following the circulation of a Questionnaire on Surrogate Motherhood in 1989, the SALC published a working paper on the topic of surrogacy (Working Paper 38: Surrogate Motherhood) and in 1993, a Report on Surrogate Motherhood. The published documents and draft legislation were tabled before the AHPC.<sup>30</sup>

## 2.2 The issues and recommendations of the SALC and AHPC

The AHPC's term of reference was 'to enquire into and report upon the SALC's Report on Surrogate Motherhood'. The AHPC expanded on its terms and conducted additional research of its own. This was a result of the 'thought

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this specific Act did deal with the situation where the gametes donated were that of the woman carrying the baby i.e. the surrogate. Here the child was seen as the legitimate child of the surrogate (birth-giving) mother and her spouse or partner if they both consented to the artificial fertilisation. Thus, in terms of this Act, the result thereof would be directly opposed to the purpose of the surrogacy agreement, which is to give birth to a child for commissioning parents who are unable to do so themselves. The issue of surrogacy not being directly regulated resulted in the fact that the status of a child born of such agreement had to be determined in terms of laws which did not give effect to the desired intention of the parties: the desire of the commissioning parents to be vested with the legal parenthood of the child. This resulted in a lacuna in the law of parentage of children born of surrogate motherhood agreements. Carmelley M and Soni S (2008) 22 *Speculum Juris*, 36; Jordaan RA and Davel CJ *Law of Persons* (2005), 106; Boezaart T *Law of Persons* 5ed (2010), 97.

<sup>28</sup> S5(3) of the Children's Status Act 82 of 1987 was repealed by the Children's Act 38 of 2005.

<sup>29</sup> Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010), 4.

<sup>30</sup> The Ad Hoc Committee was made up of representatives of the African National Congress, Democratic Party, Freedom Front, Inkatha Freedom Party, National Party and the Pan Africanist Congress of Azania. The Committee was chaired by Ms Priscilla Jana MP. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 331.



that [at the time], the SALC was inappropriately constituted in terms of gender and race; that some of the recommendations made were not in line with the Constitution and the consultation process followed [had been] inadequate'.<sup>31</sup>

The AHPC hosted informative comprehensive workshops with experts on surrogacy; conducted public hearings and called for written submissions on the draft Bill contained in Schedule A to the SALC's Report through advertisements in newspapers and invitations to all relevant stakeholders.<sup>32</sup> Study tours were undertaken in the North West Province, Northern Province, Eastern Cape Province and KwaZulu Natal Province. The four mentioned provinces of South Africa were specifically targeted, the rationale being that they were predominantly black regions where most cultures traditionally permitted surrogacy as a form of assisted reproduction. Visits to the United States and the United Kingdom were also made to investigate how the matter of surrogacy was being dealt with in international jurisdictions. The report of the AHPC was finalised in 1999. A second round of draft legislation was developed by the SALC, in correlation with the AHPC's recommendations, and was referred thereafter to the Minister of Justice for finalisation.<sup>33</sup>

A summary of the Committee's recommendations can be briefly stated as follows;

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<sup>31</sup> Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009) 331 fn 25; Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 2.

<sup>32</sup> The Ad Hoc Parliamentary Committee on Surrogate Motherhood was the first parliamentary committee to be established outside that of the SALC. Previous SALC Reports were solely SALC Reports, and no external boards or institutions had ever been requested to assist in an SALC Report. The rationale behind the inclusion of the AHPC was that the SALC of the early 1990's still consisted of members whose thoughts and suggestions were based on the pre-1994 regime where concepts such as equality, human dignity and freedom were so-to-say non-existent. Taking this into regard, and this will be evidenced through this research, the SALC Report was presented prior to the enactment of both the Interim and the Final Constitution, and thus the majority of the suggestions put forward by the SALC were supposed to not be in accordance with the Bill of Rights as it exists today. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 1.

<sup>33</sup> The AHPC's respective reports were the interim report and the 1999 Report of the Ad Hoc Parliamentary Committee on the Report of the South African Law Commission on Surrogacy. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 332; Carnelley M and Soni S (2008) 22 *Speculum Juris*, 36.



'Surrogacy should not be banned or criminalised in South Africa ... [it should] rather be recognised and regulated by legislation. Surrogate motherhood should be permitted for married couples only, [and] the wife has to be incapable of giving birth for medical reasons ... her condition [must be] permanent and irreversible. The gametes of both commissioning parents have to be used ... where this is not possible; the gametes of at least one [commissioning parent] and a donor [are] to be used. The donor should not be the surrogate or her husband.

The written surrogate agreement has to be confirmed by the [High] Court who, in order to properly consider the application for confirmation, [must be presented with] conclusive evidence...with regard to the physical and psychological suitability of the surrogate mother to act as such, the psychological suitability of the commissioning parents to accept parenthood of the child, the family circumstances of the parties in question, and the interests of any descendant or adopted child of the commissioning parents.

The surrogate will only be compensated for actual expenses in connection with [the] confirmation and execution of the agreement. The effect of a valid surrogate motherhood agreement would be that any child born of such artificial fertilisation ... would for all purposes be the child of the commissioning parents... [and] the surrogate would have no right of parenthood, custody<sup>34</sup> or access<sup>35</sup> to the child.'

Although the AHPC did not accept the SALC's Report in its original structure, both the SALC and the AHPC did accept that the majority of persons were in

<sup>34</sup> In terms of the Act, 'custody' is now referred to as 'care' and is defined in section 1, in relation to a child, as: '(a) within available means, providing the child with (i) a suitable place to live; (ii) living conditions that are conducive to the child's health, well-being and development; and (iii) the necessary financial support; (b) safeguarding and promoting the well-being of the child; (c) protecting the child from maltreatment, abuse, neglect, degradation, discrimination, exploitation and any other physical, emotional or moral harm or hazards; (d) respecting, protecting, promoting and securing the fulfilment of, and guarding against any infringement of the child's rights set out in the Bill of Rights and the principles set out in Chapter 2 of the Children's Act; (e) guiding, directing and securing the child's education and upbringing, including religious and cultural education and upbringing, in a manner appropriate to the child's age, maturity and stage of development; guiding and advising and assisting the child in decisions to be taken by the child in a manner appropriate to the child's age, maturity and stage of development; (g) guiding the behaviour of the child in a humane manner; (h) maintaining a sound relationship with the child; (i) accommodating any special needs that the child may have; and (j) generally, ensuring that the best interests of the child is the paramount concern in all matters affecting the child.'

<sup>35</sup> In terms of the Act, 'access' is now referred to as 'contact' and is defined in section 1 of the Act, in relation to a child, as : '(a) maintaining a personal relationship with the child; and (b) if the child lives with someone else- (i) communication on a regular basis with the child in person, including- (aa) visiting the child; or (bb) being visited by the child; or (ii) communication on a regular basis with the child in any other manner, including - (aa) through the post; or (bb) by telephone or any other form of electronic communication.'

favour of surrogacy as a legitimate alternative for irreversibly infertile persons who did not want to adopt (because they instead wanted the opportunity to have children of their own: children genetically related to themselves). In addition, both bodies also identified many common issues in the practice of surrogacy as a form of assisted reproduction. Ultimately it was agreed that surrogacy should not be banned in South Africa, but instead be recognised and regulated through legislation.<sup>36</sup>

For purposes of this research, the author does not intend to comprehensively examine all of the issues identified by the respective bodies. The first half of the analysis which follows considers those AHPC recommendations which are of actual relevance to this study (because of the constitutional and/or contractual implications which their application may have); the second half of this examination will take the form of a brief analysis of other recommendations. The recommendations which will receive thorough analysis are in relation to:

- i the different types of surrogacy practised in South Africa,
- ii the qualifications required of parties to a surrogacy agreement,
- iii the rights and obligations of the parties to the agreement, and
- iv the prohibition of commercial surrogacy.

In addition to this, brief mention will be afforded to the best interests of the child (specifically in respect of knowledge of genetic origin and publication of

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<sup>36</sup> It was agreed by the AHPC that the opinion of the SALC that the general principles provided by the law of contract may be insufficient to regulate the rights and obligations of parties to the agreement was correct, and that, despite the agreement being crucial to the actual surrogate motherhood, the agreement should not be used as the most important factor in the determination of such rights and duties. Instead both the SALC and the AHPC decided that legislation should be sufficiently adequate so that the rights, obligations and legal consequences of the agreement itself are clear to all parties and to ultimately ensure that the best interests of all, most importantly the interests of the child, are protected. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 1, 4. For further discussion regarding the contractual aspects of surrogate motherhood agreements see chapter 4.

identities) and state funded fertility clinics (in respect of the right to reproductive health).<sup>37</sup>

Before the author commences with an examination into the above mentioned AHPC recommendations, it is necessary to recapitulate the purpose of this chapter. The purpose of this chapter is to establish a foundation for the constitutional and contractual investigation into the provisions of Chapter 19 which will take place in chapter three and four respectively. What is important to note, is that when the SALC carried out its Report in 1993, South Africa was yet to promulgate the Interim Constitution. Consequently, the SALC submissions were presented without taking into consideration the values of equality, human dignity and freedom which today, form the basis of our constitutional supremacy. Thus, when the AHPC was appointed to examine and reconsider the SALC submissions, this was the first time that surrogacy was considered in light of the Constitution (despite the Constitution being just over 2 years old). As a result, many of the AHPC recommendations focused on the constitutional implications that the SALC submissions might have on the rights of the parties to a surrogacy agreement.

In respect of the above, and because this research considers Chapter 19 in respect of its constitutional implications, the author will focus on the AHPC's recommendations in view of the fact that these recommendations were presented with the Constitution at hand. Nonetheless, and this will be evidenced in the forthcoming paragraphs, despite the fact that the AHPC took into consideration the fundamental rights as contained in Chapter two of the Constitution, some of the recommendations of the ADPC were not incorporated into Chapter 19 of the Act, and many that were, cannot be said to be in accordance with the principles of the Constitution.

## 2.2.1 Types of surrogacy

### 2.2.1.1 Cultural surrogacy

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<sup>37</sup> These three issues will be dealt with comprehensively in Chapter 3 and 4 respectively.

The first aspect of the recommendations which will be examined is the distinction made by the SALC and the AHPC in respect of informal and formal surrogacy. The SALC and the AHPC recognised that both these types of surrogacy practices are practiced in South Africa, and both the SALC and the AHPC submitted that informal surrogacy should not be permitted.

The AHPC found that informal surrogacy (hereinafter referred to as 'cultural surrogacy') was found to be practiced in most traditional South African communities and referred to the insemination of the surrogate mother with the gametes of the commissioning parent. It was found that cultural surrogacy is privately performed by the parties, according to accepted customary practices, without the intervention of medical doctors or clinics.<sup>38</sup> In cultural surrogacy, the surrogate is both the genetic and gestational mother.<sup>39</sup>

Despite the fact that the practice of cultural surrogacy was identified as being in existence, the AHPC was nonetheless of the opinion that cultural surrogacy, as a result of it being privately performed, should not be included in future surrogacy legislation on the ground that cultural surrogacy does not protect the interests of all the parties concerned.<sup>40</sup>

As a result of the recommendation submitted by the AHPC that cultural surrogacy not be legislated or legally recognised, cultural surrogacy has not been recognised as a form of artificial fertilisation in the Act. In fact, cultural surrogacy has not been acknowledged through either prohibition or endorsement: there is not a single word or phrase incorporated into the Act

<sup>38</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 4.

<sup>39</sup> *The Concise Medical Dictionary* (1999), 283, 285 defines the 'genetic mother' as the mother from whom the child acquires his or her genetic material which is carried at a particular place on a chromosome. A chromosome is one of the threadlike structures in a cell nucleus that carries the genetic information. The nucleus of each human cell contains 46 chromosomes; 23 maternal and 23 paternal. 'Gestational mother' is defined as the woman within which the fertilised cell (ovum and sperm combined that develop into embryo) develops into a baby ready to be delivered.

<sup>40</sup> Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 335; Carnelley M and Soni S (2008) 22 *Speculum Juris*, 37; Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010), 6.

which can be interpreted to mean that cultural surrogacy is or is not permitted as a form of legally assisted reproduction.

Despite the fact that one could presuppose that the members of the AHPC were acquainted with the Constitution, the AHPC, in accordance with the SALC suggestion, recommended that cultural surrogacy not be legislated on the grounds that, because it is privately performed without medical intervention, it does not provide the requisite legal protection for all the parties concerned.<sup>41</sup>

Having regard to the above, the authors initial submission is that the failure by the AHPC to recommend the inclusion of cultural surrogacy in future surrogacy legislation could amount to discrimination on the grounds of culture, could have the potential to impair the dignity of many who choose informal surrogacy as a method of assisted reproduction when unable to bear a child themselves, and lastly, that the failure to recommend the inclusion of cultural surrogacy in Chapter 19 may also place a limitation on one's right to make decisions regarding reproduction.

The result of the recommendation of the AHPC that cultural surrogacy not be provided for in the Act has the effect (and this argument will be further substantiated with reference to the rights of the Constitution in chapter three) that the parties to cultural surrogacy agreements are not afforded the same legal recognition as those individuals who opt for formal surrogacy agreements. Persons who choose formal surrogacy agreements, which are legally recognised by the Act, are able to have such agreement sanctioned by

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<sup>41</sup> In a September 1997 address to Parliament, the Chairperson of the SALC Report on Surrogate Motherhood, Priscilla Jana, when asked whether the proposed Bill on Surrogacy would apply to customary law answered in the negative. Such response was made regardless of the fact that she had stated in the SALC Report that "surrogacy is practised within all black groups on an informal basis. Many cultures demand that a child be born of a marriage and people desire genetically linked children. In many customs the elders get together to arrange for someone to give birth for an infertile woman. It also happens that a man is found to assist where a husband is infertile". Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010); Sloth-Nielsen J and Van Heerden B 'Putting Humpty Dumpty back together again: Towards restructuring families' and children's lives in South Africa' (1998) 115 *SALJ*, 165.

the Court. Such confirmation makes the surrogacy agreement valid and binding, and the rights and obligations of the parties are protected and acknowledged: the surrogate is the gestational mother, the commissioning parents are those persons who will be the legal parents of the child born of the agreement from birth, and the child born of the agreement will be legally recognised as the child of the commissioning parents.

The impact of non-recognition of cultural surrogacy is that the parties to the agreement are not afforded the same protection and thus it cannot be said that the non-recognition of cultural surrogacy as a legal form of assisted reproduction protects the interests of the parties concerned. In point of fact, the effect is the corollary: the parties to the agreement are not afforded legal recognition, their positions in law are uncertain and the legal status of a cultural surrogacy agreement and the child born of the agreement is unclear.

To conclude, the AHPC agreed with the SALC recommendation that the Act 'should not make provision for cultural surrogacy'. The result is that cultural surrogacy has not been incorporated into Chapter 19 of the Act.<sup>42</sup>

#### 2.2.1.2 Formal Surrogacy

The second type of surrogacy practiced in South Africa, as recognised by the SALC and the AHPC, is 'formal surrogacy'. The SALC and the AHPC further subdivided formal surrogacy full and partial surrogacy. Full surrogacy refers to the in vitro fertilisation of the surrogate mother.<sup>43</sup> In full surrogacy the surrogate's gametes are not used in the fertilisation procedure, whereas in partial surrogacy, the surrogate mother is artificially inseminated with the

<sup>42</sup> Further argument will be provided in chapter 3 of this research.

<sup>43</sup> Full surrogacy pregnancy is achieved through the implantation into the surrogate's uterus of an embryo which has been 'created' outside the body of the surrogate. The surrogate is not genetically related to the child. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 335; Carnelley M and Soni S (2008) 22 *Speculum Juris*, 37; Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za/> (accessed on 1 June 2010), 6; Lupton ML *Family Law Service Issue 48: Medico-Legal Aspects* (2007), 71; Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 4.



gametes of the commissioning male, thus the surrogate is both the genetic and gestational mother.

In respect of partial surrogacy, several arguments were submitted by the members of the AHPC in favour of and against the practice of partial surrogacy. However the overriding concern of the AHPC was the enforceability of the surrogacy agreement and the future parentage of the child, and thus the AHPC recommended that partial surrogacy was only to be used in the case where it was not possible to use the female gamete of the commissioning parent for purposes of artificial insemination. Ultimately, the AHPC wanted to reduce the likelihood of future conflicts arising between the commissioning parents and the surrogate mother on the basis of the child born of the agreement being genetically related to the surrogate mother.<sup>44</sup>

In addition to this, surrogacy agreements where both gametes used in the creation of the embryo were donor gametes was not favoured. Once more, this submission was made on the basis of genetic relations; it was submitted that if the child was in no manner genetically related to the commissioning parent(s) or the surrogate mother, this would firstly give rise to a situation similar to adoption and secondly, this would not be in the best interests of the child concerned.<sup>45</sup>

In conclusion, the AHPC, after reading the SALC's Report, recommended that both full and partial surrogacy should be regulated. The reasons for infertility must be irreversible and permanent, and at the least, the gametes of one commissioning parent must be used in the surrogacy procedure.<sup>46</sup>

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<sup>44</sup> The idea that genes rather than gestation are responsible for the bond between mother and child has been criticised worldwide. Carnelley M and Soni S (2008) 22 *Speculum Juris*, 13.

<sup>45</sup> The impact of genetic relations on the best interests of the child will be comprehensively examined in chapter three of this research.

<sup>46</sup> Full surrogacy was recommended as the preferred method, whereas partial surrogacy was only to be available where full surrogacy is not possible due to medical or biological reasons. In favour of partial surrogacy, arguments submitted by the AHPC included that full surrogacy will not always be the practical alternative for infertile couples. Investigations showed that full surrogacy tended to be more expensive and could be a complex surgical procedure often with a relatively low success rate. Full surrogacy was also shown to have the potential to be more exploitive of poorer woman however more attractive to wealthier couples who desire a child who is of their own genetically. Partial surrogacy was shown to be in many cases the only

The AHPC were of the initial opinion that full surrogacy would be the best option for parties who wish to find greater legal certainty in surrogacy agreements. This recommendation was presented in consideration of the fact that full surrogates have no genetic tie to the child and it will be more constitutionally acceptable to compel a full surrogate to relinquish a child who is not genetically their own to the commissioning parents upon birth. Hence, the overriding concern of the AHPC related to the issue of genetic relations and the importance that genetics would play in respect of the enforceability of the agreement and in assuring that the agreement was in the best interests of the child.<sup>47</sup>

With regard to the above, the AHPC, in its final recommendations, recommended that full surrogacy would be the favoured option, with partial surrogacy being available only in the case where due to medical and biological reasons, full surrogacy was not possible.

Ultimately, Chapter 19 of the Act has incorporated the above recommendation to the extent that the Act recognises both partial and full surrogacy as a form of surrogacy which is legally recognised, and where the child born of such agreement is considered as the child of the commissioning parents. However, the Act does not include a proviso stating that partial surrogacy should only be permitted where the female gamete of the commissioning parent cannot be used. The reason for this 'exclusion' is unknown.<sup>48</sup> However, and this will be further substantiated in the forthcoming chapters, such exclusion on the legislature's part may have the corollary effect which the AHPC was seeking

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practical and financially feasible option; the pregnancy being easily achieved without the need for medical intervention. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 5.

<sup>47</sup> Enforceability of the surrogacy agreement will be discussed in chapter four and the impact of genetic relations on the best interests of the child will be examined in chapter 3.

<sup>48</sup> The SALC submitted in its Report on Surrogate Motherhood that 'restricting the use of partial surrogacy to situations "where it would not be possible, for biological and medical reasons, to use the female gamete of the commissioning parent for the purpose of artificial insemination" would be problematic in cases where the commissioning parents could simply not afford the procedures required for [full] surrogacy.' Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-13.



to avoid: it may increase the likelihood of disputes arising from surrogacy agreements because when the surrogate is also the genetic mother of the child, it cannot be submitted that it will be reasonable to compel her to hand over the child upon birth if she chooses not to.

## 2.2.2 Qualifications of parties

### 2.2.2.1 Surrogate mother: Psychological and physical suitability

The AHPC were of the opinion that a body or institution should be established to advise the Courts on the practice of surrogacy, and such body or institution (or a separate body or institution) would be tasked with the regulation of the screening of the potential parties to the agreement.

The AHPC submitted that the suitability of the parties to the agreement would be determined through screening, and the suitability report of the person who carried out the screening should be submitted at Court to assist the Judge in making his/her decision regarding the confirmation of the parties to the potential agreement.<sup>49</sup>

In its final recommendations, the AHPC recommended that all the parties to the agreement should be subjected to a strict screening process before the agreement would be confirmed by the Court. In support of the inclusion of such recommendation, the AHPC resorted to evidence from other jurisdictions such as the UK and the US, where it was shown that 'the majority of the problems emanating from surrogacy agreements were brought about by the insufficient screening of parties'.<sup>50</sup>

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<sup>49</sup> The AHPC recommended that the assessment to be done on the respective parties should be carried out with the following factors in mind, first the reasons for the surrogacy, secondly, the state of mind of the parties to the agreements, thirdly, the suitability of the parties and lastly, the risks involved in the agreement. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 13.

<sup>50</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 18.

Regardless of the above, when the Act was promulgated in 2005, Chapter 19 did not expressly provide for the screening and counselling of parties. The author is uncertain as to why a provision of this kind was excluded from the Act. Both the SALC and the AHPC recommended that the parties must be submitted to screening.

Nonetheless, despite this 'omission' by the legislature, in practice, the Court will only confirm a surrogacy agreement if the parties to the application provide sufficient proof of their suitability for the agreement.<sup>51</sup> In practice, such suitability is determined by a screening process conducted by private medical practitioners, usually at the expense of the potential commissioning parents. It is unknown as to why the legislature did not incorporate this recommendation, however it can be submitted that if in practice the Court did not insist that the parties provide sufficient evidence as to their suitability, such exclusion by the legislature may have created a situation where any would-be surrogate or would-be potential commissioning parent could have approached the Court to have their agreement confirmed, without having their suitability predetermined. Consequently, this may have resulted in a situation where potential parties to the agreement may not be psychologically and physically fit to enter into a surrogacy agreement, and this could give rise to the likelihood of future disputes between parties.

To bring to a close, despite the fact that the Court in practice requests that the parties to a potential surrogacy agreement produce sufficient evidence as to their suitability to enter into surrogacy agreements, and that such suitability is determined through psychological and physical screening, the legislature itself did not take heed of the AHPC's recommendation. Resultantly, Chapter 19 does not make provision for such screening, and it was submitted in 2007 that 'one [could] only hope that the regulations to the Act will address this lacuna', because, effectively, 'the successful execution of the surrogate agreement is to a large extent dependant on the surrogate mother being physically and

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<sup>51</sup> Govender S 'Rise of the baby-makers: Rent-a-womb gains favour in SA' *The Sunday Times* 25 October 2009, 10.

psychologically suited to act as a surrogate mother.<sup>52</sup> The Regulations which were promulgated in April 2010 do not provide for screening of potential parties to a surrogacy agreement. In fact, the 2010 Regulations make no reference to Chapter 19 of the Act or surrogacy agreements at all.

#### 2.2.2.2 Surrogate Mother: Age

The AHPC initially submitted that, in respect of potential surrogate mothers, a prescribed age limitation should be implemented. However, when the final recommendations were submitted to the SALC and the Minister of Justice, an age limitation in respect of surrogate mothers was not included. Though no reason was provided for the exclusion of such age limitation by the AHPC, the author submits that an age limitation was almost certainly excluded on the basis that age had been listed as a specified ground of unfair discrimination in the Constitution. With no recommendation by the AHPC, Chapter 19 of the Act did not include a provision regarding an age limitation in respect of potential surrogate mothers. Whilst the author submits that she agrees that any discrimination on the basis of age is presumably unfair, it will be shown in the subsequent chapter that there may be a constitutionally acceptable purpose for limiting the rights of potential surrogates by including an age limitation.

#### 2.2.2.3 Surrogate mother: Marriage

The AHPC recommended that marriage was not to be a suitability requirement of potential surrogates; the competency of the surrogate would be determined regardless of whether she was married or not.

The above recommendation, although not expressly stated, has been incorporated into Chapter 19 of the Act. In terms of the Act, any competent woman may act as a surrogate and there is no provision which can be interpreted to read that only married surrogates may enter into surrogacy

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<sup>52</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-16.

agreements.<sup>53</sup> In fact, section 293(2) provides that 'where the surrogate is married or involved in a permanent life relationship, the court may not confirm the agreement unless [the surrogates] husband or partner has given his or her written consent to the agreement and has become a party to the agreement'.<sup>54</sup> Hence, the part which reads 'where the surrogate' can be interpreted to mean that the surrogate is not obligated to be married or in a relationship. Taking this into consideration, it would seem that neither the AHPC nor the legislature wanted to create a situation where marriage could be a factor which would prevent a woman from becoming a surrogate.<sup>55</sup>

Despite the fact that the SALC had suggested that marriage be included as a ground of suitability of a potential surrogate, the AHPC's recommendation and the resultant legislation shows that, unlike the SALC (whose Report was concluded prior to the enactment of the Interim Constitution), both the AHPC and the legislature took cognisance of the fact that marriage is a listed ground of discrimination in terms of the Constitution, and that any limitation on the rights of woman to become surrogate mothers on the basis of this listed ground may amount to unfair discrimination.

#### 2.2.2.4 Sexual orientation

As was the case with marital status, the AHPC recommended that sexual orientation would not have an effect on the competence of a surrogate. The SALC had however suggested that sexual orientation should be a ground to determine the suitability of potential surrogate mothers.

When the Act was promulgated in 2005, it took cognisance of such recommendation and did not stipulate that only women who were heterosexual qualified as being competent to enter into a surrogacy agreement. The author once again refers to section 293 of the Act, which

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<sup>53</sup> Section 295(c)(i) of the Act.

<sup>54</sup> Section 293(2) of the Act.

<sup>55</sup> Prior to the 1984, 1989 and 2003 amendments of the Human Tissue Act 65 of 1983, artificial insemination could only be carried out on a married woman with the written consent of her husband.

refers to the surrogate's husband or her partner in a permanent life relationship.<sup>56</sup> Though the AHPC's recommendations were submitted prior to the enactment of the Civil Union Act 17 of 2006, the recommendations of the AHPC pre-emptively accord with the recognition which has been afforded to same-sex civil marriages in terms of the Civil Union Act.

As a result, Chapter 19 of the Act also gives effect to the recognition afforded to same-sex partnerships and marriages because sexual orientation has not been included as a suitability requirement of potential surrogate.

Hence the author submits that the AHPC and the legislature took into consideration that sexual orientation is a listed ground of discrimination in terms of the Constitution, and that both the AHPC and the legislature acknowledged that any restriction on the rights of a woman, to become a surrogate, on the basis of her sexual orientation could amount to unfair discrimination.

The author concurs with the AHPC's recommendation that both marriage and sexual orientation should not be determining factors in the assessment of the suitability of a surrogate. Both marriage and sexual orientation are listed grounds of discrimination in terms of section 9 of the Constitution and it is thus submitted that neither marriage nor age could be argued to be a justifiable limitation on the rights of a surrogate to exercise her right to make her own decisions regarding reproduction. The CC has held that children born of artificial fertilisation to married parents and parents of same-sex permanent life partnerships are afforded the same legal status.<sup>57</sup>

#### 2.2.2.5 Surrogate mother: One living child of her own

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<sup>56</sup> Section 293(2) of the Act.

<sup>57</sup> *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) and *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC). Boezaart T *The Law of Persons* 5ed (2010), 29, 52; Boezaart T *Child Law in South Africa* (2010), 87, 88,100, 133,134,138.

The AHPC recommended that the surrogate must have a living child of her own to be suitable to enter into a surrogacy agreement. It was argued that when a surrogate has a living child of her own, she would be emotionally better equipped to understand the consequences of entering into the agreement after having experiencing pregnancy before, thus enhancing the chances of success of the agreement being adhered to i.e. reducing the risk of the surrogate wanting to keep the child after birth.<sup>58</sup>

When the Act was promulgated in April 2005, the above recommendation of the AHPC was incorporated in terms of section 295(c)(viii). According to the AHPC, a surrogate who has a living child of her own would be less likely to withhold a child born of a surrogacy agreement from the commissioning parents at birth. Though this recommendation, and ultimately this provision, will receive greater examination in the subsequent chapter, the author submits that the application of such provision on the rights of potential surrogate mothers may not amount to a reasonable limitation on their rights to make decisions regarding reproduction, and in addition to this, it could also amount to an unwarranted restriction on their right to dignity and equality (differentiation on the ground of prior pregnancy).

Without conclusive proof showing that a surrogate who has a living child of her own will be less likely to change her mind about giving the child born of the agreement to the commissioning parents upon birth, the author cannot accept that the inclusion of this provision is constitutionally justified. The author submits that there may be some woman who, although they may not have a child of their own, would also want to offer their services as a surrogate to persons desiring a child of their own. The AHPC recommended

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<sup>58</sup> The SALC presented two further reasons in support of this recommendation: firstly, if the surrogate has her own child, she will be less likely to refuse to relinquish the child born of the agreement because the child born of the agreement will not be 'her' only child. Secondly, it was submitted that having a child of her own 'will cater for the event that through this pregnancy, she might be unable to have other children'. Report of the Ad Hoc Committee on *Report of SA Law Commission on Surrogate Motherhood* (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 6; Report of the Ad Hoc Committee on *Report of SA Law Commission on Surrogate Motherhood* (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 15.

submitted that there could be almost no justification for the legal entrenchment of criteria which would prevent someone from becoming a surrogate mother. To conclude, the author does not agree with this AHPC recommendation, unless it can be proven that a surrogate who has a living child of her own will definitely be less likely to fail to relinquish the child born of the agreement to the commissioning parents upon birth. The suitability of a surrogate should not be dependent on whether she has or does not have a living child. Essentially, suitability should be determined through a screening process.

Further to the inclusion of the above mentioned recommendation into Chapter 19, Chapter 19 does not only provide that a surrogate must have a child of her own, but section 295(c)(vi) provides that a surrogate must have had at least one viable delivery and a documented history of pregnancy. It must be noted that this provision is not a result of the AHPC recommendations because the requirement that a surrogate have at least one viable delivery and a documented history of pregnancy was not recommended by the AHPC. This provision is in fact a result of the original SALC Report.

This exclusion by the AHPC was not expressly motivated, however the author agrees with Professor Louw's suggestion that the inclusion by the legislature of section 295(c)(vi) is 'rather puzzling'.<sup>59</sup> First, it is ambiguous what exactly a 'viable delivery' would amount to: neither the SALC Report nor the Act defines a 'viable delivery'. The author presupposes that in this respect, a 'viable delivery' could mean that the child born of the mother lived, survived and subsists.<sup>60</sup> Secondly, if the surrogate has a living child of her own, the logical explanation would be that she had to have had a viable delivery to give birth to such child, and thus it would be fairly obvious to accept that she would have a documented history of such pregnancy. Effectively, the inclusion of both section 295(c)(vi) and section 295(c)(viii) is essentially superfluous for the reason that section 295(c)(vi) and section 295(c)(viii) are tautologous of

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<sup>59</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-17.

<sup>60</sup> *Chambers Twentieth Century Dictionary* (1982).



one another. It makes no sense to include the requirement that the potential surrogate must prove she has had 'at least one viable delivery and a documented history of pregnancy' when she has to prove that she has a living child of her own. Nonetheless, the implications of the application of section 295(c)(vi) will not receive further examination in further chapters.

#### 2.2.2.6 Surrogate mother: Financially secure

The AHPC agreed with the SALC's suggestion that the surrogate should be financially secure so as to eliminate the possibility that she may use the agreement for income purposes, and this suggestion was resultantly incorporated into the AHPC's final recommendations.<sup>61</sup>

In respect of financial security, the author cannot agree with the AHPC's recommendation that the surrogate must be proven to be financially secure before she may enter into the agreement. The author will submit in the subsequent chapters that 'it is unfair...for the law to deny women the freedom to decide how best to utilise their procreative ability and to fulfil their role in life'.<sup>62</sup> In this respect, if a woman is able to be financially rewarded for her services as a surrogate, and in this, further herself financially, unless there exists a constitutionally acceptable purpose for limiting this freedom, compensation for services as a surrogate should be permissible.

Despite the fact that the author will not discuss the requirement of financial security any further (because the author will argue in favour of commercial surrogacy), there could exist an issue in this recommendation. When the AHPC recommended that a surrogate must be financially secure to be suitable for surrogacy, the AHPC did not recommend any methods in which the financial security of a surrogate could be determined in practice, as well as not stipulating what would amount to being 'financially secure'. All that was

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<sup>61</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 16.

<sup>62</sup> Louw A Chapter 19: Surrogate Motherhood in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-17.



provided by the AHPC was that the screening process would provide an overall mechanism with which to determine suitability.

Having regard to the above, would it be required that a thorough examination into the potential surrogate mother's financial circumstances be carried out, and who would carry out such investigation? As to the degree of 'financial security' required, would it be possible for the Court, in its task of confirmation, to place a lower limit restriction on what a potential surrogate is required to financially possess before she may act as a surrogate?<sup>63</sup>

To conclude, the recommendation by the AHPC that the surrogate must be financially secure to enter into a surrogacy agreement was not as a whole incorporated into the Act. Section 295(c)(iv) of the Act merely provides that the surrogate mother must not use the surrogacy as a source of income, and hence does not expressly stipulate that the surrogate must be financially secure. Further examination of this provision will be carried out in chapter 4 under the discussion on commercial surrogacy agreements.

#### 2.2.2.7 Surrogate mother: Partner's consent

The AHPC included in its final recommendations that that a surrogate should have her husband or partner's written consent to enter into a surrogacy agreement, the partner himself/herself should become a party to the

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<sup>63</sup> The Legal Aid Board of South Africa makes use of a 'financial means test' whereby only those persons with the 'financial means' of R3 000-00 or less qualify as indigent persons permitted to make use of Legal Aid attorneys. Another financial means test which is made use of in South Africa is that test which is used in the determination for child support grants. Amongst the requirements for qualification is the financial means test, in terms of which, single persons who earn no more than R28 800-00 per year or R2 400-00 per month and married persons who earn a combined income of R57 600-00 per year or R4 800-00 per month, qualify for a child support grant if they are the child's primary caregiver. The qualification is subject to other limitations such as age, citizenship etc. Capegateway Government Directories 'Grant for Caring for a Young Child (Child Support Grant)' available at <http://www.capegateway.gov.za/enq/directories/services/11586/47468> (accessed on 14 August 2010).

agreement, and if the partner unreasonably withholds consent, the court may nevertheless confirm the agreement.<sup>64</sup>

The author agrees with the above mentioned AHPC recommendation. When a woman chooses to become a surrogate and she is in a relationship, her surrogacy (artificial fertilisation, pregnancy and child birth) may have an effect on her husband or partner. Any woman who is pregnant experiences changes that the husband or partner may be unwilling to experience. Even though this may sound self-centred, it may be the truth. There also exists the issue that if your wife or your partner is undergoing artificial fertilisation, this may affect your intimacy as a couple, and could maybe result in emotional problems within your relationship. In addition to that, there may exist the possibility that the husband or partner also wants to have a child but because his wife or his/her partner is party to a surrogacy agreement, the surrogates husband/partner may have to postpone his/her desires until the surrogacy agreement has come to an end.

Nonetheless, with no additional recommendations made by the AHPC, it is unknown as to whether the surrogate's spouse or partner would be compelled to abide by the agreement if he/she chooses not to and what the effect of such consent would have on his or her legal obligations. It has been suggested that because the surrogate is expected to relinquish all parental rights and responsibilities towards the child at birth, the same obligations would exist regarding the spouse or partner of the surrogate.<sup>65</sup> In this regard, the author submits that each case would have to be decided on its own merits. What may amount to an unreasonable withholding of consent by one partner, may amount to being reasonable in another situation, and if the Court is capable of confirming the agreement without the husband or partners consent, this could amount to an unreasonable limitation on his or her freedom as well. Hence, screening and counselling would assist in

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<sup>64</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 16.

<sup>65</sup> Louw A Chapter 19: Surrogate Motherhood in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-9.

determining not only the surrogate's suitability to the agreement, but her husband or partner's suitability as well.

This recommendation, although stated differently, has been included in the Act in terms of section 293. The recommendation stipulated that the surrogate 'should' obtain the consent of her partner, whereas the Act provides that a Court may not confirm the surrogacy agreement unless consent of the husband or partner has been obtained.<sup>66</sup> The difference between the AHPC recommendations and the Act lies in the fact that the recommendations provided that the court may confirm the agreement if consent is unreasonably withheld, whereas the Act provides that 'where the husband or partner of a surrogate mother who is *not the genetic parent of the child* unreasonably withholds his or her consent, the court may confirm the agreement'.

Therefore, the author submits that in the case of the AHPC recommendations, all surrogacy agreements, whether partial or full, where the husband or partner unreasonably withheld his/her consent, the Court could sanction the agreement, but in terms of the Act, it seems as though that in the case of partial surrogacy, the agreement cannot be confirmed even if the husband or partner unreasonably withholds his/her consent. This is probably because if the partial surrogate chooses to terminate the agreement in terms of section 298 of the Act, section 299 provides that the surrogate and her husband/partner are vested with full parental rights and responsibilities towards the child born of the agreement. Therefore this goes to the issue of the enforceability of a contract which is discussed more fully in chapter four of this research.

To conclude, the AHPC recommendation, although not exactly, was incorporated into the Act in the form of section 293.

#### 2.2.2.8 Commissioning parent: Last resort for conception

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<sup>66</sup> This provision should be amended to include the word spouse after husband and partner to bring this provision into accordance with the Constitution and the Civil Union Act 17 of 2006.

In respect of the commissioning parents, the AHPC recommended that surrogacy must be exercised as a last resort for persons unable to have children via natural methods. The AHPC concurred with the SALC that surrogacy should only be permitted if it can be medically or biologically proved that the infertility and inability to give birth is permanent and irreversible. The AHPC motivated the inclusion of this recommendation on the basis of all the risks inherent in a surrogacy agreement.<sup>67</sup>

The above mentioned AHPC recommendation was included in the Act in the form of section 295(a), which provides that the Court will not confirm the surrogacy agreement unless the commissioning parent(s) are not able to give birth to a child and that this condition is permanent and irreversible. As a result, the Act can be interpreted to mean that even persons who are not infertile are able to enter into valid surrogacy agreements, however, such persons must not be able to give birth to a child.

Despite the fact that section 295(a) will receive greater examination in the subsequent chapter, the author is of the opinion that the limiting effect which this AHPC recommendation and the resultant section 295(a) has on the exercise of, amongst others, the rights to make decisions regarding reproduction is warranted. In support of this argument the author submits that when fertile persons are capable of having children through other means, such as natural conception, such persons should make use of this option. Chapter 19 was enacted to provide those persons who are unable to have children on their own, due to biological and medical reasons, to enter into a surrogacy agreement whereby the child born of the agreement will be legally recognised as their own. Hence, the author submits that she is agreement with the inclusion of this recommendation and that that application of this recommendation and the resultant provision could be said to amount to a constitutionally acceptable limitation on the rights of potential commissioning parents. Section 295(a), and the constitutional implications which its

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<sup>67</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 17.

application has on the rights of would-be commissioning parents, will be further investigated in paragraph 3.5 of chapter three.

#### 2.2.2.9 Commissioning parent: Fit and proper person

The following requirement recommended by the AHPC in connection with the suitability of potential commissioning parents was that the commissioning parents must be fit and proper persons to accept the responsibility of the parenthood of the child born of the agreement. As was the case regarding a surrogate, a screening process was recommended as the manner in which to determine if the commissioning parents were fit and proper persons and if the commissioning parents were able to understand the rights, obligations and legal consequences which flow from the surrogacy agreement and the applicable legislation as well.<sup>68</sup>

The author agrees with the inclusion of the above mentioned AHPC recommendation. Since surrogacy is not an ordinary contract dealing with ordinary rights and obligations, it is imperative that parties take as many precautions possible to obtain certainty and clarity regarding their contractual duties. Screening, as proven in other jurisdictions, assists in reducing the risks of disputes which may arise out of a surrogacy agreement.<sup>69</sup>

Nonetheless, the Act did not incorporate the term 'fit and proper' as recommended by the AHPC. Instead, section 295(b) requires that the commissioning parents must be competent to enter into the surrogacy agreement and suitable to accept the parenthood of the child recieved.<sup>70</sup> Yet, the author submits that unless the commissioning parents are screened for competency and suitability, it is debatable as to how such suitability and competency will be determined. Even though the courts in practice do

<sup>68</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 17.

<sup>69</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 6, 17.

<sup>70</sup> Section 295(b)(i) and (ii) of the Act.

determine whether the parties to the agreement comprehend what is required of them and if they are indeed suitable to become parties to an agreement which has been shown to compose of so many inherent risks; the result of the failure to include a provision stating that parties to the agreement must undergo screening for suitability and competency could result in bringing about future disputes between the parties.

Nonetheless, the author agrees with the AHPC recommendation that the commissioning parents should undergo screening to determine their suitability to accept parenthood, but cannot understand why the legislature would omit to expressly include within the Act such an important component of both the SALC Report and the AHPC recommendations. The author anticipates that this omission may be amended if future regulations are drafted in respect of surrogacy agreements.

#### 2.2.2.10 Commissioning parent: Age

The SALC had submitted in its Report that an age bar in respect of commissioning parents should be incorporated into future surrogacy legislation. Nonetheless, the AHPC did not include such a restriction in their final recommendations. In fact, the AHPC members, despite their initial agreement that a prescribed age limitation should be implemented, did not even allude to such a requirement in respect of suitability of potential commissioning parents.

The omission by the AHPC to include such a provision in their recommendations could be as a result of the fact that the AHPC took into cognisance that any differentiation on the basis of age is presumably discriminatory and constitutionally suspect. Nonetheless, unlike the submission provided above that there should be an age limitation for would-be surrogates, the author cannot at this point in this research submit that she is in agreement or disagreement with the omission of an age bar for potential commissioning parents. In this respect, there exists a distinct difference regarding potential surrogate mothers and potential commissioning parents. A

surrogate mother is subject to the psychological and physical risks associated with artificial fertilisation, pregnancy and child birth, whereas the commissioning parents do not endure similar burdens. The age of the commissioning parents, although they may be submitted to emotional stress as a result of the enforceability risks of the agreement (i.e. whether the surrogate will be able to get pregnant and whether she will adhere to her obligations to hand over the child upon birth), cannot be said to affect their ability to provide the child born of the agreement with a loving and stable home.<sup>71</sup>

At this juncture in the research the author submits that the omission by the AHPC to include a provision regarding and age limitation in respect of potential commissioning parents is satisfactory. Unlike the argument submitted above that would-be surrogates should be subjected to an age bar, the author cannot justify an age limitation for commissioning parents. To conclude, when the Act was promulgated, the legislature itself also did not include provision in respect of an age limitation for potential commissioning parents.

#### 2.2.2.11 Commissioning parent: Marriage

The AHPC recommended that surrogacy agreements should not only be available to married persons. When the Act was promulgated in 2005, the Act incorporated this recommendation in that the Act does not provide that only married persons are eligible for surrogacy. As was the case with the

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<sup>71</sup> It has been said that an age limitation in respect of commissioning parents should be implemented so that the legislature does not open itself up to geriatric parenting, which has been said to not be in the best interests of the child born of the agreement. For example, in December 2010, Sir Elton John (63 years of age) and his husband David Furnish became parents to Zachary Jackson Levin who was born as a result of surrogacy agreement. Even though the author does not wish to discuss age limitations in respect of commissioning parents any further, because it will exceed the scope of this research, the author submits that age limitations in respect of potential commissioning parents may not pass constitutional muster because it will be problematic to show that that older persons are less capable of being suitable for parenthood as their younger counterparts. Nathan S and Greenhill S *You can tell everybody this is our son: Elton John and David Furnish welcome son Zachary with the help of a surrogate mother* (December 2010) available at <http://www.dailymail.co.uk/tvshowbiz/article-1342092/Elton-John-David-Furnish-welcome-son-Zachary-help-surrogate-mother.html> (accesses on 11 January 2011).



recommendation that surrogates need not be married to enter into surrogacy agreements, section 294 of the Act provides that if married, the commissioning parent must obtain the written consent of his/her spouse.

Having regard to the above, the author submits that the Act has taken into account the AHPC's recommendation that marriage should not be a requirement for suitability of potential commissioning parents, and in this, both the AHPC and the legislature have considered that in terms of section 9 of the Constitution, any differentiation on the basis of marriage is presumably unfair.

The author submits that she agrees with the AHPC recommendation that marriage should not be a prerequisite for the suitability of potential commissioning parents to a surrogacy agreement. In terms of section 12(2) of the Constitution everyone has the right to make decisions regarding reproduction, and it cannot be submitted that failure to be married would amount to a reasonable limitation on this right.

#### 2.2.2.12 Commissioning parent: Sexual orientation

The AHPC recommended that sexual orientation should not be a determining factor in the assessment of the suitability of commissioning parents. As was the case with marriage, such recommendation, although not explicitly stated in the requirements of potential commissioning parents in section 295, was incorporated into the Act when it was promulgated in 2005. Section 293, although it does not directly relate to the eligibility requirements of a commissioning parent, provides that the commissioning parent if married or involved in a permanent relationship must obtain his/her partners written consent to enter into the agreement.

The author agrees with the AHPC's recommendation that sexual orientation should not be a prerequisite for would-be commissioning parents. Such recommendation, and the subsequent provisions of the Act, is in accordance with the right to equality (sexual orientation is a section 9 listed ground of discrimination) as well as the right to make decisions regarding reproduction.



Though the recommendations were presented in 1999, it is clear that the AHPC, unlike the SALC, took cognisance of the rights embodied in the Constitution.<sup>72</sup> In this, the AHPC took into account the fact that any limitations on the rights of potential commissioning to enter into surrogacy agreements, would have to be proven justifiable, and if not, such limitations could establish the basis for future constitutional disputes.

#### 2.2.2.13 Commissioning parent: Healthy and stable family environment

The AHPC recommended that potential commissioning parents must be able to provide a 'healthy and stable family environment' for the child to be born of the agreement and that this should be established through screening.

While the AHPC did not expressly define what constitutes a 'healthy family environment', the AHPC did emphasise that future legislation 'should in all respects protect the best interests of children, especially with regard to providing a child born within surrogacy agreements with stable homes'.<sup>73</sup> The author submits that not only is the requirement similar to that which is requisite in respect of adoption i.e. 'securing stability in a child's life through permanent placement', but a 'healthy and stable family environment', although it would not encompass the same meaning, would fall under the general requirement that the commissioning parents must be competent and suitable to accept parenthood.<sup>74</sup> And competency and suitability is, as recommended by the AHPC, supposed to be determined through screening.

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<sup>72</sup> The National Party suggested that only heterosexual persons should be permitted to enter into surrogacy agreements. This suggestion was founded on the idea that it would be in the best interests of the child to grow up in a heterosexual home, and that it would be incorrect to place children in an environment that by its very own sexual nature prevented the conception of children in the first place. Of course, this argument will no longer pass constitutional muster. Not only has the enactment of the Civil Unions Act 17 of 2006 had the effect that same-sex couples are now able to marry, but there have been many Constitutional Court cases which have recognised that same-sex persons have the same rights as heterosexual persons. See for example *Du Toit v Minister of Welfare and Population Development (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA 198 (CC) and *J v Director General, Department of Home Affairs* 2003 (5) SA 621 (CC).

<sup>73</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 17.

<sup>74</sup> Boezaart T *Child law in South Africa* (2010), 134, 150, 151.

However, if it was not practice that the Courts request sufficient information regarding suitability and that attorneys ensure that the parties to the agreement undergo screening, the regretful omission by the legislature to include a provision stipulating that the parties shall undergo screening may have resulted in a situation where the commissioning parents may in fact not be able to provide a healthy and stable family environment.

Once again, the author is appreciative that legal practitioners and the judiciary have taken it upon themselves (without any legislation which directs them to do so) to ensure that the parties to the agreement are suitable candidates for surrogacy agreements. To conclude, the author agrees with the AHPC recommendation that, in the interests of the child born of the agreement, the commissioning parents should be required to show that they are capable of providing a healthy and stable family environment for the child born of the agreement. This requirement and the requirement of screening should have been more expressly stated in the Act.

#### 2.2.2.14 Commissioning parent: Genetic relation

In its final recommendations, the AHPC recommended that that it would be in the best interests of the all the parties concerned if the commissioning parent(s) were to be genetically related to the child.<sup>75</sup>

This recommendation was incorporated in its entirety into the Act in terms of section 294 which is headed 'Genetic origin of the child' and provides as follows:

'No surrogate motherhood agreement is valid unless the conception of the child contemplated in the agreement is to be effected by the use of the gametes of both commissioning parents or, if that is not possible due to biological, medical or other valid

<sup>75</sup> 'Genetic relation' is defined as the inherited link between a parent and child in terms of which the child possesses maternal or paternal chromosomes or both maternal and paternal chromosomes. Martin EA *The Concise Medical Dictionary* (2007) 285; Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood. (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 17.

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'.

The AHPC was of the opinion that donor gametes should not be permitted where it would be possible to use the gametes of both the commissioning parents, and in cases where the single commissioning parent is, or both the commissioning parents are, unable to provide a gamete for purposes of artificial conception, other parenting options such as adoption is available to these above mentioned categories of persons.

The inclusion of this recommendation has been justified that it would be in the best interests of the child if he/she is genetically related to at least one of his/her commissioning parents. In addition to this, it has been submitted that this recommendation was included to 'restrict undesirable practices such as shopping around with a view to creating children with particular characteristics'.<sup>76</sup>

Despite the fact that the issue of genetic relations will receive further consideration in chapter three and four respectively, the impact of the application of this recommendation may have both constitutional and contractual implications on the rights of all the parties to the surrogacy agreement. Constitutionally, the application of section 294 has the effect that infertile persons are unable to enter into surrogacy agreements because they cannot provide a gamete for purposes of conception. Having regard to the contractual implications of the application of section 294, it could be argued that when there exists a genetic relation between the commissioning parent and the child born of the agreement, it could be easier to compel the surrogate to hand over the child to the commissioning parent upon birth and that it may be better for a child to be raised by a parent with who he/she shares a genetic link.

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<sup>76</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-12, 19-13.

To conclude, it is suffice to say that the application of this recommendation and the resultant provision (section 294) gives rise to a number of constitutional which will examined in great detail in paragraph 3.5, 3.5.2, 3.5.21 and 3.8.2.

#### 2.2.2.15 Commissioning parent: Partners consent

The AHPC recommended that that the commissioning parent should acquire his/her husband's, wife's or partners written consent to enter into the agreement, and that the husband, wife or partner should be a party to the contract. The AHPC also recommended that where the husband, wife or partner unreasonably withholds his or her consent, the court will have the power to decide whether to dispose of such consent.

The author agrees with this recommendation, and although the arguments which were submitted in paragraph 2.2.2.7 above in favour of this recommendation regarding the husband, partner or spouse of the surrogate are relevant, the situation is not wholly similar. In most cases, a married commissioning parent who chooses to enter into a surrogacy agreement will be married to a partner who too wishes to have a child and thus, one could presuppose that he/she will consent. However, there may be a case where the commissioning parent is not married but has a partner and only the commissioning parent desires a child of his/her own. In this respect, such person cannot be compelled to become party to an agreement which they choose not to be apart of.

With this in mind, it is uncertain what legal status is attached to a 'partner' of a commissioning parent. The Act is silent if the consent required of such 'partner' is the consent of only 'permanent life partners', or an ordinary partner which may have only been involved in a relationship with the surrogate for a few months. This result of this recommendation is that uncertainty may arise as to the status of the 'partner' of the commissioning parent.

Taking the above into consideration, it is worthy of note that, despite the fact that the Act, in the form of section 293(1), incorporates the AHPC's recommendation that the husband, wife or partner of the commissioning parent must consent to the agreement and become a party thereto, unlike in the case of the surrogate mother, the legislature did not include the AHPC recommendation that when a husband, wife or partner of a commissioning parent unreasonably withholds his/her consent, the Court can dispose of this requirement. Thus, it can be submitted that the commissioning parent's husband, wife or partner cannot be compelled to enter or abide by the agreement. Consequently, if the commissioning parent's husband, wife or partner refuses to consent to the agreement, the court will not confirm the agreement. It is debatable as to why the legislature did not include an 'unreasonably withheld' provision in respect of the commissioning parents, however, further discussion regarding this will is beyond the ambit of this research.

### 2.2.3 Rights and obligations of parties

Depending on the specifics of a surrogacy agreement, it is possible that a child born of such agreement may have up to six possible parents.<sup>77</sup> Thus the AHPC felt it was of utmost necessity that the rights and obligations of such parties be clearly defined so as not to found future disagreement.

When the AHPC commenced its investigation into surrogate motherhood, one of the primary issues brought to the attention of the AHPC members was the issue of genetic relations and what impact genetic relations would have on the rights of the respective parties.

Having regard to the above, and the previous discussion under paragraph 2.2.2.2, the AHPC were aware of the very 'emotive' dilemma regarding the

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<sup>77</sup> The six potential parents could be the genetic parent/s, the surrogate mother, the surrogate's husband or partner and the commissioning parent(s). Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 8.

compulsion of a surrogate mother to give up her genetically related child. With this in mind, the AHPC recommended that the rights and obligations which flow from a surrogacy agreement must be determined on the basis of whether a genetic relation exists between the surrogate mother and the child i.e. the rights and obligations of the parties were recommended to be dependant on whether the agreement was a full surrogacy agreement or a partial surrogacy agreement.<sup>78</sup>

#### 2.2.3.1 Rights and obligations of the parties in a full surrogacy agreement

In respect of full surrogacy agreements, the AHPC recommended that any child born of a full surrogacy agreement would be regarded as the legitimate child of the commissioning parents immediately from birth. Hence, the AHPC recommended that the surrogate would be obliged to hand over the child to the commissioning parents immediately upon birth.

In respect of the rights of the child born of the agreement, he or she would from the moment of birth be regarded as the child of the commissioning parents and thus would have no claim of maintenance or succession from the surrogate, her husband, partner or spouse or the surrogates' relatives.

To conclude, the AHPC recommended that subject to the right to terminate one's pregnancy in terms of the Choice on Termination of Pregnancy Act 92

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<sup>78</sup> Three submissions were made by members of the AHPC in respect of the distinction regarding full and partial surrogacy agreements. The first was that where a genetic relation exists between the surrogate and the child, the likelihood of her surrendering the child upon birth was less than if she was not genetically related. The second submission referred to a study by the American College of Obstetricians and Gynaecologists, where it was found that attachment to the child born of the agreement would occur whether or not the surrogate was genetically related to such child. The final opinion was that bonding between the mother and child did not always happen: bonding supposedly takes place after birth. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 8, 9, 20.

of 1996, the agreement would be wholly valid and enforceable and would not be capable of termination post artificial fertilisation.<sup>79</sup>

Having regard to the above, the recommendations of the AHPC in respect of full surrogacy does, in effect, gives expression to the overriding purpose of surrogacy agreements: the child born of the agreement is regarded as the child of the commissioning parents immediately from the moment of birth and no party can terminate the agreement post artificial fertilisation.

The recommendations presented above were directly incorporated into section 297(1) of the Act. The author submits that she is in agreement with the above mentioned recommendations and the resultant section, because as stated above, these recommendations and section 297(1) of the Act fulfil the objective behind legalising surrogacy agreements. The AHPC recommendations provide for persons who are naturally unable to have children of their own to enter into an agreement with a woman who agrees to bear a child for them. Such child will from the moment of birth be for all purposes considered to be their own and neither party can terminate the agreement post fertilisation.

#### 2.2.3.2 Rights and obligations of the parties to a partial surrogacy agreement

To recapitulate, partial surrogacy is when the surrogate mother is both the genetic and gestational mother of the child to be born of the agreement. In this, the AHPC identified two problems, first whether a partial surrogate could be compelled to relinquish the child and all parental rights and responsibilities to such child upon birth to the commissioning parents, and secondly, if enforcing the agreement upon a partial surrogate (i.e. compelling her to hand over the child) would amount to an infringement of her constitutional rights to dignity and the right to make decisions regarding reproduction.

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<sup>79</sup> *Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood* (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 19, 20.



Taking the above into consideration, the AHPC recommended that, unlike in the case of full surrogacy, the child born of the agreement would not be considered the legitimate child born of the commissioning parents. The AHPC recommended that the child born of the agreement would be regarded the child of the surrogate upon birth, and a guardian ad litem would be appointed to protect the interests of the child born of the agreement. Despite the fact that the surrogate would be considered the legal mother of the child born of the agreement, the commissioning parents would be able to apply for a change of parentage in respect of such child after six weeks after the birth of the child. If the partial surrogate unconditionally consented to the 'change in parentage', the child born of the agreement would be given a new birth certificate with the commissioning parents listed as the child's parents.<sup>80</sup>

However, the AHPC recommended that if the surrogate does not provide her unconditional consent to the change in parentage, the status quo would prevail, and she would for all purposes remain the mother of the child born of the agreement.

As was the case with full surrogacy, if the partial surrogate consents to the change in parentage, the AHPC recommended that the child born of the agreement would have no claim of maintenance or succession against the surrogate, her husband, partner, spouse or relatives.

Lastly, having regard to the termination of the agreement, although not expressly stated by the AHPC, it is submitted by the author that because the partial surrogate has the right to keep the child born of the agreement as her

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<sup>80</sup> This proposed procedure is similar to that which is in operation in the UK today. Surrogacy Agreements (although not legally enforceable) are governed by the 1985 Surrogacy Arrangements Act and the 1990 and 2008 Human Fertilisation and Embryology Act. All three Acts are still in operation and regulate surrogacy agreements in the UK. Section 54 of the 2008 Human Fertilisation and Embryology Act provides for Parental Orders. In terms of this, commissioning parents apply to the Court after the child has born for a parental order. The effect thereof is that the rights and the responsibilities of the surrogate towards the child will be terminated and the commissioning parents will become the legitimate parents of the child born of the agreement. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 20, 21.



own and not to consent to the change in parentage in respect of the commissioning parents, partial surrogacy agreements are capable of termination post fertilisation.

The author submits that even though she is in agreement that it would be difficult to compel a woman to give up her own genetic child, and that forcing her to do so may amount to an unconstitutional act, recommending that partial surrogacy agreements, by comparison to full surrogacy agreements, constitute different rights and obligations for the parties does not give effect to the purpose of surrogacy agreements. Effectively, in the case of partial surrogacy, the surrogate mother will always possess the opportunity to terminate the agreement post fertilisation and to refuse to relinquish the child born of the agreement to the commissioning parents. Hence the commissioning parents, who entered the agreement with the desire to have a child which naturally they are on their own unable to do, will not be certain that this will be the result of the partial surrogacy agreement. To conclude, the effect of the AHPC recommendations is that partial surrogacy agreements will never be wholly enforceable against parties.<sup>81</sup>

Though this argument will receive further examination in the subsequent chapters, the author submits that partial surrogacy does not protect the rights and the interests of all the parties concerned. Keeping in mind that in terms of the AHPC recommendations, the surrogate may choose not to hand the child born of the agreement to the commissioning parents, the position of the parties to a partial surrogacy agreement will, in the author's opinion, never be certain.

The overall thrust of the above-mentioned recommendations of the AHPC has been incorporated into the Act in the form of section 298. Whilst the author submits that it is important to differentiate between surrogates on the basis of

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<sup>81</sup> This is despite the fact that the AHPC recommended that all surrogacy agreements, whether full or partial, should be regarded as valid and enforceable once confirmed by the Court. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 19.

the genetic relation which they share with the child of the agreements, and in doing so, the AHPC took cognisance of the possible implications that forcing a genetic mother to give up a child may have on her rights to dignity and her rights to make decisions regarding reproduction, the author submits that in principle, she does not agree with the practice of partial surrogacy.

Whilst the substance of section 298 will receive further investigation throughout this research, what is important to note is that, in respect of the recommendations of the AHPC, section 298 does not wholly replicate the AHPC recommendations. Section 298 (read with section 297(1)(a)), unlike the AHPC recommendations, provides that the child born of the agreement is for all purposes the child of the commissioning parents. Instead of stipulating that the commissioning parents can request consent from the surrogate mother to apply for a change of parentage after sixty days since the birth of the child, the Act provides that the partial surrogate can terminate the agreement through written notice to the court before the expiry of the sixty day period after birth. Hence, the acquisition of the parental rights and responsibilities towards the child born of the agreement by the commissioning parents is delayed by this sixty day 'cooling-off' period.<sup>82</sup>

Taking the above into consideration, the author submits that unlike the AHPC recommendations which created certainty as to who the parent of the child born of the agreement was during the sixty day period, the Act, in the form of section 298 leaves a lacuna in the law. Effectively, although the commissioning parents are considered the parents, the surrogate can choose to keep the child. During the sixty days between the birth of the child and the envisaged 'handover', the question which arises out of the application of section 298 is who bears the responsibility for the child for this period? For example would it be the surrogate or the commissioning parents who must consent to the emergency medical attention of the child? Would it be the surrogate or the commissioning parents who register the birth of the child: in terms of section 9(1) of the Births and Deaths Registration Act, the Director-

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<sup>82</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-24.

General of Home Affairs must be notified of the birth of every child within 30 days after such birth? Lastly, if the child born of the agreement needed an emergency passport, would it be the surrogate or the commissioning parents who would make such application?

Having regard to the above and the contents of the AHPC recommendations and section 298 of the Act, it is clear that partial surrogacy and full surrogacy agreements impose different rights and obligations on the parties to the respective agreements. In the case of full surrogacy, the child is the child of the commissioning parents from the moment of birth and the surrogate mother may not terminate the agreement post fertilisation. In the case of a partial surrogacy agreement, the commissioning parents only acquire parentage after the expiry of the sixty day period, and this is only if the surrogate mother chooses not to exercise her right to terminate the agreement. As the child born of a full surrogacy agreement is the child of the commissioning parents from the moment of birth, there exists no uncertainty as to the commissioning parent's rights and obligations towards the child. Whereas in the case of the partial surrogacy agreement (as it was illustrated above), it is debatable who bears the responsibility for the child born of the agreement during the first sixty days of his/her life.

To conclude, the author submits that she does not in principle agree with the recommendation by the ADPC that partial surrogacy agreements be permitted due to the fact that they do not provide protection to the positions of the parties to the surrogacy agreement. This argument will be further substantiated in paragraph 4.5 of chapter four.

#### 2.2.4 Commercial surrogacy

The AHPC recommended that surrogate motherhood for financial gain should not be permitted and that surrogacy should be seen as a method in which to

assist persons who are permanently and irreversibly unable to have children on their own and not as a means in which to accomplish financial upliftment.<sup>83</sup>

As a result, the AHPC recommended that future legislation which regulated surrogacy should provide that no person shall in connection with a surrogate motherhood agreement give or promise to give any reward or compensation in cash or in kind. This recommendation was extended beyond that of the surrogate mother and the commissioning parents and included agencies and brokers. The only persons who were recommended to be exempt from such recommendation were legal practitioners and medical practitioners if they carried out bona fide services in the confirmation and performance of the agreement. Nonetheless, the AHPC members did provide that the surrogate would be entitled to reasonable compensation for those actual expenses incurred as a result of the confirmation and execution of the agreement.<sup>84</sup>

The author submits that she is not in agreement with the above-mentioned recommendation of the AHPC. Despite the fact that the issue of commercial surrogacy will be examined in chapter four of this research, the author submits that unless the practice of commercial surrogacy can be said to be harmful to others, or have the potential to impair the dignity of the surrogate, commercial surrogacy is a viable option.<sup>85</sup>

Section 22 of the Constitution provides that everyone has the right to choose and practice their choice of trade, occupation and freedom, and provided that the compensation for surrogacy services is adequately regulated by government, it can be argued that women not only have right to choose surrogacy as a form of trade, occupation or profession, but they also have the

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<sup>83</sup> Report of the Ad Hoc Committee *on Report of SA Law Commission on Surrogate Motherhood* (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 7, 17.

<sup>84</sup> The surrogate would be entitled to be compensated for her loss of earnings arising out of performance in terms of the agreement and the commissioning parents would have to take out an insurance policy to cover the surrogate in the event of death or disability arising out of her performance in terms of the agreement. Report of the Ad Hoc Committee *on Report of SA Law Commission on Surrogate Motherhood* (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 1, 17.

<sup>85</sup> See paragraph 4.6 of chapter 4 for further examination.

right to make decisions regarding reproduction. Therefore the author submits that women should be permitted to be compensated for their reproductive services.

Even though some AHPC members did initially submit that commercial surrogacy could be viable, and that 'if the state wished[d] to avoid discrimination and to treat its citizens equally, [the state] should adopt a hands-off approach' and permit citizens to exercise their freedoms, the final AHPC recommendations, and Chapter 19 of the Act, prohibit payment to the surrogate for her services as a surrogate.

#### 2.2.5 Best interests of the child

It was the intention of both the SALC and the AHPC to ensure that any legislation which provided for the recognition and regulation of surrogacy agreements would give effect to the 'best interests of the child' and the majority of the submissions made 'highlighted the fact that everything should be done within the surrogacy agreement with the best interest of the child in mind.'<sup>86</sup>

Having regard to this, the AHPC recommended the following:

- i) that the legal status of the child to be born of the agreement must be evident from the legislation and that such legislation should provide that the child born of the agreement has the right to be informed of his/her genetic origin,<sup>87</sup>

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<sup>86</sup> The principle (and the right as contained in section 28 of the Constitution) of the best interests of the child will be examined in chapter three under the heading 'The constitutional implications of the application of Chapter 19 on the best interests of the child'. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmq.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 10.

<sup>87</sup> Some members of the AHPC argued that it would not be in the child's best interests if he or she is to be aware of the identity of his or her surrogate mother. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmq.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 10.

- ii) that the child born of the agreement should be genetically related to the commissioning parent,<sup>88</sup>
- iii) that full surrogacy, and the protection which it affords all parties to the agreement, would be in accordance with the best interests of the child,<sup>89</sup>
- iv) that the commissioning parents must be able to provide a healthy and stable home for the child born of the agreement, and<sup>90</sup>
- v) that the interests of any descendant or adopted children of the surrogate and/or the commissioning parents must be taken into account.<sup>91</sup>

All of these recommendations, bar number iii were incorporated into Chapter 19. For the reason that numbers ii, iii and iv have already been discussed in this chapter, the author will not examine these recommendations further, and because numbers i and v will be examined in great detail in chapter three, these recommendations will only be briefly discussed.

The author agrees with the recommendation of the AHPC that the child born of the surrogacy agreement should have the right to be informed of his or her genetic origin. As it will be evidenced in chapter three, the right of access to information to one's genetic origin can be said to be vital to the enhancement and preservation of one's human dignity and self-worth.

The above recommendation has been afforded some consideration by the legislature, albeit that the AHPC recommendation has not been precisely

<sup>88</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 17.

<sup>89</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 16.

<sup>90</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 17.

<sup>91</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 18.

replicated. Section 41 of the Act, which provides for access to biographical and medical information concerning genetic parents, reads as follows:

- (1) A child born as a result of artificial fertilisation or surrogacy or the guardian of such child is entitled to have access to –
- (a) any medical information concerning that child's genetic parents; and
  - (b) any other information concerning that child's genetic parents *but not before the age of 18 years*
- (2) Information disclosed in terms of subsection (1) may not reveal the identity of the person whose gamete was or gametes were used for such artificial fertilisation of the identity of the surrogate mother.
- (3) The Director-General: Health or any other person specified by regulation may require a person to receive counselling before any information is disclosed in terms of subsection (1).

Although section 41 restricts the information accessible to only that of medical and biographical information and the child is only entitled to access such information at the age of 18 years, the child born of a surrogacy agreement has been afforded the right to have access to his/her genetic origin and this is in accordance with the best interests of the child principle.

To conclude the author submits that she agrees that it will be in the best interests of the child born of a surrogacy agreement to have access to information regarding his/her genetic origin.<sup>92</sup>

In addition to the AHPC recommendation that children born of surrogacy agreements should have access to information regarding their genetic origin, the AHPC also recommended that due consideration needed to be afforded to the interests of any descendants or adopted children of the surrogate and/or the commissioning parents. I.e. due consideration should be given to the children of the parties to the surrogacy agreement who are already in existence.

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<sup>92</sup> The right of access to knowledge in respect of one's genetic origin will be further examined in paragraph 3.8.2 of chapter 3.



This recommendation, albeit in different wording, has been incorporated into the Act in terms of section 295(e). Section 295(e) provides that a court may not confirm a surrogacy agreement unless it has regard to the 'family situations of all the parties concerned'. With this, the author submits that 'having regard to the family situations of all the parties concerned' can be said to mean that the court must consider the views of the family members of the surrogate mother and/or the commissioning parents.

In addition to section 295(e), section 10 of the Act provides for child participation in all matters concerning the child. In terms of section 10, 'every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by that child must be given due consideration'.

To conclude, the author agrees that the views of the child of the surrogate and/or the commissioning parents must be afforded consideration, however, and this will be further substantiated in chapter three, whether the views and interests of the other children (who are already in existence) of the surrogate and/or the commissioning parents will have the effect that they may trump the rights of the surrogate mother and/or the commissioning parent to enter into a surrogacy agreement, is debatable. Though the best interests of the child are paramount, this right is not absolute and can be proportionately limited. Lastly, without provision made for the screening of the parties to the agreement, it is unclear how the 'family situations' of these parties will be given due regard.

#### 2.2.6 State funded fertility clinics

Due to the high costs involved in surrogacy procedures, initially, most of the AHPC members were in agreement with the SALC suggestion that State-funded fertility clinics needed to be established to provide access to those who could not afford surrogacy-enabling medical procedures. Section 27(1)(a) of the Constitution provides that everyone has the right to access to reproductive health care services. In light of this constitutional provision, the



AHPC felt that the State should provide the opportunity to access medical procedures assisting in surrogacy to those who are unable to afford the medical procedures involved in fulfilling surrogacy agreements.<sup>93</sup> However, when it came to drafting the final recommendations, the AHPC recommendations did not make provision for State funded fertility clinics.

The author is partial agreement with the exclusion of the above recommendation. Although it is acknowledged that everyone has a right to access to reproductive health services, it is proposed that the right to access to reproductive health care cannot, at this point in time, be interpreted to include the right of access to surrogate motherhood enabling technologies. With the aid of socio-economic rights case law, this recommendation will be comprehensively examined in chapter three.

In addition to this, the author notes that whilst both the SALC and the AHPC were very much in favour of the establishment of state-funded fertility clinics to assist in the medical procedures associated in surrogacy, neither the SALC nor the AHPC made any suggestions regarding possible monetary assistance in respect of legal costs.

Section 292(e) of the Act provides that 'no surrogate motherhood agreement is valid unless the agreement is confirmed by the High Court'. Whilst it can be presupposed that because the High Court is the upper guardian of all children that the Judges of the High Court could be said to be the most qualified to determine that the surrogacy agreement conforms to the requirements of the Act and ultimately, that the agreement to be confirmed is in the best interests of the child, the fact of the matter is that High Court litigation is costly.

South Africa is a third-world country where the majority of the persons are unemployed. If the SALC, AHPC and the legislature envisaged that all surrogacy agreements be sanctioned by the High Court before they could

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<sup>93</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 February 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 15.

become valid, the SALC, AHPC and the legislature were impractical. By providing that surrogacy agreements must be confirmed by the High Court, the legislature clearly has not taken cognisance of the South African economic sphere and within this, the Act advocates high legal costs in respect of the confirmation of surrogacy agreements.

To conclude, the legislature should have delegated surrogacy agreement jurisdiction to Children's Courts and High Courts.

#### 2.2.7 The proposed Surrogacy Act

The AHPC completed its final report (Report of the Ad Hoc Parliamentary Committee on the Report of the SALC on Surrogacy) in 1999. The report was referred to the Department of Justice and recommended the adoption of the Surrogacy Act. In the interim, the SALC had commenced its enquiry into the Child Care Act.<sup>94</sup> The First Issue Paper of the Review of the Child Care Act was published in 1998. The Paper acknowledged that surrogacy agreements had not been sufficiently regulated in the Children's Status Act and comment was called for on whether a comprehensive children's statute should be drafted so as to include such agreements.<sup>95</sup> The Issue Paper was followed by the Discussion Paper 103 on the Review of the Child Care Act in 2001, the perception being that the determination of legal parenthood especially in the case of surrogate motherhood had grown additionally challenging.<sup>96</sup>

In the 2002 Report and Draft Children's Bill on the Review of the Child Care Act it was ultimately recommended by the SALC that those provisions which were to be found in the AHPC's proposed Surrogacy Act were to be included in the new Children's Act: thus no discrete legislation would be promulgated which dealt solely with surrogacy agreements.<sup>97</sup>

<sup>94</sup> Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 332.

<sup>95</sup> Carnelley M and Soni S (2008) 22 *Speculum Juris*, 37.

<sup>96</sup> Carnelley M and Soni S (2008) 22 *Speculum Juris*, 37.

<sup>97</sup> Jordaan RA and Davel CJ *Law of Persons* (2005), 106; Carnelley M and Soni S (2008) 22 *Speculum Juris*, 97; Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 332.

In 2003, the Minister of Social Development tabled a draft Children's Bill aimed at enhancing the rights of vulnerable and poor children, addressing the increase in child abuse and neglect and providing better care for all children, and in June 2005, the Children's Act 38 of 2005 was promulgated.<sup>98</sup> The Children's Act made provision for surrogacy agreements and was the first South African legislation to openly regulate surrogate motherhood and establish surrogacy as a legally recognised procedure of assisted reproduction.<sup>99</sup>

Having regard to the above, the author disagrees that the regulation of surrogate motherhood agreements has been incorporated into the Children's Act. Though surrogacy does deal with the conception of a child and his/her interests need to be protected, surrogate motherhood agreements, as it will be evidenced in chapter three and four respectively, do not solely involve children or families. Surrogate motherhood agreements involve a hybrid of legal issues that cannot be regulated through the application of one aspect of South African law. Surrogacy agreements involve contract law, family law and may even involve customary law. Hence the author submits that to regulate surrogate motherhood agreements adequately, the proposed Surrogacy Act which was recommended by the AHPC in 1999 should have been promulgated. Thus the author submits that the inclusion of surrogate motherhood into the Children's Act was erroneous.

### 2.3 Conclusion

The purpose of this chapter has been to lay a foundation for the examination of some specific provisions of Chapter 19 which, in the author's opinion, may give rise to future constitutional and/or contractual disputes. Consequently, only these recommendations (and their resultant provisions) which the author

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<sup>98</sup> Carr K 'Surrogate Motherhood' (2007) available at <http://mcsadewcom.blogspot.com/2007/03/surrogate-motherhood.html> (accessed on 14 February 2010); Boezaart T *Law of Persons* (2010), 97.

<sup>99</sup> Carnelley M and Soni S (2008) 22 *Speculum Juris*, 36; Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 330.

submitted may give rise to constitutional and contractual implications were examined.

The first part of this chapter dealt with the legislative history of surrogacy prior to 2003. It was noted that due to the highly publicised case of the Ferreira-Jorge triplets of Tzaneen in 1987 and the realisation that surrogacy was being practiced in South Africa, the SALC recognised a need for legislation that would clarify the positions of all parties to a surrogacy agreement, and most importantly, elucidate the legal status of children born of these agreements.

As a result of the general opinion that the SALC were, as an investigative committee, inappropriately constituted, the AHPC was appointed to investigate surrogacy in light of the newly enacted Constitution and recent legislative developments.

With this in mind, the author examined several of the AHPC recommendations. The recommendations which were examined were those that the author identified as having the possibility of being either constitutionally and/or contractually suspect. Having regard to these recommendations, the author investigated the rationale behind the inclusion of each individual recommendation and whether such recommendation had been wholly or partially incorporated into Chapter 19, or whether such recommendation was in fact omitted from the Act.

Thereafter the author briefly examined the AHPC's proposed Surrogacy Act. The author submitted that the incorporation by the legislature of surrogacy agreements into the Children's Act was inappropriate due to the fact that surrogacy is not solely a children's rights issue: surrogacy agreements compose of conflicting human interests which cannot alone be regulated through family/children law.

The purpose of this chapter was to examine the legislative history of surrogate motherhood in South Africa. It was intended to identify possible constitutional and contractual implications which may arise out of the application of Chapter

19 of the Act. Hence, this chapter aimed to establish the necessary foundation for this research.

With reference to the provisions of the Act, which were briefly examined in this research, as well as to those aspects proposed by the AHPC, which were either included or excluded in the Act, the next chapter intends to show that despite the fact that surrogacy as a form of assisted reproduction has been afforded legal recognition, the application of some of the provisions, and the impact of some of the exclusions, of Chapter 19 of the Act has the likelihood of infringing the constitutional rights of would-be commissioning parents, would-be surrogates and the child born as a result of the agreement.



**CHAPTER THREE:  
THE CONSTITUTIONALITY OF CHAPTER 19 OF THE CHILDREN'S ACT**

3.1 Introduction

This chapter aims to comprehensively investigate the possible constitutional issues which were identified in Chapter Two. Each issue will be dealt with individually, taking into account the constitutionally guaranteed right that may be infringed by the relevant provisions of the Act. The purpose of this chapter is to illustrate the encumbering effect that the relevant provisions of Chapter 19 have on specific rights as contained in the Constitution.

Ultimately, the intention is to illustrate that certain provisions are in fact not based on a law of general application and are not reasonable and justifiable in an open and democratic society based on dignity, equality and freedom and that these specific provisions are neither rational nor fair. As a result, it will be established that such provisions are in fact inconsistent with the Constitution, are invalid and it is thus the duty of the state to amend Chapter 19 to construct legislation which respects promotes and fulfils a constitutionally acceptable purpose. The core rights of equality, freedom and dignity will be discussed as well as the effect Chapter 19 has on aspects of reproductive autonomy and cultural freedom.

3.2 Introduction to the Constitution

Arguably the most important chapter of the Constitution is Chapter 2: The Bill of Rights. Based on the Freedom Charter, the rights contained in Chapter 2 form the cornerstone of our democracy. The state and all South Africans, whether as natural or juristic persons, are required to respect and protect these rights. All rights contained in Chapter 2 are however subject to the application of section 36, the limitations clause.

The Constitution has two primary functions, namely to grant power and to limit power.<sup>100</sup> Empowerment provisions provide the constitutional authority to different branches and organs of state to perform certain tasks; however at the same time, by providing certain branches or organs with constitutional authority, provisions may also limit the powers of other organs or branches to act.

The Bill of Rights is vertically and horizontally applicable.<sup>101</sup> Vertical application refers to application between private persons and the state, whereas horizontal application is between one private individual and another (a natural person<sup>102</sup> and/or a juristic person).<sup>103</sup>

Certain legislation places a duty on the state to implement procedures and methods in which private citizens are provided with the opportunity to realise their rights.<sup>104</sup> Vertically, individuals may invoke the Bill of Rights and approach the Constitutional Court (hereinafter referred to as the 'CC') either directly or indirectly when they are of the opinion that their right has been infringed by an organ of state. Horizontally, individuals, when of the opinion that their rights have been infringed, may also approach the CC.<sup>105</sup>

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<sup>100</sup> Provisions which grant power are termed 'empowerment or power provisions'. Provisions which limit power are 'rights or limitation clauses'. Motlale Z and Ramaphosa C *Constitutional Law: Analysis and Cases* (2002), 221.

<sup>101</sup> In terms of section 8 of the Constitution, 'the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state'.

<sup>102</sup> Cronje DSP and Heaton J *The South African Law of Persons* 3ed (2007), 2; Jordaan RA and Davel CJ *Law of Persons* (2005), 5. Legal personality is bestowed upon legal subjects. A legal subject is any entity which can have rights, duties and capacities. An example of a legal subject is a natural person who is any human being irrespective of age, mental capacity and intellectual ability.

<sup>103</sup> A juristic person is the other example of a legal subject bestowed with legal personality. Certain associations of natural persons are legal subjects of their own and have their own separate legal existence from that of the natural persons who created it. An example of a juristic person is a company incorporated in terms of the relevant legislation. Cronje DSP and Heaton J *The South African Law of Persons* 3ed (2007), 5; Jordaan RA and Davel CJ *Law of Persons* (2005), 4.

<sup>104</sup> An example of such legislation is found in section 26 of the Constitution which provides that everyone has the right to have access to adequate housing. The State must take reasonable measures, within its available resources to achieve the progressive realisation of this right.

<sup>105</sup> Horizontal application may result from a contractual dispute, defamation, or for instance discrimination. See for example *Hoffmann v South African Airways* 2001 (1) SA (CC).

The forthcoming paragraphs will examine the rights of the Constitution which are pertinent to this research: the right to equality, the right to human dignity and the right to make decisions regarding reproduction. All of these rights are relevant because of the restrictive impact that the application of Chapter 19 may impose on their implementation.

### 3.2.1 Section 9 of the Constitution: The equality clause

“Equality is often seen as the most difficult right to achieve; a right which often promises more than it can deliver, however it gives meaning to specific substantive rights and it can be used as a tool to develop a powerful and progressive jurisprudence”.<sup>106</sup>

One of the rights that will be examined in this chapter will be the right to equality, and the impact that specific provisions of Chapter 19 have on this right.

Although no precise definition of the word equality or the exact composition thereof exists, equality has however been said to encapsulate ‘the social democratic vision embracing both equality of opportunity and outcomes’.<sup>107</sup> Section 9 of the Constitution (hereinafter referred to as the equality clause) commences with the words ‘everyone is equal before the law and has the right to equal protection and benefit of the law’. In this, the equality clause purports to include the full and equal enjoyment of all rights and freedoms. The equality clause stipulates that neither the state nor an individual may directly or indirectly unfairly discriminate against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience,

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<sup>106</sup> Woolman S, Roux T and Bishop S *Constitutional Law of South Africa* 2ed: Vol. II (2008), 35-4.

<sup>107</sup> Albertyn A and Goldblatt B *Constitutional Law of South Africa: Equality* Vol. III (2008), 35-2.



belief, culture, language and birth.<sup>108</sup> A positive duty exists on the state to enact legislation preventing and prohibiting unfair discrimination.<sup>109</sup>

Amongst others, discrimination on the grounds of age, disability and culture are significant to this research, in that it will be contended that by and large the application of Chapter 19 has the effect that these rights are superfluously limited without the justification of a constitutionally acceptable purpose.

### 3.2.1.1 The meaning of equality in South Africa: Fair discrimination

A unique aspect of the South African Constitution is that it can be said that 'fair' discrimination is permitted.<sup>110</sup> The equality clause is primarily aimed at redressing the inequalities of the pre-1994 era in which our social and legal system rested predominantly on discrimination. The infamous terms of 'separate development' and 'apartheid' were characterised by the unequal treatment and overall discrimination against the majority of South Africans in all divisions of their lives, such as in property, education and marriage.<sup>111</sup>

The legislation of pre-1994 regimes has left a legacy of inequality and unequal growth. Those South Africans who suffered under the pre-1994 rule were economically, educationally and socially disadvantaged and they could not compete on an equal level with previously advantaged South Africans. As a result, equality for all could not be realised overnight. Legislation had to be implemented and lengthy procedures were embarked upon so as to achieve equality for all. As a result, South Africa does not approach equality from a hierarchical approach but rather a relational approach: no group is valued

<sup>108</sup> *Satchwell v President of the Republic of South Africa* 2002 (9) BCLR 986 (CC); *Du Toit and Another v Minister for Welfare and Population Development and Others* 2002 (10) BCLR 1006 (CC); *Bhe and Others v Magistrate, Khayelitsha and Others* 2004 (1) BCLR 27 (C); *S v J* 1998 (4) BCLR 424 (SCA); *Bannatyne v Bannatyne and Another* 2003 (2) BCLR 111 (CC).

<sup>109</sup> An example of legislation which the state has enacted in the fulfilment of its duty to prevent and prohibit unfair discrimination is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Chapter 2(a) of this Act states that, amongst others, the 'object of this Act [is] to enact legislation required by section 9 of the Constitution.'

<sup>110</sup> Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 45.

<sup>111</sup> The Group Areas Act 41 of 1950 (repealed in 1991), The Natives Land Act 27 of 1913 (repealed in 1991), The Bantu Education Act 47 of 1953 (repealed in 1979), The Immorality Act 23 of 1957 (repealed in 1985) and Prohibition of Mixed Marriages Act 55 of 1949 (repealed in 1985).

above another; instead it is the substantive arrangements that produce or prevent a group's social prosperity or political self-determination which is calculated.<sup>112</sup>

Rather than relying on the idea that any different treatment is presumably suspect, irrational and thus unfair, South Africa recognises that inequality does not only emerge from irrational legal distinctions but is often more deeply rooted in the social and economic differences between groups and individuals.<sup>113</sup>

'A substantive approach to equality ... promote[s] the value of human dignity and prevent[s] arbitrary treatment: it is not about how we compare but why we compare'.<sup>114</sup>

In light of this, the Constitution and the CC in its interpretation thereof, consider different treatment not from a subjective viewpoint, but through the eyes of an objective person. Thus the inclusion of reasonableness as an objective standard in the determination of whether the differentiation between individuals (or categories of individuals) seeks to fulfil a constitutionally acceptable purpose.

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### 3.2.1.2 Reasonableness

<sup>112</sup> Woolman S, Roux T and Bishop S *Constitutional Law of South Africa* 2ed: Vol. II (2008), 35-4; Albertyn A and Goldblatt B *Constitutional Law of South Africa: Equality* Vol. III (2008), 35-2.

<sup>113</sup> Section 9(2) of the Constitution provides as follows; "... [T]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken". Woolman S, Roux T and Bishop S *Constitutional Law of South Africa* 2ed: Vol. II (2008), 35-6 and 35-7; Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 245. See *Eskom v Hiemstra NO and Others* 1999 (11) BCLR 1320 (LC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 17 (CC).

<sup>114</sup> The Employment Equity Act 55 of 1998 purports to redress the inequalities in both the public and private sector labour markets. The Broad-Based Black Economic Empowerment Act 53 of 2005 aims to promote the economic empowerment of all black people, women, workers, youth, disabled persons and persons within rural communities. Currie I & De Waal J *The New Constitutional and Administrative Law* (2008), 349. See *Botha & Another v Mthiyane & Another* 2002 (4) BCLR 389 (W) for further discussion on substantive and formal equality and *Stoman v Minister of Safety and Security* 2002 (3) SA 468 (T); *Motala v University of Natal* 1995 (3) BCLR 374 (D); *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC); *Public Servants Association of South Africa v Minister of Justice* 1997 (5) BCLR 577 (T) regarding affirmative action.

In the determination of unfair discrimination, reasonableness is the key. The case in point is that of *Harksen v Lane NO 1998 (1) SA 300 (CC)* para 53, where the CC tabulated the stages of an enquiry into a violation of the equality clause as follows:

“(a) Does the challenged law or conduct differentiate between people or categories of people? If so, does the differentiation bear a rational connection to the legitimate government purpose? If it does not, then there is a violation of section 9(1). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? this requires a two-stage analysis:

(i) Firstly, does the differentiation amount to discrimination? if it is on a specified ground then discrimination will have to be established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to discrimination, does it amount to unfair discrimination? if it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If at the end of this stage of enquiry, the differentiation is found not to be unfair, there will be no violation of section 9(3) and 9(4).

(c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

[The limitation analysis involves a “weighing of the purpose and effect of the provision in question and a determination as to the proportionality thereof in relation to the extent of its infringement of equality”].<sup>115</sup>

In summary, differentiation will only be unfair and discriminatory if no reasonable relation exists between the differentiation and the purpose of the

<sup>115</sup> Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 235,236; Woolman S, Roux T and Bishop S *Constitutional Law of South Africa* 2ed: Vol. II (2008), 35-18.

act or provision. Ultimately it must be established that the law cannot achieve its purpose, or that the relation between the differentiation and the legitimate governmental purpose that the provision is designed to further or achieve, is arbitrary.<sup>116</sup> It must be noted that in the cases of *Prinsloo v Van der Linde* and *National Coalition for Gay & Lesbian Equality v Minister of Justice and Zondi v President of the RSA and Others* the CC held that it was unnecessary to perform the reasonableness stage of the test on the basis that the differentiation was clearly unjustifiable and illogical.<sup>117</sup>

Whether the discrimination is in fact unfair rests on the determination of whether such discrimination is based on a section 9(3) listed ground or an analogous ground. 'An analogous ground is one that is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings or to affect them in a seriously comparable manner'.<sup>118</sup>

The rights and freedoms contained in the Bill of Rights are not absolute and circumstances do exist where unreasonable differentiation and unfair

<sup>116</sup> Currie I and De Waal J *Constitutional and Administrative Law* (2008), 351; Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 236; *Master of the High Court v Deedat and Others* 1999 (11) BCLR 1285 (N); *Moseneke and Others v Master of the High Court* 2001 (2) BCLR 103 (CC); *City Council of Pretoria v Walker* 1998 (3) BCLR 257 (CC); *Mwellie v Ministry of Works, Transport and Communications and Another* 1995 (9) BCLR 1118 (C); *Jooste v Score Supermarket Trading (PTY) Ltd* 1998 (9) BCLR 1106 (E); *East London Transitional Local Council v Taxpayers' Action Organisation and Others* 1998 (10) BCLR 1221 (E).

<sup>117</sup> *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) para 22; *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W); *Zondi v President of the RSA and Others* 1999 (11) BCLR 1313 (N).

<sup>118</sup> A case in point would be that of *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC). The case dealt with the constitutionality of Section 25(9) of the Aliens Control Act 96 of 1991 which required applicants for immigration permits to be outside of South Africa when their permits were granted (however this Act exempted spouses, same sex life partners, dependant children and destitute, aged or infirm family members of South African permanent residents and citizens). The CC held that despite the right to family life not being expressly provided for in the constitution, the right to enter into and sustain a permanent intimate marriage relationship formed part of the fundamental right to human dignity. Any legislation which prohibited the right to form a marriage infringed the right to dignity and any legislation which would have the effect of impairing the ability of spouses to honour their obligations under marriage would also limit ones right to human dignity. Living together is a central aspect of marriage. Thus the applicant was discriminated against the basis of his nationality and marital status and the protection of his family was seen to be analogous to marital status. Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 244. *Larbi-Odam v MEC for Education (North West Province)* 1998 (1) SA 745 (CC); *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

discrimination can be justifiable if in accordance with section 36 (hereinafter referred to as the limitations clause).

In terms of the limitations clause, any right may be limited if such limitation is in the form of a law of general application.<sup>119</sup> The limitation must nevertheless be reasonable and justifiable in light of the open and democratic country in which we live: a country whose laws and regulations are based on human dignity, equality and freedom. Consequently, the provision in question must be shown to serve a constitutionally acceptable purpose and sufficient proportionality must exist between the infringement and the benefit such infringement is intended to achieve.<sup>120</sup> When determining if the limitation is reasonable and justifiable, factors such as the composition of the right, the significance of the purpose of the limitation, the composition and degree of the limitation, the relation between the limitation and the purpose; and whether less restrictive means exist to fulfil such purpose are taken into account. The motivation for limiting a right must be exceptionally formidable: the limitation must serve a purpose which the majority of persons would find compellingly imperative. To be precise: proportionality must exist between the restriction and the advantage.<sup>121</sup>

In *S v Bhulwana* 1996 (1) SA 388 (CC), paragraph 18, the CC held that the application of the limitations clause required the following:

'[I]n sum, the Court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification must be'.<sup>122</sup>

<sup>119</sup> A law of general application is any original or delegated legislation which applies impersonally (equal un-arbitrary application) and which is sufficiently clear and precise so that those affected can readily ascertain their subsequent rights and obligations. Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 168. See for example *August v Electoral Commission* 1999 (3) SA 1 (CC); *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC); *S v Mbatha* 1996 (2) SA 464 (CC).

<sup>120</sup> Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 176.

<sup>121</sup> Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010) 164; *Larbi-Odam and Others v Member of the Executive Council for Education, North-West Province and Another* 1997 (12) BCLR 1655 (CC); *Van Rensburg v South African Post Office Ltd* 1998 (10) BCLR 1307.

<sup>122</sup> 1996 (1) SA 388 (CC).

### 3.2.2 Human dignity

The right to equality does not stand in isolation. Very often, when specific conduct or legislation is challenged on the grounds that it is a violation of the right to equality, the right to dignity is also implicated.

'The term dignity itself means 'worthiness' or 'excellence'. It is any quality of a person entitling them to be regarded, respected and protected.'<sup>123</sup>

Section 10 of the Constitution provides everyone with the right to inherent dignity and the right to have such dignity respected and protected. The Judges of the CC have yet to reach consensus regarding the meaning of human dignity. Nevertheless it has been held to entail that that all individuals are to be recognised as being able to make individual choices; that 'at its least...dignity requires us to acknowledge the value and worth of all individuals of our society' and that human dignity is 'the foundation of many of the other rights that are specifically entrenched in ... the Bill of Rights.'<sup>124</sup>

In the ground breaking judgment of *Dawood*, the Court held that 'human dignity is not only a justifiable and enforceable right that must be respected and protected [but] it is also a value that informs the interpretation of possibly all other fundamental rights'.<sup>125</sup> The so-called right to family life which was afforded protection in the case of *Dawood* shows that the protection afforded to family life 'extends at the very least, to the core elements of these

<sup>123</sup> Wood A *Human Dignity, Right and the Realms of Ends* (2007); Barnard - Naude AJ, Cornell D and Du Bois F *Dignity, Freedom and the Apartheid Legal Order: The Critical Jurisprudence of Laurie Ackerman* (2008), 47.

<sup>124</sup> Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 274.

*S v Makwanyane* 1995 (3) SA 391; *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC); *Advance Mining Hydraulics v Botes NO* 2009 (2) BCLR 119 (T); *S v Pienaar* 2000 (7) BCLR 800 (NC); *S v Dodo* 2001 (3) SA 382 (CC); *Christian Education v Minister of Education of the Government of RSA* 1999 (9) BCLR 951 (SE); *S v Williams* 1995 (3) SA 632 (CC); *S v Huma* 1996 (1) SA 232 (W); *National Coalition for Gay & Lesbian Equality v Minister of Justice* 1999 (1) SA 6 (CC).

<sup>125</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35. See further *B v M* 2006 (9) BCLR 1034 (W); *Patel and Another v Minister of Home Affairs and Another* 2000 (2) SA 343 (D); *Booyesen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC); *Robinson and Another v Volks NO and Others* (2004) 6 BCLR 671 (C); *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (3) BCLR 249 (CC); *EN and Others v Government of RSA and Others* 2007 (1) BCLR 84 (D).



institutions, namely the right and duty of spouses to live together as spouses in community of life'.<sup>126</sup>

In the matter of *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (3) BCLR 249 (CC) the CC held that the failure of section 1(1) of the Intestate Succession Act 81 of 1987 to include permanent life partners within its ambit of 'spouse' was inconsistent with the right to equality and dignity. At this point, the Civil Union Act 17 of 2006 was not yet in operation and permanent same-sex life partners were prohibited from marriage.<sup>127</sup> The Intestate Succession Act provided that only 'spouses' were entitled to inherit intestate. The Court held that because same-sex marriage was expressly prohibited by the Marriage Act 25 of 1961, the provision of the Intestate Succession Act was inconsistent with the Constitution, was discriminatory on the basis of sexual orientation (a listed ground) and marriage (analogously) and had the effect that the right to dignity of the complainant was impaired.

In the 2005 case of *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC) the first Respondent had been successful in her application to the High Court for an order of invalidity regarding the definition of 'spouse' in the Maintenance of Surviving Spouses Act 27 of 1990.<sup>128</sup> The first Respondent had been involved in a permanent life partnership with the deceased for sixteen years and a marriage had never been concluded. The parties had shared a home for twelve years and both contributed to each other's wellbeing and were ever present in each other's daily lives. Upon the death of the deceased, first applicant submitted a claim for maintenance in terms of the

<sup>126</sup> Article 8 of the European Convention on Human Rights (ECHR) (previously the Convention for the Protection of Human Rights and Fundamental Freedoms 1950) provides that everyone has the right to respect for his or her private and family life, his or her home and his correspondence. For precedent relating to the right to family life see C – 60/00 *Mary Carpenter v Secretary of the State for the Home Department*; Application number 27138/04 *Ciubotaru v Moldova*; Application number 16318/07 *Moretti and Benedetti v Italy*. International Human Rights Law 'Blog of the international justice law centre' available at [www.http://internationalhumanrightslaw.org/2010/04/72/echr-judgments-april-2011/](http://internationalhumanrightslaw.org/2010/04/72/echr-judgments-april-2011/) (accessed on 6 January 2011); *Mary Carpenter* [2002]: EU Case Law available at [www.http://www.eucaselaw.info/mary-carpen-2002](http://www.eucaselaw.info/mary-carpen-2002) (accessed on 6 January 2011).

<sup>127</sup> 2007 (3) BCLR 249 (CC).

<sup>128</sup> 2005 (5) BCLR 446 (CC). Section 1 of the Maintenance of Surviving Spouses Act 27 of 1990 defines a survivor as the surviving spouse in a marriage dissolved by death.

Maintenance of Surviving Spouses Act 27 of 1990, which was subsequently rejected.

The High Court based its finding on the fact that the CC had on previous occasions recognised different forms of life partnership and that a marriage was only but one form thereof and that the first Respondent, on the grounds of her marital status, was being discriminated against and the respective provision was unconstitutional.<sup>129</sup>

When the matter was directed to the CC for an order confirming the unconstitutionality and the invalidity of the provision, on the grounds of dignity and equality, the first applicant appealed on the basis that it was clear that the deceased had chosen not to enter into a marriage and 'to have the consequences of marriage imposed...would infringe the freedom and dignity of both the deceased and his estate'.<sup>130</sup>

In both of the majority judgments, the CC found that the exclusion of life partners from the interpretation of 'survivor' in the Maintenance of Surviving Spouses Act was not unconstitutional and thus not invalid. The CC held that the distinction between married and unmarried persons was not unfair and did not violate the dignity of the surviving partner. 'To extend the provisions of such Act to the deceased's partner when they were not married and thus not obliged to maintain one another during life was to impose a duty that did not exist'.<sup>131</sup>

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<sup>129</sup> *Satchwell v President of the Republic of South Africa and Another* 2002 (9) BCLR 976 (CC) – permanent same-sex life partnerships and *Daniels v Campbell NO and Others* 2003 (9) BCLR 969 (C) – Muslim marriages.

<sup>130</sup> *Robinson and Another v Volks NO and Others* 2004 (6) BCLR 671 (C) 672 G – H; *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC).

<sup>131</sup> Justice Albie Sachs handed down one of three dissenting judgments. He referred to the principle of restricting maintenance claims to married survivors only as the 'exclusivity principle', and said the critical question must have been whether there was a family relationship of mutual dependency amongst the parties. Sachs stated that the mutual dependency is based not on the provision of 'equal support in material and financial terms', but rather on 'equal care and concern' and whether such relationship revolved around material and financial support or care and concern depended on the nature of the particular relationship itself. *Volks NO v Robinson and Others* 2005 (5) BCLR 446 (CC). Lenaghan P 'The right to be different: A retrospective analysis of the Constitutional Court jurisprudence of Justice Albie Sachs – weaving the voice of difference' (2010) *SAPL*, 180.



In *Gory* the right to dignity played a significant role in the interpretation of the right to inherit intestate. In *Volks*, the outcome was dissimilar: dignity was found not to have been infringed. The author submits that the difference in the outcome of these two matters revolved around the issue of same-sex partnership. Whilst in *Volks* the claimant had not been prohibited from marrying the deceased, in *Gory*, the claimant and the deceased were prohibited from becoming married on the basis of their sexual orientation. Thus in these two matters, dignity played two completely different roles.<sup>132</sup>

Nevertheless, regardless of the fact that it may be very difficult to precisely define what the right to dignity entails, the concept of dignity has proven to be a vital tool in the interpretation and application of all rights. The right to dignity, and the invaluable role it plays in the interpretation of many rights, will form the heart of many of the forthcoming discussions regarding the constitutional implications of Chapter 19.

### 3.2.3 Freedom and security of a person: Reproductive rights

'The major slogan of the women's liberation movement is a demand for control over our own bodies'.<sup>133</sup>

When an individual or a couple choose to make use of a surrogate mother to give them a child that they would not ordinarily be able to have, such individual or couple make a decision regarding reproduction. Section 12(2) of the Constitution provides everyone with the right to bodily and psychological integrity including the right to make decisions concerning reproduction and to security in and the control over the body.<sup>134</sup> No person may be subjected to

<sup>132</sup> For further discussion see Smith BS *The development of South African Matrimonial Law with specific reference to the need for and application of a Domestic Partnership rubric* (unpublished LLD thesis, University of Free State, 2009); Smith B 'Rethinking *Volks v Robinson*: The implications of applying a "contextualised choice model" to prospective South African Domestic Partnership legislation' (2010) 13 *PER*; Smith B 'Marrying Domestic Partnerships and the Constitution: A discussion of *Volks NO v Robinson* 2005 (5) BCLR 446 (CC)' (2005) 20 *SAPR/PL*.

<sup>133</sup> Scott JA *The baby machine: Reproductive technology and the commercialisation of motherhood* (1990), 1.

<sup>134</sup> Section 9 of the Constitution lists pregnancy as a ground of discrimination.

medical and scientific experiments without their informed consent.<sup>135</sup> The inclusion of section 12(2) recognises the power to make decisions concerning reproduction as a crucial aspect of one's control over one's own body.<sup>136</sup> The primary motivation for the inclusion of the express right to make decisions concerning reproduction has been said to be 'symbolic' in that it recognises 'that some of the most devastating and socially entrenched forms of physical and psychological oppression and exploitation relate to reproduction and sexuality'.<sup>137</sup>

The effect of the inclusion of section 12(2) is that recognises the reality that many women do not enjoy security in and control over their bodies – the exceptionally high rate of rape, sexual abuse, forced sexual intercourse, domestic violence and femicide in South Africa is evidence of this. Often the

<sup>135</sup> The principles in respect of informed consent, which were established in case's such as *Stoffberg v Elliot* 1923 CPD 128, *Castell v Greef* 1994 (4) SA 408 (C) and *C v Minister of Correctional Services* 1996 (4) SA 292 (T) have been largely codified in the form of the National Health Act 61 of 2003 which provides that informed consent is 'the process of information – sharing and decision – making based on mutual respect and participation'. Section 6(1) read with 7(3) states that informed consent requires that there is to be the 'consent for the provision of a specified health service given by a person with the legal capacity to do so'. More recently, the composition of informed consent was discussed in the 'reproductive rights' case of *Christian Lawyers Association of South Africa and others v Minister of Health and others* 2005 (1) SA 509 (T). The court held that, in the case of termination of pregnancy, informed consent is when: 'it is clearly shown that the risk was known, that it was realised and that it was voluntarily taken. Knowledge, appreciation and consent are essential elements, but knowledge does not invariably imply appreciation and both together are not necessarily the equivalent to consent. The requirement of knowledge means that the women who consent to the termination of pregnancy must have full knowledge "of the nature and extent of the harm or risk". The requirement of "appreciation" implies more than mere knowledge. The women giving consent to the termination of her pregnancy "must also comprehend and understand the nature and extent of the harm or risk". The last requirement of consent means that the women must "in fact subjectively consent" to the harm or risk associated with the termination of her pregnancy and her consent "must be comprehensive" in that it must "extend to the entire transaction, inclusive of its sequences".' In the case of artificial fertilisation, before a patient undergoes surgery she must be informed of why the procedure is necessary and what such procedure entails. For consent to be legally effective, the consent must be given by someone who possesses the capacity to act, the patient must be given sufficient information regarding the proposed procedure and the consent given must be clear, unequivocal and comprehensive with regards to informed consent. Hassim J A, Heywood M and Berger J *Health and Democracy: A guide to human rights, health law and policy in post-Apartheid South Africa* (2007), 22; Cusine DJ *New Reproductive Techniques: A Legal Perspective* (1990), 114; The Centre for Reproductive Law & Policy (CRLP) Women's Health Project 'Women's reproductive rights in South Africa: A shadow report' (June 1998), 9, available at <http://www.reproductiverights.org/en/our-regions/Africa/south-africa> (accessed on 10 February 2011).

<sup>136</sup> Section 12(2) affords recognition to reproductive autonomy: the right to reproductive self-governance. Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 308.

<sup>137</sup> Bishop M and Woolman S *Constitutional Law of South Africa: Freedom and security of the person* 2ed (2007), 40-81.

circumstances in which women become pregnant are beyond their control.<sup>138</sup> Consequently, section 12(2) expressly recognises that South African women have and still are subjected to repression and degradation and with this, section 12(2) provides the much needed structure within which women can in fact enjoy their fundamental rights.<sup>139</sup>

Although many of the provisions contained in Chapter 19 will be subsequently shown to have an unjustifiably restrictive impact on the exercise of our fundamental rights, Chapter 19 does in some manner give expression to the right to make decisions concerning reproduction. Nonetheless, before we determine the extent of the constitutional implications of Chapter 19, we must first examine Chapter 19 in light of the development of reproductive rights in South Africa.

### 3.3 Development of reproductive rights in South Africa

Prior to 1975, the acknowledgment of the right to reproductive health was so to say non-existent. Termination of pregnancy in South Africa was illegal and reproductive health services were incomprehensive,<sup>140</sup> consisting mainly of maternal and child health services; prominence was placed on contraceptives as a means by which to minimise population growth.<sup>140</sup> The promulgation of the Abortion and Sterilisation Act 2 of 1975 (hereinafter referred to as the

<sup>138</sup> Sullivan M *Constitutional Law of South Africa: Reproductive Rights 2ed* (2007), 37-17.

<sup>139</sup> Section 12(2) 'expressly delineates the ambit of the right to security of the person so as to include protection of physical integrity and extends it to the protection of psychological integrity'. Section 12(2) gives women control over their own fertility and provides a framework within which women will actually be able to enjoy the freedom to chose how and when to have children. Sullivan M *Constitutional Law of South Africa: Reproductive Rights* (2008), 37-18; Currie I and De Waal J *The Bill of Rights Handbook 5ed* (2010), 274.

<sup>140</sup> In 1984, the government established the Population Development Programme (PDP), its goal was to achieve a lower population growth rate and to promote a smaller family norm amongst black or African families. The aim of the PDP was two-fold; the control of the fertility of the African population and the increase of the fertility of whites. In 1994, 65,000.00 contraceptive service points existed in the country, other reproductive health services were far and few between and mostly inaccessible to the majority of South Africans. Cooper D et al 'Ten years of democracy in South Africa: Documenting transformation in reproductive health policy' 2004 *Reproductive Health Matters Journal* 72. The Centre for Reproductive Law & Policy (CRLP) Women's Health Project *Women's reproductive rights in South Africa: A shadow report* (June 1998), 3; Palamuleni M, Kalule-Sabiti I and Makiwane M 'Fertility and childbearing in South Africa' (2007), 114, 129, available at [www.hsrbpress.ac.za](http://www.hsrbpress.ac.za) (accessed on 10 February 2011).

'ASA') brought about the availability of the termination of pregnancies in certain circumstances and was the first legislation to expressly recognise a women's right to choice.<sup>141</sup>

In terms of the ASA, termination could however only be performed when pregnancy would seriously threaten a women's life, her physical or mental health or the mental capability of the unborn child. In circumstances where the pregnancy was an unsolicited result of a rape and the desire for termination would arise, a woman first had to provide evidence of such rape before she could undergo the termination of the pregnancy.<sup>142</sup>

Regarding the actual termination procedure, women had to receive approval from at least three independent medical practitioners.<sup>143</sup> In some situations, a psychiatrist or magistrate's consent was required and all terminations had to be performed in government hospitals.<sup>144</sup> Despite the ASA and the risks inherent in illegal terminations of pregnancy, many women still sought illegal terminations. Consequently, in 1993, the Medical Research Council of South Africa (hereinafter referred to as MRCSA) began monitoring the complications of unsafe and 'illegal' terminations.<sup>145</sup>

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<sup>141</sup> Cooper D and Others 'Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status' 2004 *Reproductive Health Matters Journal*, 72.

<sup>142</sup> Guttmacher S et al 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' 1998 *International Family Planning Perspectives*, 191.

<sup>143</sup> Mhlanga R 'Abortion: Developments and impact in South Africa' (2005) available at <http://bmb.oxfordjournals.org/content/67/1/115.full> (accessed on 10 February 2011). Many women who stayed in rural areas were unable to have legalised terminations. Hospitals were understaffed and the 1975 Act required at least three medical practitioners to agree to the termination.

<sup>144</sup> Guttmacher S et al 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' 1998 *International Family Planning Perspectives* 193.

<sup>145</sup> The ANC established a health commission who were tasked with formulating a health plan aimed at transforming the health sector, especially in respect to women's and gender rights. Prior to 1994, approximately 200,000 illegal abortions occurred annually in South Africa. According to its estimations, the MRCSA stated that approximately 45 000 women were admitted to hospitals for miscarriage or complications resulting out of illegal termination. Poorer women with little to no access to health care were unlikely to have been included in this survey. Guttmacher S et al 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' 1998 *International Family Planning Perspectives* 191; Cooper D and Others 'Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status' 2004 *Reproductive Health Matters Journal*, 72.

When the ANC/NP coalition government came into power in 1994 they were faced with a 'deeply divided, fragmented and inequitable health system' and hence bona fide access to legal termination of pregnancy was considered as a vital component of the national health program.<sup>146</sup> Many opposed the call for the replacement of the ASA. Opponents ranged from religious leaders, to parliamentarians and civil society groups such as Doctors for Life. However others supported the pro-choice argument as an instrument in the development of greater gender equality and the furthering of women's rights, specifically that of the right to make decisions regarding reproduction.<sup>147</sup> Concurrently, international conventions were making specific associations between reproductive health, women's rights and socio-economic development, and the need for founding an expanded definition of reproductive health.<sup>148</sup>

In 1994, the newly established government undertook a rapid evaluation of reproductive health services in South Africa and national workshops were held to develop recommendations on research priorities and policy formulation.<sup>149</sup> The year 1995, under the auspices of the Ministry of Health, brought about the formation of the directorate of Mother, Child and Women's Health with the objective of augmenting access to appropriate health care services and with that came about the establishment of an enhanced national reproductive and sexual health service.<sup>150</sup>

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<sup>146</sup> Guttmacher S et al 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' 1998 *International Family Planning Perspectives* 197; Cooper D and Others 'Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status' 2004 *Reproductive Health Matters Journal*, 201; The Centre for Reproductive Law & Policy (CRLP) Women's Health Project 'Women's reproductive rights in South Africa: A shadow report' (June 1998), 2.

<sup>147</sup> Guttmacher S et al 'Abortion reform in South Africa: A case study of the 1996 Choice on Termination of Pregnancy Act' 1998 *International Family Planning Perspectives*, 8.

<sup>148</sup> Cooper D and Others 'Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status' 2004 *Reproductive Health Matters Journal*, 194.

<sup>149</sup> Cooper D and Others 'Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status' 2004 *Reproductive Health Matters Journal*, 201.

<sup>150</sup> Cooper D and Others 'Ten years of democracy in South Africa: Documenting transformation in reproductive health policy and status' 2004 *Reproductive Health Matters Journal*, 201.

Although the CC has yet to have been afforded the opportunity to thoroughly investigate and interpret reproductive rights in a South African context, the subject has been broached in both the 1998 and the 2004 *Christian Lawyers Association v Minister of Health* cases.<sup>151</sup> Both of these judgments, although not CC decisions, dealt with the application of the Choice on Termination of Pregnancy Act 92 of 1996 (hereinafter referred to as 'the CTOP'). Keeping in mind that the objective of this research is to illustrate the restrictive effect which Chapter 19 has on the exercise of, amongst others, the right to make decisions regarding reproduction, it now becomes necessary to determine whether the application of the CTOP has had a similar obstructing effect or if the CTOP accurately gives expression to the right to make decisions regarding reproduction.

### 3.3.1 The CTOP of 1996

Arguably one of the most significant steps in the recognition and further development of reproductive health rights in South Africa, the CTOP provides any woman of any age with the right to terminate her pregnancy on request during the first 12 weeks.<sup>152</sup> The promulgation of the CTOP is a result of the ANC/NP government placing extreme importance on the realisation of access to equitable health services. The 1994 government realised that health, as a basic necessity of life, needed not only to be wholly accessible but certain aspects thereof also needed to be highlighted. For many advocates and stakeholders the CTOP embodies the success of a reproductive rights based framework.<sup>153</sup> Access to safer termination of pregnancy is more readily

<sup>151</sup> *Christian Lawyers Association v Minister of Health* 1998 (4) SA 113 (T) and *Christian Lawyers Association v National Minister of Health* 2004 (10) BCLR 1086 (T). Other jurisdictions such as the United States of America and Canada have recognised the right to make reproductive choices as flowing from the right to privacy and security of a person. See *Morgentaler, Smoling and Scott v The Queen* [1988] 1 SCR 30; *Eisenstadt v Baird* 405 US 483 (1972) and *Roe v Wade* 410 US 113.

<sup>152</sup> Mhlanga R 'Abortion: Developments and impact in South Africa' (2005) available at <http://bmb.oxfordjournals.org/content/67/1/115.full> (accessed on 10 February 2011). In terms of CTOP, the gestational period is broken up into three parts: 0-12 weeks, 12-20 weeks and 20 weeks up. From 20 weeks and up, all pregnancies are deemed viable.

<sup>153</sup> Maharaj P and Rogan M *Reproductive health and emergency contraception in South Africa: policy context and emerging challenges* (July 2007), 12.



available and deaths of mothers as a result of illegal terminations have been reduced.<sup>154</sup>

The legalising of termination of a pregnancy did not come about without controversy and dispute. The constitutionality of the Act was challenged in the 1998 case of *Christian Lawyers Association of South Africa v Minister of Health*<sup>155</sup> where the Act was challenged on the basis that it permitted the termination of human life. This case was the first to interpret reproductive rights in South Africa. The Court rejected the application judging that section 11 of the Constitution (the right to life), and specifically the meaning of the word 'everyone', did not include a foetus to be a bearer of the right to life.<sup>156</sup> The decision by the Court was in line with section 12 of the Constitution which enshrines the right of all persons to make decisions concerning reproduction.<sup>157</sup>

<sup>154</sup> A year into operation, there were only 9 deaths resulting from septic terminations as opposed to the 400 tabled in the 1994 MRCSA report. Mhlanga R 'Abortion: Developments and impact in South Africa' (2005) available at <http://bmb.oxfordjournals.org/content/67/1/115.full> (accessed on 10 February 2011).

<sup>155</sup> 1998 (4) SA 1113 (T).

<sup>156</sup> In the case of *S v Mshumpa and Another* 2008 (1) SACR 126 (E) the court had to determine whether the killing of an unborn child in the mothers womb constituted murder i.e. the intentional killing of another person. The court noted that a person was always understood to have been born alive and thus an unborn child did not meet the requirements of the definition. Practical difficulties arose around formulating a reasonably precise definition of murder to extend to that of the killing of the unborn child. The court did not extend the definition of murder to the killing of an unborn child. However, in its interpretation of the right to make decisions concerning reproduction and the right to security and control over the body, the court did find the accused to be guilty of attempted murder. From the above, we can see that although a foetus is not deemed to be the bearer of rights and duties, the mother who is carrying such unborn child has the right to have her body protected and any assault upon her which may lead to the injury or death of her unborn child can be interpreted to be assault or attempted murder. Section 239(1) of the Criminal Procedure Act 51 of 1977 deems a child to have been born alive if the child has breathed. Boezaart T *Child Law in South Africa* (2009), 591.

<sup>157</sup> The constitutionality of the Act came under consideration again in the 2004 case of *Christian Lawyers Association v National Minister of Health* 2004 (10) BCLR 1086 (T). Section 5 of the CTOP was challenged on the grounds that it infringed section 28(1)(b) (the right to family or parental care, or to the appropriate alternative care when removed from the family environment) and section 28(1)(d) (the right to be protected from maltreatment, neglect, abuse or degradation) of the Constitution in that it permitted a child to make a decision about termination of pregnancy without the assistance or guidance of her parents/guardian. The Court noted that the above argument did not consider the requirement that before termination could be carried out, the woman had to provide her informed consent. Despite the fact that the issue regarding the general permissibility of termination was not constitutionally challenged, the court did note that the Constitution recognised and protected the right to termination of pregnancy through section 12(2)(a) and (b). Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 308.

Conception and pregnancy more often than not involve two parties, a female and male; however the decision to terminate such pregnancy lies with the woman because it is her informed consent which is required.<sup>158</sup> Despite the CTOP recognising that both men and women have the right to be informed of and have access to safe, effective, affordable and acceptable methods of fertility regulation of their choice, it is the woman in terms of the CTOP, who may request termination in the first 12 weeks of gestation. It is, after all, women's reproductive capacity which differentiates them from men.<sup>159</sup> As this is the case, the CTOP indirectly fulfils the purpose of the equality clause: a woman cannot be discriminated against on the grounds of her pregnancy. The CTOP also gives expression to section 12(2) of the Constitution: the pregnant woman has the right to make a decision regarding reproduction in that she has the right to elect to terminate. From the outlook of the realisation of reproductive rights of South African women, CTOP represents one of the greatest successes.

Despite the fact that the initial implementation of the CTOP did not escape constitutional challenge, the last fifteen years of its application has been largely successful in achieving what it set out to do: to reduce the number of illegal and fatal terminations of pregnancy and to provide a framework for all woman to exercise their freedom of choice regarding reproduction.<sup>160</sup> It is with this that I respectfully submit that the CTOP does accurately give expression to, amongst other rights, the right to make decisions regarding reproduction

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<sup>158</sup> Early United Kingdom and United States case law illustrated that discriminatory treatment on the grounds of pregnancy was not held to be unlawful and thus unfair because 'there were no pregnant male comparators'. Fredman S *Women and the Law* (2002), 15; The Centre for Reproductive Law & Policy (CRLP) Women's Health Project *Women's reproductive rights in South Africa: A shadow report* (June 1998), 8.

<sup>159</sup> Dada MA and McQuoid-Mason *Introduction to Medico-Legal Aspects* (2001) 184; The Centre for Reproductive Law & Policy (CRLP) Women's Health Project *Women's reproductive rights in South Africa: A shadow report* (June 1998), 4, available at <http://www.reproductiverights.org/en/our-regions/Africa/south-africa> (accessed on 10 February 2011).

<sup>160</sup> Despite CTOP's overall success in fulfilling its initial objectives, the 'demand for abortion services has exceeded supply, with operational designated facilities decreasing from 60-43%'. Centre for the Study of Violence and Reconciliation, People Opposing Women Abuse and Western Cape Network on Violence Against Women *South African Shadow Report on the Implementation of the Convention of the Elimination of all Forms of Discrimination Against Women: Submitted to the CEDAW Committee's 48<sup>th</sup> Session, 17 January-4 February 2011* (February 2011), 46.



and that it does not impose the same restrictive effect that Chapter 19 inflicts on the exercise of our constitutionally guaranteed rights to equality, dignity and the right to make decisions regarding reproduction. This submission will be substantiated in the subsequent paragraphs.

#### 3.4 The constitutional implications of the application of Chapter 19 on the rights of the parties to the surrogacy agreement

It has been illustrated above that prior to the enactment of the Constitution, reproductive health and the recognition of reproductive rights were in point of fact unknown to South Africans. The ASA may have attempted to give voice to the desire of many to terminate pregnancies, nevertheless the circumstances under which termination could occur were so limited that it cannot be said that the right to choose was truly pronounced.

In 1996 the Constitution came into operation and for the first time all were afforded the opportunity to have access to reproductive health and to make decisions concerning reproduction.<sup>161</sup> The duty on the State to implement legislation to give effect to our rights is visibly present in the form of the CTOP: all women of all ages could choose to terminate their unwanted pregnancies, whether or not this was because of medical or personal reasons.

With the advent of the Children's Act almost a decade later, came Chapter 19 and the legalisation of surrogate motherhood agreements in South Africa. Although Chapter 19 does not expressly give recognition to reproductive rights, surrogate motherhood is in many material aspects a reproductive rights issue. Both the AHPC recommendations and Chapter 19 of the Act have provided a positive bearing on the further recognition and development of reproductive rights in South Africa is arguable. It can be proffered that the legal recognition of surrogacy agreements and the subsequent permitting of South Africans to enter into surrogacy agreements is a step forward in the recognition of one's right to make choices concerning reproduction.

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<sup>161</sup> See paragraph 3.9 below for the discussion regarding the right to access to reproductive health care services (section 27(1)(a) of the Constitution).

Nevertheless, and it is rather unfortunate in a country which is so profoundly opposed to discrimination, many of the provisions in Chapter 19 do not equitably and fully realise the right to reproduction. It is with this that the author will now commence to show that many of these impugned provisions are in direct conflict with other constitutionally afforded rights.

### 3.5 The constitutional implications of the application of Chapter 19 on the rights of potential commissioning parents

'The capacity to bear children is in many cases the most creative of all human potentialities. It is also a social necessity. Yet, far from being valued, women's unique reproductive function has generally been used as a pretext for stigma and exclusion from public life. The reasons for this lie deep in the history of woman's subordination to men. As we have seen, throughout history, women have been portrayed as naturally and all pervasively reproductive creatures; a convenient justification for imprisoning women in domestic life. This essentially male perspective on the role of child-birth has been a major factor contributing to the perpetuation of women's subordination'.<sup>162</sup>

Section 294 of the Act is headed the 'genetic origin of the child' and provides that at least one of the commissioning parent's gametes must be used in the process of assisted reproduction. The effect of section 294 is that at least one of the commissioning parents to the agreement must be able to provide a gamete for purposes of artificial fertilisation. In addition to section 294, section 295(a) of the Act stipulates that surrogacy is only available to commissioning parent(s) who are permanently and irreversibly unable to give birth to a child. Thus, with regards to the above-mentioned sections, surrogacy is only available to a couple where one partner is able to provide a gamete for purposes of conception (i.e. fertile) and the other partner is permanently and irreversibly unable to give birth to a child (i.e. infertile) or a couple where the female partner is able to provide a gamete for purposes of conception but who is unable to carry a child to term.<sup>163</sup>

<sup>162</sup> O'Brien M *The Politics of Reproduction* (1981), 20.

<sup>163</sup> A fertile woman may be able to provide a gamete for purposes of conception, but may be unable to gestate a child for nine months due to medical reasons. The inability to gestate for nine months can be caused by a number of medical reasons, such as a low hCg level (human chorionic gonadotrophic level) or a thin uterus or endometrium lining. Both low hCg levels and a thin uterus lining results in the inability of the zygote to attach itself to the uterus lining. If the

For many woman, infertility or 'involuntary childlessness' not only constitutes a physical defect but can also lead to placing a burden on a woman's personal relationships and a burden on her role in a society which often considers motherhood to be a vital part of femininity.<sup>164</sup> In a world which predicates a woman's very humanness upon the products of her womb, a woman who chooses not to bear children runs the risk of being seen as 'abnormal'.<sup>165</sup> For many infertile women the infertility itself moulds their identity: for some the inability to reproduce may lead them to perceive themselves as in fact not being a real woman.<sup>166</sup>

One of the many reproductive issues facing woman today is the issue of infertility.<sup>167</sup> In South Africa it is a familiar problem which often goes unacknowledged. Currently South Africa has one of the lowest fertility levels in Africa.<sup>168</sup> Many traditional communities place paramount importance on families and resultantly women face a great deal of pressure to reproduce. 'Women who cannot have children often experience social isolation, stigma, psychological and even physical abuse, as it is often automatically assumed that the problem lies with them'.<sup>169</sup> In summary, the inability to give birth to a child is a serious problem in South Africa and for many, infertility is not only

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zygote is unable to attach itself to the lining, the foetus will not develop and the woman will miscarry, thus she is unable to give birth to a child. Elefthenial E 'Causes of uterus rejection' (17 August 2007) available at [www.groundreports.com](http://www.groundreports.com) (accessed on 12 May 2011).

<sup>164</sup> Koch L *Issues in Reproduction: The fairytale as a model for women's experience of in vitro fertilisation* (1994), 276.

<sup>165</sup> Scott JA *The baby machine: reproductive technology and the commercialisation of motherhood* (1990), 196.

<sup>166</sup> Scott JA *The baby machine: reproductive technology and the commercialisation of motherhood* (1990), 196.

<sup>167</sup> A couple is considered infertile when they have yet to conceive a child after 12 months of regular unprotected sexual intercourse; or if the woman is above 35 years of age, after 6 months of regular unprotected intercourse. Cuisine CJ *New reproductive Techniques: a legal perspective* (1990), 5-8; Bequaert Holmes H *Issues in reproductive technology* (1994), 417.

<sup>168</sup> As of 1 March 2011, the fertility rate in South Africa was 2.3. In context, this rate is calculated on the amount of children to be born of woman if all women live to the end of their child bearing years (RSA approximately 43 years). South Africa ranks 101 out of 224 countries regarding fertility. The three most important proximate determinants of the inhabitation of fertility are marriage, contraception and lactational infecundity. 'Fertility stats worldwide' (2011) available at [www.indexmundi.com](http://www.indexmundi.com) (accessed on 28 March 2011); Palamuleni M, Kalule-Sabiti I & Makiwane M 'Fertility and childbearing in South Africa' (2007) available at [www.hsrcpress.ac.za](http://www.hsrcpress.ac.za) (accessed on 10 February 2011).

<sup>169</sup> Ombellet W 'Infertility and the provision of infertility medical services in developing countries' (2008) available at [www.humupd.oxfordjournals.org](http://www.humupd.oxfordjournals.org) (accessed on 28 March 2011).

seen as a physical 'disability', but a psychological one with far reaching effects.

Notwithstanding the fact that the legislature has acknowledged that many people bear the burden of this disability and thus has enacted of legislation which permits surrogacy as a form of assisted reproduction, section 294 and the requirement that at least one of the commissioning parent's must provide a gamete for artificial fertilisation purposes was still incorporated.

In the 1999 Report, the SALC and AHPC offered two explanations for the recommendation which was subsequently codified in the form of section 294. Firstly, it was noted that exclusively donor surrogacy agreements would give rise to arrangements akin to adoption, and that adoption was already regulated in our law, and secondly, with at least one of the commissioning parents providing a gamete, this would ensure that a genetic link was established between commissioning parent and child.

Whether it is on the basis of fertility or infertility, section 294, read with section 295(a) (commissioning parent(s) must be permanently and irreversibly unable to give birth) has the effect that four categories of persons are excluded from valid surrogacy agreements:

- i a single infertile commissioning parent is unable to provide a gamete for fertilisation purposes and thus he or she is excluded;
- ii a couple where both partners are infertile are also excluded because neither party will be able to provide a gamete for fertilisation purposes,
- iii a single fertile person, because he or she does not meet the requirement that he or she is permanently and irreversibly unable to give birth to a child, and
- iv a couple where both partners are fertile are excluded because neither of them meets the requirement of being commissioning parents who are unable to permanently and irreversibly give birth to a child.

In summary, the application of section 294 of the Act has the effect that categories i and ii above are excluded from entering valid surrogacy agreements on the basis of their infertility, and the application of section 295(a) has the effect that categories iii and iv are excluded from entering into a valid surrogacy agreement on the basis of their fertility. Such exclusion amounts to differentiation on the ability/inability to provide gametes for the purpose of conception and/or on their ability/inability to give birth to a child. Hence it is necessary to determine if the application of these two sections, could amount to an unwarranted limitation on the rights of equality, dignity and to make decisions regarding reproduction of potential commissioning parents.

However, before the implication of the application of Chapter 19 on the rights of the potential parties to a surrogacy agreement is further examined, it is necessary to determine as to whether the right to make decisions regarding reproduction can be said to include the right to have a child. For the reason that if it can be established that the right to make decisions regarding reproduction could be interpreted to establish the right to have a child, it would be difficult to submit that the limitations that the application of Chapter 19 has on such right could be warranted. Ultimately, if there does indeed exist a right to have a child, it would be problematic to justify that the restrictions which arise out of the application of Chapter 19 of the Act on the rights of potential parties (especially the rights of potential commissioning parents) accomplishes a constitutionally suitable objective.

### 3.5.1 The right to family life

In paragraph 3.2.2 above, the groundbreaking judgment of *Dawood* and the protection the CC afforded to institutions such as marriage and other forms of family life was discussed. Initially, the author intended to argue that such protection, although not expressly provided for in the Constitution, could also be extended to the right to form and found a family by means of artificial fertilisation and surrogate motherhood agreements, and thus failure to permit certain categories of persons from entering a surrogacy agreement on the basis of their ability to conceive and give birth to a child was discriminatory. In

particular the author intended to argue that *Dawood*, read with section 12(2) of the Constitution, could perhaps be interpreted to include that there exists an implied right to a child.

Although the CC stated that the protection afforded to family life 'extends at the very least, to the core elements of marriage-like institutions, namely the right and duty of spouses to live together as spouses in community of life', the author cannot submit that the decision in *Dawood* can be interpreted to infer that the right to dignity, and the protection afforded to 'spouses in community of life', purports to include the right to family life as a whole.

Despite the inclusion of the right to family life in international instruments such as the UNCRC and the ECHR, 'the Constitution deliberately did not include a right to family life'.<sup>170</sup> Although the courts have recognised that there do indeed exist different forms of families (i.e. the narrow, more archaic definition which restricts the concept of family to spouses in a valid civil marriage and their children has been eradicated), it has been submitted that if the right to family life had been included in the Constitution, such right 'may have given rise to a dominance of conservative, parent-centred jurisprudence'.<sup>171</sup>

Hence, despite the fact that the court in *Dawood* extended the *protection* of the Constitution to the institutions of marriage *and* family life, the word *protection* does not mean that we have a constitutional right to form and found a family. It merely means that we must respect the family and the relationships which arise out of its establishment.<sup>172</sup>

In addition to this, although section 12(2) provides that we have the right to make decisions regarding reproduction, section 12(2) does not provide that

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<sup>170</sup> *Du Toit v Minister of Welfare J v Director-General of Home Affairs B v M* 2006 (9) BCLR 1034 (W); *Patel and Another v Minister of Home Affairs and Another* 2000 (2) SA 343 (D); *Booyesen and Others v Minister of Home Affairs and Another* 2001 (4) SA 485 (CC). Boezaart T *Child Law in South Africa* (2009), 278; Cronje DSP and Heaton J *The South African Law of Persons* (2003), 3.

<sup>171</sup> Boezaart T *Child Law in South Africa* (2009), 278.

<sup>172</sup> *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) para 35.

we have the right to a child. Section 12(2) can be submitted to mean that we may choose whether to procreate and to terminate and we may choose in which manner we want to procreate, but section 12(2) cannot be interpreted to include that we have the right to a child.

In conclusion, the court in *Dawood* merely interpreted the right to dignity to extent to the *protection* of institutions such as marriage and family like situations, the court did not interpret the right to human dignity to mean that we have a right to a family. If we do not have the right to a family, it cannot be submitted that we have a right to a child. Keeping this in mind, the author will now determine whether the application of Chapter 19 of the Act imposes unwarranted limitations on the rights of potential commissioning parents.

### 3.5.2 The impact of section 294 and section 295 of Chapter 19 on the rights of potential commissioning parents

In paragraph 3.5 above the author submitted that the effect of the operation of section 294 and section 295 of the Act is that four categories of persons are excluded from entering into a valid surrogacy agreement on the basis of their ability/inability to provide gametes for the purpose of conception as well as their ability/inability to give birth.

Whether such exclusion on the basis of the ability to provide gametes for purposes of conception and on the ability to give birth is in fact warranted will be determined with reference to the *Harksen* test and the limitations clause.

Applying constitutional theory, it is obvious from the above that sections 294 and sections 295(a) do differentiate between categories of people on the basis of their ability/inability to provide gametes for purposes of conception and on the basis of their ability/inability to give birth to children. The SALC and AHPC submitted that the purpose of section 294 was, firstly to avoid a situation similar to adoption when our laws already provided for this. Secondly, the SALC and AHPC were of the opinion that when at least one of the commissioning parents' gametes was used in the process of artificial



fertilisation, there would exist a genetic link between commissioning parent and child and this would ultimately assist in protecting all parties' interests.

In support of section 295(a), the limitation on the rights of potential commissioning parents who were able to give birth to a child was justified on the basis that 'surrogacy should be seen as a last option and not merely a way for women to avoid the rigours of pregnancy i.e. for the sake of convenience'.<sup>173</sup>

3.5.2.1 Section 294: Exclusion on the basis of single persons or both partners in a couple being unable to provide a gamete for purposes of conception - exclusion on the basis of infertility

It has been established above that section 294 does differentiate on the basis of the ability to provide gametes for the purpose of conception, but whether such differentiation bears a rational connection to a legitimate governmental purpose needs to be determined. It is the author's submission that if surrogate motherhood agreements create a situation similar to that of adoption, this alone does not warrant the exclusion of persons who are unable to conceive and to give birth from valid surrogacy agreements. Hence, in order to reach an apposite conclusion regarding whether or not the limitation found in the application of section 294 on the rights of individuals who are unable to contribute their own gametes to the process of artificial fertilisation is fair and reasonable and ultimately proportionate to the purpose, it becomes necessary to simultaneously refer to the second submission which was made in favour of the inclusion of section 294.

The second argument which was submitted by the SALC and AHPC in support of section 294 was that when at least one of the commissioning parent's gametes was used in the process of artificial fertilisation, there would exist a genetic link between commissioning parent and child and this would ultimately assist in protecting all parties' interests. Despite the fact that this

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<sup>173</sup> Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009).



rational is supposed to reflect the interests of 'all the parties', the impact that section 294 has on the best interests of the child will only be examined in paragraph 3.8.2 below. Thus any reference made at this juncture to 'all the parties' will refer only to the interests of the commissioning parents and the surrogate mother.

In relation to the *Harksen* test, the question that arises is whether differentiation on the basis of being unable to contribute a gamete and ensuring that a genetic relation is created between the commissioning parent and child, thus not creating a situation similar to adoption, bears a rational connection to a legitimate governmental purpose (the protection of all parties concerned)?<sup>174</sup>

The author submits that the protection of all the parties' interests does bear a rational connection to the limitation of the rights of potential commissioning parents. Nonetheless, despite the fact that one of the initial purposes of Chapter 19 of the Act was to provide legal protection to all parties to a surrogacy agreement, and that it is vital that the provisions of Chapter 19 give effect to such objective, it remains to be seen whether despite the rationality for the inclusion of section 294, whether the impact of section 294 on the rights of potential commissioning parents is in fact still discriminatory. Ultimately it must be determined whether the restriction created by section 294 is proportionate to the limitation i.e. whether the exclusion of persons on

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<sup>174</sup> This submission will be further examined in chapter 4, where the influence of genetic relations on the enforceability of the contract is discussed. In terms of section 298 of the Act, where the surrogate mother is also the genetic mother of the child to be born of the agreement, she has up until 60 days after the date of the birth of the child to determine whether or not she wants to keep the child as her own or relinquish all parental rights and responsibilities towards such child to the commissioning parents. Section 297(e) however provides that no surrogate motherhood agreement may be terminated after artificial fertilisation has taken effect. Although section 297(e) is not expressly made subject to section 298, it can be submitted that in the case of full surrogacy agreements (where no genetic link exists between surrogate and child) the agreement is wholly valid and enforceable once artificial fertilisation has taken effect, whereas in the case of partial surrogacy agreements (where a genetic link does exist between surrogate and child), the enforceability of the agreement post artificial fertilisation is subject to the rights of the partial surrogate to terminate in terms of section 298. As it will be presented in chapter 4, section 298 has the effect that partial surrogates will always possess the stronger contractual position than the commissioning parents, and the commissioning parents, in the case of a partial surrogacy contract, will also bear the additional concern regarding whether or not the surrogate will exercise her right to terminate.

the basis of their inability to conceive (single infertile persons and couples where both partners are infertile) achieves the protection of all the parties' interests.

Even though it cannot be said that such differentiation is founded on a section 9 listed ground, it is important to bear in mind Carnelley's submission that differentiation on the basis of the inability to contribute a gamete for purposes of establishing a genetic relation between the commissioning parent and the unborn child, and the ability to give birth, could be regarded as discrimination on the grounds of disability.<sup>175</sup> If this is indeed the case and it can be said that the inability to provide gametes for the purpose of conception and the ability to give birth amounts to a disability, then such differentiation is presumed to equate to unfair discrimination for the reasons set out in paragraph 3.5 above as well as in the discussion below.

In *Harksen v Lane* the CC provided the following explanation for what constitutes a section 9(3) specified ground:

'What the specified grounds have in common is that they have been used (or misused) in the past (both in South Africa and elsewhere) to categorise, marginalise and often oppress persons who have had, or who have been associated with, these attributes and characteristics. These grounds have the potential, when manipulated, to demean persons in their inherent humanity and dignity.'<sup>176</sup>

In addition to this, the CC held that 'in some cases these grounds relate to immutable biological attributes or characteristics'.<sup>177</sup>

In light of the above, it could be argued, as Carnelley submits, that the inability to provide gametes for the purposes of conception could equate to a disability on the basis that it is an immutable biological attribute or characteristic. If we are to accept that the inability to provide gametes for the purpose of conception is a disability, and that such inability has the potential to demean

<sup>175</sup> Carnelley M and Soni S (2008) 22 *Speculum Juris*, 42.

<sup>176</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 49.

<sup>177</sup> *Harksen v Lane NO* 1998 (1) SA 300 (CC) para 49.

persons in their inherent humanity and dignity, then in accordance with the *Harksen* test, differentiation on such ground is presumed to be unfair. Nevertheless, even if such differentiation on the basis of the inability to conceive cannot be deemed to amount to a disability, exclusion on this basis does have the potential to impair the fundamental dignity of these persons as human beings as was illustrated above where the psychological impact of not being able to bear a child was discussed.

With regard to section 294, the impact that the implementation of this provision has on the rights of potential commissioning parents is discriminatory. The effect of such discrimination is that people who are unable to contribute their own gametes to the process of artificial fertilisation are disqualified from exercising their right to make decisions regarding reproduction, and in that, they cannot choose to make use of surrogacy as a form of assisted reproduction. Such discrimination is resultantly unfair.

In terms of the limitations clause, any right may be limited if such limitation is in the form of a law of general application and section 294 is a law of general application. Whether section 294 serves a constitutionally acceptable purpose and sufficient proportionality exists between the limitation and the 'benefit' section 294 intends to achieve will have to be determined in light of factors such as the composition of the impacted rights, the significance of the purpose of the section 294, the composition and degree of the limitation in section 294, the relation between the limitation and the purpose; and whether less restrictive means exist to fulfil such purpose. In the end it must be shown that section 294 serves a purpose which the majority of persons would find analogously compellingly. In totality, does proportionality exist between the restriction created by section 294 and the advantage it supposedly aims to achieve?

The right to equality and dignity form the foundation for our Constitutional supremacy. The right to make decisions regarding reproduction recognises that many women do not enjoy security in and control over their bodies as a result of many years of patriarchal supremacy. Section 294 was included so

that children born of a surrogacy agreement would have a genetic tie with the commissioning parent, and it was submitted that if no genetic tie existed, this would amount to a situation comparable to adoption.<sup>178</sup> In the opinion of the SALC and the AHPC this would be in the best interests of all parties concerned, because if a genetic tie existed between commissioning parents and the child to be born of the agreement the willingness of the surrogate to relinquish the child upon birth would supposedly be more likely, and thus, the protection of the interests of all the parties to the agreement would be enhanced.

If the only argument provided in support of section 294, was that when there is no genetic link then surrogacy gives rise to a situation similar to adoption, then it could possibly be submitted that the limitation imposed on persons who are unable to provide a gamete for purposes of conception could be justifiable, for the reason that if adoption is available in law to persons who are unable to provide gametes for conception, then such persons should make use of adoption. However, it could also be argued that when one has the right to make decisions regarding reproduction and surrogate motherhood is available as a form of assisted reproduction, why must persons who are unable to provide gametes for purposes of conception make use of adoption when they can find a surrogate willing to give birth to their child?

Taking the above into consideration, and the submission by the SALC and the AHPC that when there is a genetic tie between the commissioning parent and the child born of the agreement that it will be in the interests of all the parties concerned because the surrogate mother would be more likely to hand over the child to the commission parents upon birth, the author submits that her initial submission which was made in chapter two (that it is debatable if section 294 imposes a warranted or unwarranted limitation on the rights of potential commissioning parents) was incorrect.

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<sup>178</sup> See paragraph 3.8.2 below for further discussion.

Without conclusive evidence that because the child born of the agreement shares a genetic tie to his/her commissioning parent will make it less likely that the surrogate will fail to refuse to relinquish the child born of the agreement upon birth, the author cannot submit that the limitation which is imposed on infertile persons as a result of the operation of section 294 amounts to a reasonable limitation on their rights. In addition to this, and this will be further argued in paragraph 3.8.2 below in terms of the effect of section 294 on the best interests of the child, a child's best interests does not require that he/she be genetically related to his/her parent. There are many children who are not genetically related to their children, i.e. adopted children and children in foster care, and it cannot be submitted that because they are raised by non-genetic parents that it is not in their best interests.

I submit that the limitation which arises out of the application of section 294 on would-be infertile commissioning parents is unjustifiable and does not serve a constitutionally acceptable purpose. The Act expressly discriminates against infertile persons and such discrimination is unfair. As a result of the operation of section 294 of the Act, infertile persons are not permitted to exercise their right to make decisions regarding reproduction and the dignity of these persons is further impaired because they are not permitted to resort to surrogacy as a form of assisted reproduction. The author agrees that the protection of all the parties to the agreement interests must be considered, but without conclusive evidence to show that when the child born of the agreement is genetically related to the commissioning parent that the surrogate mother will be less likely to refuse to hand over the child upon birth, the author cannot submit that the inclusion of section 294, and the restrictive effect that it imposes on infertile persons is warranted and is proportionate to the benefit which aims to achieve.

#### 3.5.2.2 Section 295(a): Exclusion on the basis of not being permanently and irreversibly unable to give birth

After having determined that the limitations imposed on the rights of would-be commissioning resulting from the application of section 294 of the Act are

unreasonable and unjustifiable, it is now necessary to determine the constitutionality of the rationale for the differential treatment arising out of the operation of section 295.

In chapter two, the author submitted that the differentiation which arises as a result of the application of section 295(a) could be justifiable and reasonable. It was stated that the limitation imposed on commissioning parents in section 295(a) has been 'justified insofar as surrogacy should be seen as a last option [available for persons who are permanently and irreversibly unable to give birth] and not merely a way for women to avoid the rigours of pregnancy i.e. for the sake of convenience'.<sup>179</sup>

Section 295(a) of the Act provides that only those persons who are permanently and irreversibly unable to give birth to a child are permitted to enter into a valid surrogacy agreement. Consequently, through the application of section 295(a) of the Act, single fertile persons and couples, where both are fertile, are not permitted to enter into valid surrogacy agreements.

In support of the inclusion of section 295(a) was the submission that surrogacy should not be available to persons who are able to give birth, but nonetheless choose surrogacy because it could be argued to be 'easy' way in which to have a child. With surrogacy these persons can avoid the physical and emotional dilemmas' which are involved in pregnancy.<sup>180</sup>

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<sup>179</sup> Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 345.

<sup>180</sup> Such 'dilemmas' noted by the SALC and the AHPC were the fact that women who are pregnant undergo both physical and emotional changes during and pregnancy, and that through surrogacy, women who do not want to endure such changes, can find another woman to gestate their child so they need not worry about mood swings, stretch marks and many of the ordinary physiological and physical consequences of pregnancy. In addition to this, many women choose not to have children because they want to concentrate on their careers. As a result, some women may want children much later in their lives and struggle to conceive, and others may want children, but worry about how having a child may impact on their career growth. In the first respect, the 'career' woman who struggles to have a child at a later stage may be able to conceive, but unable to give birth, and thus may want to turn to a surrogate to assist her. In the second example, these career focused women may want children, but may not want to endure the 'burden' associated with the nine months of pregnancy, and they too may turn to a surrogate to 'carry' such a burden. Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011).

Taking the above into consideration, with reference to the *Harksen* test and the limitations clause, the author will determine if the limitation imposed by the application of section 295(a) on the rights of potential commissioning parents to enter into a surrogacy agreement is justifiable.

The impact of section 295(a) on the rights of potential commissioning parents is that where commissioning parents are not permanently and irreversibly unable to give birth to a child (i.e. they are fertile), they are excluded from entering into a valid surrogacy agreement. The effect is that section 295(a) differentiates on the basis of the ability to give birth. The objective behind the inclusion of Chapter 19 was to provide the opportunity for persons who are naturally unable to conceive and to give birth to enter into a valid and enforceable surrogacy agreement where the child born of the agreement would for all intents and purposes be recognised as their child.

Although it can be submitted that the differentiation could serve a reasonable purpose in that it gives expression to the intention of the Act, such reasonable differentiation may still amount to discrimination.

In the preceding section, the impact of the application of section 294 on the rights of commissioning parents was comprehensively examined. It was submitted that differentiation on the basis on the inability to provide gametes for the purposes of conception may amount to discrimination on the ground of disability. It was also submitted that differentiation on the basis of the ability to give birth may also amount to discrimination on the grounds of disability, because such ability could be deemed as an immutable biological attribute.<sup>181</sup>

Taking this into consideration, the author needs to determine if the ability to give birth can be said to amount to a disability. The CC described 'immutable biological attributes or characteristics' as a specified ground on which people are treated differently and the author has previously submitted that both the

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<sup>181</sup> See paragraph 3.5 and 3.5.2.1 above.



inability to provide gametes for purposes of conception and the inability to give birth are immutable biological attributes which has lead to differentiation, the impact thereof which may impair the fundamental dignity of those affected. In contrast, differentiation on the basis of being able to conceive and being able to give birth cannot be said to have the same implications: being able to conceive and to give birth is not a disability. Hence it is submitted that differentiation on the basis of the ability to conceive and give birth does not amount to differentiation on a specified ground.

With regards to the above, if the differentiation is not based on a specified ground, can it be concluded that such differentiation is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner?

It is the author's submission that this is not the case. Chapter 19 was not enacted to assist 'able' persons to have children because they choose not to burden themselves physically or psychologically with pregnancy. 'Able' persons are as the word says, able to have their own genetically related child through natural conception, and if such people do not want to 'burden their bodies and minds', they can always adopt. We have the right to make decisions regarding reproduction, but when other opportunities exist other than surrogacy, the author submits that she partially agrees that these options should be exhausted first.

However, even if it cannot be said that that the ability to give birth has the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner, the author nevertheless submits that the application of section 295(a) imposes an unjustifiable limitation on the rights of would-be fertile commissioning parents. Merely because a single fertile person or a couple where both are fertile choose not to endure the ordinary 'dilemmas' of pregnancy and opt rather for surrogacy does not serve as a constitutionally acceptable purpose for the



limitation of the above-mentioned persons' rights to equality and to make decisions regarding reproduction.

To conclude, the author's initial conclusion in chapter two that the limitation which arises out of the application of section 295(a) on would-be fertile commissioning parents was justified has changed. All persons should be afforded the right to make decisions regarding how they wish to reproduce.

### 3.6 The constitutional implications of the application of chapter 19 on the rights of potential surrogate mothers

After having considered the constitutional implications of the application of Chapter 19 on the rights of potential commissioning parents, the author will now examine the impact that the operation of specific provisions of Chapter 19 has on the rights of potential surrogate mothers.

Section 295 of the Act is headed 'Confirmation by the court' and lists the qualifications necessary for confirmation of the surrogacy agreement by the Court. With regards to potential surrogate mothers, the implications of the application of section 295(c)(viii) on their rights will be discussed. Section 295(c)(viii) stipulates that a potential surrogate must have a living child of her own.

In addition to this, the author will also examine the implication of the exclusion of an age limitation in respect of would-be surrogates i.e. whether or not the initial AHPC recommendation that potential surrogate mothers should be subjected to an age limitation should have been incorporated into the Act despite the fact that the AHPC did not include such requirement in their final report which was presented to government.<sup>182</sup>

#### 3.6.1 Section 295(c)(viii): Exclusion on the basis of not having a living child of her own

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<sup>182</sup> The constitutional implications that these provisions may have on the best interests of the child will be examined separately in paragraph 3.8 below.

The first provision which needs consideration is that of section 295(c)(viii) of the Act and impact that the application thereof could have on the rights of a woman who wants to be a surrogate mother. The SALC and AHPC's hesitancy surrounding 'childless woman' being surrogates was based on the supposition that a woman who had a living child of her own would be better equipped emotionally to understand the consequences of entering into a surrogacy agreement, specifically that of having to relinquish the child and to forego all the rights and responsibilities towards such child at birth.<sup>183</sup> Having your own child would presumably provide sufficient emotional preparation and enhance the chances of success of the agreement being adhered to i.e. reducing the risk of the surrogate wanting to keep the child after birth.<sup>184</sup> Professor Louw submits that the 'reasoning behind the requirement...may be found in the argument that a woman who no longer has a living child of her own may be more inclined to bond with the child born of a consequence of the surrogate motherhood agreement and [thus] more reluctant to relinquish [such child]'.<sup>185</sup>

Whether or not a woman who has a living child will be able to cede her rights and responsibilities to a child she has subsequently given birth to less effortlessly than a woman who does not have a child of her own is unknown and a complete investigation of this would exceed the ambit of this research.<sup>186</sup> What is necessary is to determine is whether or not this argument in support of the inclusion of section 295(c)(viii), and the resultant limitation on

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<sup>183</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-17.

<sup>184</sup> Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010), 4.

<sup>185</sup> Louw AS *Acquisition of Parental Responsibilities and Rights* (unpublished LLD thesis, University of Pretoria, 2009), 351.

<sup>186</sup> The SALC submitted that in fact, this could be both an advantage and a disadvantage. 'On the one hand the surrogate mother, having given birth to a child, would be able to appreciate the risks associated with pregnancy and the implications of surrendering the child upon birth. On the other hand the children born of the surrogate mother could be traumatised upon surrender of the child, fearing that they too will be given away'. During my personal experiences in the drafting of a surrogacy agreement, one surrogate did inform me that 'there is nothing better than being able to give the gift of life to others and then go home to your own gift [your own child]'. Louw AS *Acquisition of Parental Responsibilities and Rights* (unpublished LLD thesis, University of Pretoria, 2009), 351.

the rights of potential surrogates who do not have a living child of their own, is reasonable.

The effect of section 295(c)(vii) is that it differentiates against women on the basis of whether they have or had not had children. Without clear evidence that proves that the fact that a surrogate has her own child will make her less likely to refuse to relinquish all parental rights and responsibilities towards a child born of the surrogate agreement to the commissioning parents, the author cannot submit that the purpose for this exclusion, and thus the limitation on the rights of the surrogate is rational.

In light of the above, the author needs now to determine if such differentiation amounts to discrimination. Differentiation on the basis that the surrogate has or does not have a child cannot be categorised as differentiation on a listed ground as provided for in the equality clause. If such differentiation is not based on a section 9 listed ground, it will only amount to discrimination if the impact of such differentiation can be said to have the potential to impair the fundamental human dignity of the would-be surrogate as a human being or to affect her adversely in a comparably serious manner.

The author submits that, in this respect, there can be no clear cut conclusion. Some woman may argue that not being permitted to be a surrogate on the basis that they do not have a living child of their own does impair their dignity because their suitability as a surrogate is pre-determined on an unproven basis (it is unknown whether having a child of your own will make it less likely that you will fail to relinquish the child born of the agreement upon birth), whereas others may deem such requirement legitimate because they agree that their intentions before and after the birth of the child could change. In this respect, the author submits that the suitability of the surrogate should be determined on an agreement-to-agreement basis. Nevertheless, if the differentiation is found to have the potential to impair the fundamental human dignity of the would-be surrogate mother concerned, and is resultantly discrimination, the question then arises as to whether such discrimination unfair?

Such discrimination is not based on a listed ground, however, once again the impact such discrimination has on such a person or persons in her situation will have to be determined in light of the individual surrogacy agreement concerned. If we are to assume that the discrimination is unfair to the person eager to serve as a surrogate, can such discrimination be justified in terms of the limitations clause?

Section 295(c)(iv) is in the form of a law of general application. Whether section 294 serves a constitutionally acceptable purpose and sufficient proportionality exists between the limitation and the 'benefit' section 294 intends to achieve will have to be determined in light of factors such as the composition of the impacted rights.

The rights which are limited as a result of the application of section 295(c)(vi) are the rights to equality, the right to dignity and the right to make decisions concerning reproduction (after all it is the surrogate whose body is used in the process or artificial fertilisation and pregnancy).<sup>187</sup> The purpose of section 295(c)(vi) is to fulfil one of the objectives of Chapter 19: the protection of the interests of all the parties concerned, the submission being that a surrogate who has a child of her own is less likely to withdraw from her legal obligations in terms of the agreement. Whether or not less restrictive means exist to fulfil such purpose is unknown. The author cannot submit that having a living child or not having one makes a woman more or less suitable to be a surrogate mother. One cannot predict if a surrogate will, whether intentionally or without fault, form a bond with the child growing inside of her womb.

Although the author submits that the purpose of section 295(c)(vi) is in accordance with the overall objective of Chapter 19 and that, in the interests of all the parties concerned, it can be that the limitation that this provision

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<sup>187</sup> Professor Louw argues that it is of even more importance that the surrogate understands the legal consequences of a surrogacy agreement, than the commissioning parents. Her submission is that 'it is the surrogate who is exposed to all the risks inherent in the conclusion of a surrogate motherhood agreement [and it is the surrogate who is] subjecting herself to the physical risks of an artificially induced pregnancy'. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 349.

places on the rights to equality, dignity and reproductive choices of would-be surrogate mother's is, in this respect, reasonable and justifiable and proportionate to the purpose, the author is still drawn to the argument that each case must be decided on its own merits. Hence, as it was concluded in chapter two regarding the inclusion of this AHPC recommendation, it cannot be said that just because a woman has a living child of her own she is less likely to breach the terms of the contract.<sup>188</sup> Conversely, it cannot be said that not having a living child of her own would make the surrogate mother more likely to renege on her obligation to hand over the child upon birth.

In light of the above, every person has the right to make decisions regarding reproduction, and every person has the right to decide whether or not they want to have a child. When a would-be surrogate illustrates her intention to become a surrogate mother, she is exercising her right to make decisions regarding reproduction, even though it is a decision to reproduce a child which will not be her own. Section 12(2) does not contain a proviso stipulating that we may only make decisions regarding reproduction of our own children. Hence it is concluded that the limitation arising out of the application of section 295(c)(viii) on the rights of would-be surrogates without a living child of their own is unwarranted.

Lastly, in support of this submission, the author quotes the following:

'If procreational autonomy is to be taken seriously, it should not be possible for it to be trumped easily; it is necessary for any democratic society ... to demonstrate that it has compelling reason before denying individual citizens control over their own reproductive choices and decisions.'<sup>189</sup>

### 3.6.2 The impact of the exclusion of age as a determining factor in the suitability of a surrogate mother

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<sup>188</sup> Further discussion regarding the relinquishment of the child by the surrogate will be made in chapter 4.

<sup>189</sup> Cook R, Day Slater S and Kaganas F *Surrogate Motherhood International Perspectives* (2003), 78.

After having considered the impact of the application of section 295(c)(viii) on the rights of potential surrogate mothers, the author will now examine whether age should have been included as one of the determining factors of the suitability of a potential surrogate.

In chapter two it was noted that some members of the AHPC were of the opinion that a general age limitation should be implemented in respect of potential surrogate mothers; nonetheless, when it came to the finalisation of the recommendations for the qualifications of a surrogate, no indication was made as to the inclusion of such requirement.<sup>190</sup>

Despite the fact that 'the maternal childbearing age range has widened over the past decade [as a result of] advances in medical technology and assisted reproduction' the risks associated with pregnancy and childbirth amongst older woman are still higher than that in younger woman.<sup>191</sup> The risks included in 'geriatric pregnancies' are the increase in the possibility of birth defects, miscarriage, premature birth, stillbirth and, in addition to this, pre-existing health conditions such as high blood pressure, diabetes, kidney and heart problems can also affect the outcome of the pregnancy.<sup>192</sup> Geriatric pregnancies are also more likely to be associated with complications in the delivery of the child as well as the death of the child and the death of the

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<sup>190</sup> It was not stated in the AHPC recommendations if the age limitation would be in respect of a minimum or a maximum age limitation (or both). Report of the Ad Hoc Parliamentary Committee on Report of SA Law commission on Surrogate Motherhood (1999) available at <http://www.pmq.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011).

<sup>191</sup> Kenner L and Wright Lott J 'Comprehensive neonatal care: An interdisciplinary approach' (2007) *Elsevier Health Science Journal*, 651, 653.

<sup>192</sup> Geriatric pregnancy (or advanced maternal age pregnancy) refers to pregnancy over the age of 35 years. Women who are over the age of 40 years are two times more likely to miscarry than women below 30 years of age. Women over the age of 45 years are nine times more likely to miscarry than women below the age of 30 years. March of Dimes 'Pregnancy after 35' (2010) available at [http://www.marchofdimes.com/trying\\_after35.html](http://www.marchofdimes.com/trying_after35.html) (accessed on 20 April 2011); Babbidge C 'The new, late baby boomers' (2009) available at [http://news.bbc.co.uk/2/hi/uk\\_news/4105083.stm](http://news.bbc.co.uk/2/hi/uk_news/4105083.stm) (accessed on 20 April 2011); Murray LJ & Others *The babycentre essential guide to pregnancy and birth: Expert advice and real-world wisdom from the top of pregnancy and parenting resources* (2005), 544; Kenner L and Wright Lott J 'Comprehensive neonatal care: An interdisciplinary approach' (2007) *Elsevier Health Science Journal*, 652.

mother.<sup>193</sup> Lastly, and this could be vital in respect of the success of the surrogacy agreements, the older the woman, the less fertile she is.<sup>194</sup>

The author submitted in chapter two that the reason why the AHPC did not include an age limitation in respect of their final recommendations was more than likely as a result of the enactment of the Constitution and the fact that age had been included as a section 9 listed ground of discrimination. In this, the AHPC acknowledged that any differentiation on the basis of age may not have been justifiable.

With this in mind, it needs now to be considered whether if legislature had implemented an age restriction on potential surrogates, if this would have indeed amounted to discrimination, or whether the exclusion of the legislature of an age limitation for would-be surrogates has its own constitutional implications for the rights of would-be surrogates that do not serve a constitutionally acceptable purpose.

It has already been said that any differentiation on the basis of age would amount to differentiation. If such age limitation was implemented because older women are more likely to endure, amongst others, a heightened risk of injury or death during pregnancy and childbirth than the risk which younger women may endure. The author submits that an age limitation on would-be surrogates would amount to a reasonable justification for such limitation on their right to make decisions regarding reproduction.

Differentiation on the ground of age is a listed ground in section 9 of the Constitution and will resultantly be presumed unfair. 'Age is different from most of the other grounds of discrimination in that it does not refer to an unchanging characteristic. Age changes constantly throughout the course of

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<sup>193</sup> Middleburg MI *Promoting reproductive security in developing countries* (2003), 28.

<sup>194</sup> Grosvenor MB and Others *Visualising nutrition: everyday choices* (2009), 381; Middleburg MI *Promoting reproductive security in developing countries* (2003), 28; March of Dimes 'Pregnancy after 35' (2010) available at [http://www.marchofdimes.com/trying\\_after35.html](http://www.marchofdimes.com/trying_after35.html) (accessed on 20 April 2011).



one's life.<sup>195</sup> However, even if such discrimination on the basis of age is unfair, the limitation imposed on, amongst others, the right to reproduction may still be warranted if it is proved to be proportionate to the purpose: the health and safety of older would-be surrogate mothers.

With reference to the above, any right may be limited if such limitation is in the form of a law of general application. Despite the fact that we are dealing with a hypothetical provision, the author submits that if such age limitation was prescribed it would amount to a law of general application. The rights which will be affected are the rights to equality, dignity and the right to make decisions regarding reproduction.

The composition of the above-mentioned rights has been comprehensively examined throughout this chapter, and thus the author submits that it is not necessary to recapitulate. The purpose of the limitation on these rights is the protection of the overall health and safety of the would-be surrogate and the child, because if she were to enter into a surrogacy agreement the risk to her and the child's health and safety may be elevated as a result of the pregnancy and childbirth. The content of the limitation is that older would-be surrogates are unable to exercise their right to make decisions regarding reproduction on the basis of their age. The relation between the limitations on the rights of older would-be surrogates and the purpose is to guard against permitting these women the opportunity to put themselves in a position which may have the result of causing them and the child physical harm.

The author cannot submit that less restrictive means may exist to achieve this purpose, however the author does submit that the limitation which arises as a result of implementing an age restriction on potential surrogate would serve a purpose which the majority of persons would find compelling.

Hence, the author submits that despite the fact that a maximum age limitation for would-be surrogates may limit their right to make decisions regarding

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<sup>195</sup> Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 256.

reproduction, such limitation is warranted. Therefore the author submits that the legislature should have included a provision which provided for an age limitation of would-be surrogates, and that the failure to incorporate such a provision in Chapter 19 is far more of an unjustifiable infringement of the rights of would-be surrogates than that of the inclusion of such a maximum age limitation. In conclusion, the health of these women is a reasonable objective behind this limitation. Therefore it is submitted that proportionality does exist between the inclusion of the limitation on the rights of potential surrogate mothers and the advantage which the would-be surrogate would obtain: preservation of her general health.

After having investigated the above-mentioned limitations and the arguments in favour thereof, I submit as follows: the inclusion of section 295(c)(viii) of the Act, and the limitation which its application has on the rights of potential surrogates, is not justifiable. There is no cast-iron evidence which proves that a surrogate who does not have a child of her own is more likely to fail to honour her obligation to hand over the child to the commissioning parents at birth and thus it cannot be concluded that the inclusion of section 295(c)(viii) of the Act fulfils a constitutionally acceptable purpose.

With regard to the exclusion by the legislature (as a result of the failure of the AHPC to recommend such inclusion) of a provision which would provide for a maximum age restriction for would-be surrogates, the author submits that, despite the advancement of medical technologies, there still exists an inherent danger in 'geriatric pregnancies' (not only for the mother, but for the child as well). In conclusion, although the implementation of a maximum age limitation for would-be surrogates would amount to discrimination on the grounds of age, such limitation would be justifiable as it would proportionate to the purpose: the protection of the health and safety of the would-be surrogate and the child conceived as a result of the agreement. Ultimately, failure to implement a maximum age limitation for potential surrogates amounts to a failure to recognise that older women are not only more likely to be at a heightened risk through pregnancy, but are also more likely not going to be

able to perform in terms of the surrogacy agreement i.e. to give birth to a healthy child.

With reference to the above, the author now directs the reader's attention to another omission made by the legislature. The Act does not make provision for cultural surrogacy and not only will this be shown to amount to differentiation on the basis of cultural belief and practice, but it will also be proven to have serious constitutional implications for all the parties to the agreement.

### 3.7 The constitutional implications of the application of Chapter 19 on the rights of potential commissioning parents and potential surrogate mothers in cultural surrogacy

The Constitution was remarkable in that it was the first legislation to recognise the equal rights of all. It was also significant in that customary law, for the first time, became an issue of constitutional importance. In the form of section 30 and 31 of the Constitution, customary law is recognised as a basic component of South African law.<sup>196</sup>

<sup>196</sup> Section 31(1) (a) of the Constitution provides that 'persons belonging to a cultural, religious and linguistic community may not be denied the right to enjoy their culture, practise their religion and use their language'. Section 31 is similar to that of Article 27 of the 1966 United Nations International Covenant on Civil and Political Rights. Article 27 places a duty on states to guarantee the rights of minority populations, and reads as follows: 'Persons belonging to minorities shall not be denied the right, in community with other members of their group, to enjoy their culture, to profess and practise their own religion, or to use their own language'. Customary Law is defined in section 1 of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 as 'the customs and practices observed amongst the indigenous African people of South Africa which form part of the culture of those people'. Customary law has also said to 'comprise the written and unwritten rules which have developed from the customs and traditions of communities, they have to be known by the communities, followed by the communities and be enforceable'. International conventions such as the Convention on the Elimination of all Forms of Discrimination Against Women and The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa also expressly recognise the right to culture. Le Roux L *Harmful traditional practices, (male circumcision and virginity testing of girls) and the legal rights of children* (unpublished LLM thesis, University of the Western Cape, 2006), 48; Bekker JC and Others *Introduction to legal pluralism in South Africa 2ed* (2006), 19; Bennet TW *Customary Law in South Africa* (2004), 34, 77; Mwambene L and Sloth-Nielsen J 'Benign accommodation? Ukuthwala, 'forced marriage' and the South African Children's Act' (2011) *Law in Context (forthcoming)*.

The appreciation of customary law and the right to language and culture and the issues surrounding these were only truly ascertained in 1993.<sup>197</sup> This was despite the fact that Traditional Leaders attempted to have customary law wholly exempted from the application of the Bill of Rights. Today customary law is regarded as an integral part of the South African legal system.<sup>198</sup>

When the right to culture is scrutinised, courts must take into account the significance of the cultural practice to the community concerned and the rights which such practice has potentially infringed.<sup>199</sup> In the instance of culture, the scope of the right as contained in section 30 and 31 is 'virtually limitless' as culture embraces a wide variety of human activities.<sup>200</sup> However, as with other rights contained in the Bill of Rights, the right to culture can be limited. Both section 30 and 31 contain a proviso or 'internal limitation clause': no right may be exercised in a manner inconsistent with any Bill of Rights provision.<sup>201</sup>

<sup>197</sup> When the Interim Constitution was being drafted, the right to culture was associated with certain right-wing political groups and their activities; such groups were using their cultural identity as a justification for claiming a separate and self-governed nationhood. However, when greater importance was placed on customary law in or about 1993, constituencies of traditional leaders were represented by a multi-party negotiating process which was a result of political bargains struck between the then in-power National Party and the recently unbanned African National Congress. The equality clause, specifically the right not to be discriminated on grounds of sex and gender threatened to override the customary system of patrilineal succession and in that the customary practise of Traditional Leaders and Chief Headmen in having leadership for men only. With regards to the above, a member of the Cape Traditional Leaders Association, Nkosi Nonkonyana voiced his concerns saying that 'my son can be successfully challenged for my throne by my daughter, because the Bill (of Rights) says that all forms of discrimination-and its emphasis on gender-should not be permitted'. Moyo PT *The relevance of culture and religion to the understanding of children's rights in South Africa* (unpublished LLM thesis, University of Cape Town, 2005), 30; Bennet TW *Customary Law in South Africa* (2004), 77 fn 6.

<sup>198</sup> Bennet TW *Customary Law in South Africa* (2004), 77; Mwambene L and Sloth-Nielsen J *Talking the talk and walking the walk: How can the development of African customary law be understood?* (2011) *Law in Context (forthcoming)*, 1.

<sup>199</sup> Le Roux L *Harmful traditional practices, (male circumcision and virginity testing of girls) and the legal rights of children* (unpublished LLM thesis, University of the Western Cape, 2006), 114.

<sup>200</sup> Section 30 gives individuals the right to culture, whereas section 31 speaks of individuals having the right with other members of the community. Thus 30 and 31 are complementary. Bennet TW *Customary law in South Africa* (2004), 84; Currie I and De Waal J *The Bill of Rights Handbook* 5ed (2010), 199; Le Roux L *Harmful traditional practices, (male circumcision and virginity testing of girls) and the legal rights of children* (unpublished LLM thesis, University of the Western Cape, 2006), 45, 46.

<sup>201</sup> The proviso was included to prevent communities from "privatising" offensive practices and including oppressive features of cultural traditions. This is in accordance with many international conventions and guidelines such as article 24(3) of the United Nations Convention on the Rights of the Child and article 21 of the African Charter on the Rights and Welfare of the Child. In this regard, section 12(3), (4), (8) and (9) of the Act prohibits female circumcision, virginity testing (below the age of 16) and forced male circumcision. Male

The rights to equality and to culture have come to heads on several occasions. In the case of *Bhe and Others v Magistrate-Khayelitsha and Others* the constitutionality of primogeniture was dealt with.<sup>202</sup> The CC held section 23 of the Black Administration Act 38 of 1927 was inconsistent with the Constitution as it discriminated against woman, young children and children born of unmarried parents on the grounds of sex and birth.<sup>203</sup> Despite the recognition given to customary law in the Constitution, the CC found that the right to equality (on the basis of birth or gender) outweighed the right to culture and took into account the changing nature of customary law in South Africa both in terms of the historical and current content.<sup>204</sup>

In the matter of *Christian Education South Africa v Minister of Education* the prohibition on corporal punishment in schools was challenged on the grounds that it violated the religious freedom and practice of the applicant who administered corporal punishment as a biblical directive.<sup>205</sup> However, despite the fact that the CC recognised corporal punishment as a form of religious and cultural practice, the prohibition in schools was found to be permissible on the grounds that, for amongst other reasons, it afforded respect to and promoted the right to human dignity.<sup>206</sup>

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circumcision may occur below 16 only for religious or medical purposes. Above the age of 16 years, male circumcision may only occur with the child's informed consent. Le Roux L *Harmful traditional practices, (male circumcision and virginity testing of girls) and the legal rights of children* (unpublished LLM thesis, University of the Western Cape, 2006), 17, 46; Moeketse W *Virginity testing and male circumcision: harmful traditional practices of customary law?* (unpublished LLM thesis, University of the Western Cape, 2005), 46; Boezaart T *Child Law in South Africa* (2009), 186-194 and 238-241; Bennet TW *Customary law in South Africa* (2004), 89; Bekker JC and Others *Introduction to legal pluralism – Part 1: Customary law 2ed* (2006), 35, 105.

<sup>202</sup> 2005 (1) BCLR (CC).

<sup>203</sup> Moyo PT *The relevance of culture and religion to the understanding of children's rights in South Africa* (unpublished LLM thesis, University of Cape Town, 2005), 42-48; Boezaart T *Child Law in South Africa* (2009), 230, 233, 277.

<sup>204</sup> The purpose of the Reform of Customary Law of Succession and Regulation of Related Matters Act 11 of 2009 was to abolish the customary rule of primogeniture as far as it was applicable to the law of succession so as to bring it into accordance with the Constitution as well as to give effect to the *Bhe* judgment which was held to be inconsistent with the notions of equality and human dignity. Mwambene L and Sloth-Nielsen J *Talking the talk and walking the walk: How can the development of African customary law be understood?* (2011) *Law in Context (forthcoming)*, 14.

<sup>205</sup> 2000 (10) BCLR 1051 (CC). Boezaart T *Child Law in South Africa* (2009), 426.

<sup>206</sup> In application of the limitations clause the CC held that the purpose of the prohibition was to promote respect for dignity and physical and emotional integrity of all children and any

In *Kwazulu-Natal MEC for Education v Pillay* a claim of unequal treatment by a school on the ground of religious and cultural affiliation was upheld.<sup>207</sup> The CC held that refusal by a school to permit learners to wear nose studs, as required by their religion, amounted to discrimination on the grounds of religion and culture.<sup>208</sup> The CC noted that whether or not the individual was compelled or voluntarily chose to dress in religious and cultural attire was immaterial, what was important was that the Constitution “confirm[ed], encourage[ed] and celebrate[d] diversity.”<sup>209</sup> The CC drew a connection between culture and religion, and in this particular case, ‘religious belief[s] inform[ed] cultural practice and cultural practice attain[ed] religious significance.’<sup>210</sup>

Lastly, in a recent matter brought before the Equality Court (Bisho High Court) court, the applicant successfully lodged a constitutional challenge against his parents who wanted to have him circumcised. The applicant argued that forced circumcision, although forming part of his right to passage in terms of Xhosa tradition, was a violation of his right to freedom of and security of his person and his religious beliefs.<sup>211</sup>

The inclusion of the right to culture in the Constitution was controversial from the outset, specifically in so far as the right related to other rights. Some constitutional commentators argued that when conflict arose, the right to equality or dignity must always override culture; whilst others stated that no

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exemption ‘even if one religious grounds would disturb the whole symbolic, moral and pedagogical purpose of the measure, and would undermine the states duty to protect people from violence’. Le Roux L *Harmful traditional practices, (male circumcision and virginity testing of girls) and the legal rights of children* (unpublished LLM thesis, University of the Western Cape, 2006), 51; Boezaart T *Child Law in South Africa* (2009), 426.

<sup>207</sup> 2008 (1) SA 474 (CC).

<sup>208</sup> Currie I and De Waal J *The Bill of Rights handbook* 5ed (2010), 794-797; Boezaart T *Child Law in South Africa* (2009), 423, 431, 441.

<sup>209</sup> Boezaart T *Child Law in South Africa* (2009), 431.

<sup>210</sup> Lenaghan P ‘The right to be different: A retrospective analysis of the Constitutional Court jurisprudence of Justice Albie Sachs – weaving the voice of difference’ (2010) *SAPL* 25: 1; Boezaart T *Child Law in South Africa* (2009), 431, 442.

<sup>211</sup> Smook E *Forced circumcision: Son takes parents on* (August 2009) available at <http://www.iof.com> (accessed on 30 March 2011); Ncube ME and Ross E ‘Reproductive health issues emanating from the Children’s Act No. 38 of 2005 as amended in 2008: A pilot study of the rights of parents versus rights of children’ (2010) *SAJBL* Vol III, 14.



one right will prevail over the other. In his 1999 address to the Southern African Society of Legal Historians on the topic of the *Law in Africa: New Perspectives on Origins, Foundations and Transition*, now retired Justice Albie Sachs stated that:

'it is important to avoid an unfortunate but prevalent tendency to put customary law and the constitutional principle of equality on a collision course, i.e. to say that for the one to live, the other must die, or to use a less dramatic metaphor, if custom triumphs, equality must fail [or visa versa]. I think that is a profoundly mistaken view. Our Bill of Rights is not based on a hierarchy of rights, nor is it an assemblage of categorically defined rights sealed off from each other. Rather it contemplates interdependence of mutually supportive rights.'<sup>212</sup>

The right to culture, although difficult to define exactly, encompasses the right of religious and cultural groups to foster their cultural identity by maintaining separate schools, speaking different languages, practising certain religions and applying their own individual legal system.<sup>213</sup> However, when faced with conflicting rights, it could be said that the right to culture is the most difficult to give effect to, in that traditional cultural practices have often not been seen to be in accordance with our societies views of equality, dignity and freedom.<sup>214</sup>

Having regard to the above, I turn now to informal surrogacy (hereinafter referred to as cultural surrogacy) and pose a two fold question. Firstly, whether or not cultural surrogacy is in accordance with the Constitution and if so, whether the non-recognition thereof in Chapter 19 amounts to a reasonable limitation of the rights of both potential commissioning parents and potential surrogates in a cultural setting?

### 3.7.1 Cultural surrogacy as a customary practice

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<sup>212</sup> Moyo P T *The relevance of culture and religion to the understanding of children's rights in South Africa* (unpublished LLM thesis, University of Cape Town, 2006), 30-31.

<sup>213</sup> Bennet TW *Customary Law in South Africa* (2004), 33, 77.

<sup>214</sup> Examples of such practices would be virginity testing, forced circumcision and forced marriage.



Cultural surrogacy was defined in SALC Report as the insemination of the surrogate mother with the gametes of the commissioning parent. It is privately performed by the parties according to accepted customary practice without the intervention of medical doctors or clinics. As a result, a surrogate to a cultural surrogacy arrangement is both the genetic and gestational mother.<sup>215</sup>

Cultural surrogacy has been briefly discussed in chapter two under the heading 'types of surrogacy'.<sup>216</sup> To recapitulate, the AHPC recommendations provide that 'informal surrogacy is practised in most communities and is regulated by cultural norms and practices.'<sup>217</sup> [The] overall view on informal surrogacy [was that it] should be practiced within families only.' In the AHPC's Recommendations, paragraph 3.3, the reasons for the non-regulation of cultural surrogacy were stated as follows:

'Legislation should not make provision for "informal surrogacy" since it is performed privately (and quite often in secret) without the intervention of medical doctors or clinics and is regulated by customary law. The Committee would, however, encourage people currently engaging in informal surrogacy to make use of the processes set out in the proposed legislation, if they so wish. This will be in the in the best interest of the child and will ensure better protection to all parties involved.'

The SALC noted that cultural surrogacy, despite 'the urbanisation of the Black population [and the] falling into disuse of [cultural surrogacy], [was] a form of surrogate motherhood which was generally known and practiced by them (the Black population).'<sup>218</sup> Cultural surrogacy is most often preferred seeing that it is the more 'cost effective' option and because it is practiced 'according to 'custom'. Often in the case where one member of the community is unable to

<sup>215</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 9.

<sup>216</sup> Paragraph 2.2.1.

<sup>217</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.sacreport.html> (accessed on 20 April 2011), 4.

<sup>218</sup> Parliamentary Monitoring Group Report of the South African Law Commission on Surrogate Motherhood (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010).

reproduce she will turn to another to assist. One could say that this practice fulfils the meaning behind 'ubuntu' – a person is a person through others.<sup>219</sup>

The constitutional implications which arise as a result of the exclusion of potential commissioning parents on the basis of the inability of both to conceive and to give birth was discussed in paragraph 3.5 above. At this juncture, it now becomes necessary to examine such exclusion in the 'African cultural context'.

'Despite the understanding that every woman, whether or not she has biological children, is to take up the role of mothering all other children in the community, practically speaking, it is not that simple and a *childless* woman's status is severely diminished.'<sup>220</sup>

As far as the African individual is concerned, 'being healthy means having the right relationship with the environment...illness is connected not so much to viruses or infections in the body, [but rather] as to the question of who disturbed the societal order and why.'<sup>221</sup> The African communal tradition places a very high value on a man's ability to father children; to be without children and a home is seen as an evil that is very hard to bear.<sup>222</sup> Infertility in the traditional African context is not about medical problems or unexplained causes; the community immediately reflects on such person's presumed faulty conduct.<sup>223</sup>

### 3.7.2 The constitutional implications raised in connection with the practice of cultural surrogacy

<sup>219</sup> The word Ubuntu is defined as 'an ethnic or humanist philosophy focusing on peoples allegiances and relations with each other' In 1999, now retired Archbishop Desmond Tutu described a person with Ubuntu as a person who is 'open and available to others, affirming others, does not feel threatened that others are able and good, for he or she has proper self-assurance that comes from knowing that he or she belonged in a greater whole and is diminished when others are humiliated or diminished, when others are tortured or oppressed.' Ulwazi 'Sharing Indigenous Knowledge- Ubuntu' available at <http://ulwazi.org/index.php5?title=Ubuntu> (accessed on 7 January 2011).

<sup>220</sup> Gravett I *Narratives of Couples Affected by Infertility: Daring to be Fruitful* (unpublished D Phil thesis, University of Pretoria, 2008), 167.

<sup>221</sup> Bennet TW *Customary Law in South Africa* (2004), 266.

<sup>222</sup> Lucier RM et al *Issues in Reproductive Technology: Heritage, Surrogacy and Ethics of Community – Choice and Avoidance in African and African-American Traditions* (1994), 334.

<sup>223</sup> Bennet TW *Customary Law in South Africa* (2004), 165.

Having regard to the above, a women's body in the 'African cultural context' is inter alia seen as the reincarnation of her ancestors, and in most parts of Africa, motherhood is seen as a sacred religious duty and a way in which to prove that you are a full and faithful person. In light of this, the author needs firstly to determine if the practice of cultural surrogacy will pass constitutional muster, and secondly, what constitutional implications the non-recognition of cultural surrogacy in Chapter 19 may have on the rights of the potential parties to the surrogacy agreement, specifically the rights of the commissioning parents where, in accordance with their culture, cultural surrogacy as a form of assisted reproduction has been in existence for many years.

Cultural surrogacy, unlike the practices of virginity testing and forced female and male circumcision, is not a harmful practice. Unlike formal surrogacy arrangements, in cultural surrogacy there is no artificial fertilisation procedure: the surrogate and the male commissioning parent have sexual intercourse by way of natural means. The surrogate agrees to carry the child to term for the 'good of the community', and when the child is born, the child is deemed the child of the commissioning family.

Despite the deficiency of literature in respect of customary surrogacy, I submit that the ideology and legal consequences of the practice run parallel to customary adoption i.e. the 'institution of an heir', and in this respect the child who is adopted is regarded by the community as the child of the adoptive parents.<sup>224</sup>

Customary adoption has been recognised by our courts. In the cases of *Maneli v Maneli* and *Metiso v Padongelukfonds*, where, after the adoption of a child in terms of customary law, both sets of parents had divorced, both the

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<sup>224</sup> Bennet TW *Customary Law in South Africa* (2004) 319; Mwambene L and Sloth-Nielsen J 'Talking the talk and walking the walk: How can the development of African customary law be understood?' (2011) *Law in Context (forthcoming)*, 3.

respective courts upheld the validity of customary adoption and the obligation of the parties to maintain the respective children.<sup>225</sup>

Nevertheless it has been said that customary law adoptions, although having been recognised as upholding the best interests of the child, may not pass constitutional muster on the basis that 'customary adoption involves a private, non regulated arrangement with the two families in terms of which the adoptive father may make payment for the child.'<sup>226</sup>

In terms of section 30 and 31 of the Constitution, neither an individual nor a community may exercise his or her/their rights to culture in a manner which is inconsistent with the Bill of Rights as a whole. Though many will argue that payment in respect of the gestation of a child could amount to conduct which is inconsistent with the Bill of Rights, the author will make a submission to the contrary in chapter 4. Nonetheless, due to the fact that a shortage of literature exists concerning the practice of cultural surrogacy, and the fact that the only bona fide source the author has available to here is the commentary made in the SALC Report on Surrogate Motherhood, where there is no evidence to suggest that cultural surrogacy involves the payment of the surrogate mother for the gestation of the child, the author submits that apart from the similarities in the legal consequences and the 'private agreement between parties', it cannot categorically be stated whether or not cultural surrogacy, as is the case of cultural adoption, involves payment to the surrogate mother.<sup>227</sup>

However, even if cultural surrogacy involved payment, in many traditional African communities, payment does not constitute monetary currency and may consist of a number of objects such as cattle or land. Hence, even if cultural surrogacy agreements did involve the payment of the surrogate

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<sup>225</sup> *Maneli v Maneli* 14/3/2-234/05, [Unreported Judgment] South Gauteng High Court and *Metiso v Padongelukfonds* 2001 (3) SA 1142 (T). Mwambene L and Sloth-Nielsen J 'Talking the talk and walking the walk: How can the development of African customary law be understood?' (2011) *Law in Context (forthcoming)*, 3.

<sup>226</sup> *Kewana v Santam Insurance Co Ltd* 1993 (4) SA 771 (TKA). Bennet TW *Customary Law in South Africa* (2004), 230; Boezaart T *Child law in South Africa* (2009), 320.

<sup>227</sup> Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010), 103, 104.

mother, the author is unsure as to whether this could amount to a practice which is inconsistent with the Constitution. In South Africa we permit the practice of *lobola*, whereby 'marriage in the African tradition is characterised by the transfer of goods between the families of prospective spouses...the family of husband-to-be 'compensates' the family of the bride-to-be in 'consideration of a customary marriage'.<sup>228</sup>

Taking cognisance of the above, the author submits that she cannot make an accurate finding as to whether the practice of cultural surrogacy is inconsistent with the Bill of Rights. Hence it will be assumed for further research purposes that cultural surrogacy is not a customary practice that is inherently inconsistent with the Bill of Rights and thus it will be determined in the subsequent paragraph whether or not the non-recognition of cultural surrogacy in Chapter 19 of the Act has constitutional implications for the rights of potential commissioning parents and potential surrogate mothers.

### 3.7.3 The constitutional implications in the non-recognition of cultural surrogacy

In the determination of whether the non-recognition of cultural surrogacy in Chapter 19 amounts to an unwarranted limitation on the rights to potential commissioning parents and potential surrogate mothers, the author will refer to the *Harksen* test and the limitations clause.

Although the Act does not expressly differentiate on the basis of culture, failure to explicitly identify cultural surrogacy in the Act amounts to differentiation on the basis of cultural practice. The reasoning behind this exclusion was founded on the perception that because cultural surrogacy is privately performed, without medical intervention and regulated through customary law, cultural surrogacy was not favoured.<sup>229</sup> The SALC and AHPC

<sup>228</sup> Bekker JC, Labuschagne JMT and Vorster LP *Introduction to legal pluralism in South Africa – Part I: Customary Law* (2002), 62.

<sup>229</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 916.

suggested that 'in the interests of the protection of all parties to the agreement' formal surrogacy was the preferred option.<sup>230</sup> At this point I submit that the objective of protecting all the parties to the contract is a justifiable reason for the exclusion of cultural surrogacy; nevertheless, such exclusion may still amount to discrimination.

Differentiation on the basis of culture is a listed ground of discrimination in terms of the equality clause. Everyone has the right to participate in the cultural life of their choice and every cultural community may not be denied the right to enjoy their culture. These rights must however be practiced in a manner consistent with the Bill of Rights, and as was presented in paragraphs 3.7.1 and 3.7.2 above, the practice of cultural surrogacy is not inherently inconsistent with the Bill of Rights and thus failure to recognise it in the form of Chapter 19 of the Act may give rise to unfair discrimination on cultural grounds.

With reference to the limitations clause, the exclusion of cultural surrogacy, although not explicit in the Act, is based on a law of general application. The rights which are impacted as a result of such exclusion are the rights to equality (on the basis of culture), dignity (the possible psychological effect that was alluded to in paragraph 3.5 above as a result of the inability to procreate and the right to make decisions regarding reproduction (choosing to reproduce the way you want).

To recapitulate, the purpose of the exclusion of cultural surrogacy agreements was that the AHPC were of the opinion that the interests of the parties to a cultural surrogacy agreement would not be adequately protected. As previously submitted, the importance and the objective of the exclusion is reasonable and justifiable: protecting the interests of all parties to the agreement is vital. Nonetheless, the impact that such exclusion has on the rights to equality, dignity, the right to make decisions regarding reproduction and culture are as important.

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<sup>230</sup> The implication of this exclusion on the interests of the child will be discussed in paragraph 3.8.6 below.

The non-recognition of cultural surrogacy has the effect that persons of cultural communities in South Africa are not afforded the same legal protection in respect of their culturally mandated surrogacy agreements as those who can afford to make use of expensive medical procedures and can afford to appoint legal representation in respect of a confirmation application to the High Court. They may choose to continue to exercise their right to make decisions concerning reproduction, but if they choose to do so through cultural surrogacy, their interests and particularly the interests of the child will not receive equal protection.<sup>231</sup> In addition to this, if these cultural communities continue to practice cultural surrogacy, although this is not stipulated in the Act, there does indeed exist the possibility that the parties to cultural surrogacy agreements may be acting in contravention of the Act and thus subject to criminal liability as provided for in section 301-303 of the Act.

Less restrictive means do exist rather than complete and absolute non-recognition of cultural surrogacy. Further consultation with Traditional Leaders and/or those qualified in the field of cultural surrogacy should have taken place.<sup>232</sup> The opinions and views of such persons should have in the least been used to develop guidelines concerning the practice of cultural surrogacy.

The AHPC (and the SALC) chose not to foreground cultural surrogacy and therefore did not legislate for it. Many months were spent travelling the predominantly black provinces of the Northern Province, Limpopo, Eastern Cape and Kwazulu Natal conducting study tours so as to form a perspective of the people's opinion towards surrogacy. They obtained their answer: South

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<sup>231</sup> Even though the child born of a cultural surrogacy agreement will be recognised as the child of the commissioning parents, the parents and the surrogate do not have statutory mechanisms to protect them and the child in the instance of a dispute.

<sup>232</sup> The Black Administration Act 38 of 1927 permitted commissioners' courts and the court of Appeal to call assessors from the community concerned to give advice on the respective customary law. Although this hardly ever occurred, the SALC in its *Report on the Conflict of Laws* recommended reviving this option in the hope that it could assist courts in keeping abreast of customary practice. The SALC were of the opinion that assessors should be taken from a more representative sample of the community and that anthropologists, who were experts on particular customary practices, should also be utilised in assisting the courts in their interpretation and application of the law. Previously traditional leaders were preferred as their training imposed procedural constraints calculated to produce a more reliable version of customary practice than the results acquired from tests.



African black cultures accept and practice cultural surrogacy where assisted reproduction is required.<sup>233</sup> 'Whatever the advantages and disadvantages of surrogacy, it seems to be a practice that will continue unabated for as long as infertility is a reality.'<sup>234</sup>

When faced with infertility and insufficient national fertility health services, surrogacy agreements, whether formal or cultural, are the alternative. In the case of traditional cultural communities, where reproductive health care services are not as readily available as in affluent areas, cultural surrogacy is a mechanism of assisted reproduction used to repair the void created by infertility.<sup>235</sup>

In conclusion, cultural surrogacy is neither expressly included nor excluded from the Act and as a result cultural surrogacy could be said to be neither permitted nor prohibited. The non-recognition of cultural surrogacy in Chapter 19 of the Act amounts to unfair discrimination on the grounds of culture which amounts to a crucial restriction on the rights of parties to cultural surrogacy agreements. However, for purposes of legal clarification and more importantly, in the best interests of the child, if the legislature truly intended cultural surrogacy be excluded, it should have expressly provided as such. In spite of this it is nevertheless the authors submission that cultural surrogacy should be regulated, or in the very least, guidelines should have been drafted which would as a minimum regulate the positions of the parties to the agreement and the legal status of the child born of a cultural surrogacy agreement.

The right to culture requires that cultural practices, which are not inconsistent with the Bill of Rights, be respected and protected. Cultural surrogacy is in accordance with the Constitution. Our Constitution 'confirms, encourages and

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<sup>233</sup> Parliamentary Monitoring Group *Report of the South African Law Commission on Surrogate Motherhood* (1997) available at <http://www.pmg.org.za> (accessed on 1 June 2010).

<sup>234</sup> Carnelley M and Soni S (2008) 22 *Speculum Juris*, 39.

<sup>235</sup> 'In both developed and less developed countries, artificial reproductive technologies [are] perceived [to be] a luxury for wealthy couples, and not as a service for anyone wanting a son or a daughter.' Ikemoto LC 'Reproductive Tourism: Equality Concerns in the Global Market for Fertility Services' (2009) 27 *Law and Inequality Review*, 277.

celebrates diversity', and it is the duty of the legislature to give effect to its extraordinary features.<sup>236</sup> The exclusion of cultural surrogacy from Chapter 19 of the Act does not fulfil a constitutionally acceptable purpose. Hence, the non-recognition of cultural surrogacy in Chapter 19 of the Act is an unwarranted limitation of the rights of the parties to a cultural surrogacy agreement.

### 3.8 The constitutional implications of the application of Chapter 19 on the best interests of the child

During the course of this research the author has regularly made reference to the interests of 'all the parties' to the agreement. However this research has yet to determine the impact of Chapter 19 on what can be argued to be the most important interests of all: the interests of the child. It is with this that a number of the issues which were examined above will be re-discussed with regard to the other party to the agreement: the child to be born as well as the child(ren) of the surrogate mother and/or of the commissioning parents who are already in existence.

The best interest of the child principle is not novel to South African law. Despite the fact that its first codification came about in the form of section 28(2) of the Constitution and subsequently section 7 and 9 of the Act, the best interest principle has been applied as far back as in the 1948 case of *Fletcher v Fletcher*.<sup>237</sup> Today, what was originally a common law principle of family law has developed as the 'golden thread which continues to run through case law' and has become stronger ever since'.<sup>238</sup>

Internationally, both Article 3 of the United Nations Convention on the Rights of the Child (hereinafter referred to as the 'UNCRC') and Article 4 of the

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<sup>236</sup> *Kwazulu-Natal MEC for Education v Pillay* 2008 (1) SA 474 (CC).

<sup>237</sup> 1948 (1) SA 130 (A).

<sup>238</sup> Boezaart T *Child Law in South Africa* (2010), 62, 439.

African Charter on the Rights and Welfare of the Child (hereinafter referred to as the 'ACRWC') incorporate the principle.<sup>239</sup>

Domestically, section 28(2) of the Constitution provides that the child's best interests are of paramount importance in every matter concerning the child. Section 9 of the Act stipulates that in all matters concerning the care, protection and well-being of a child the standard that the child's best interest is of paramount importance *must* be applied and section 7 lists the factors which are to be considered when determining the best interests of the child. Although these two provisions could be seen to be as mandatory, it will be shown that, although the child's best interests must be taken into account, such interests can be limited and as a result can be trumped by other conflicting interests and rights.<sup>240</sup>

### 3.8.1 Interpreting the best interests of the child

The best interest of the child principle as contained in section 28(2) of the Constitution is not merely a guiding a principle, but a right in itself.<sup>241</sup> Though the courts have had many opportunities to examine exactly what constitutes 'the best interests of the child', an exact definition still does not exist.<sup>242</sup>

<sup>239</sup> Article 3 of the UNCRC provides that 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be of primary consideration*'. Article 4 of the ACRWC describes the best interest of the child as *the primary consideration* in all actions concerning the child. The principle was initially incorporated in the 1959 Declaration on the Rights of the Child and the 1979 Convention on the Elimination of All Forms of Discrimination against Women. Zermatten J *Best interests of the child principle: literal analysis and function* (2010), 18 *International Journal of Children's Rights*, 405; Boezaart T *Child Law in South Africa* (2010), 315, 317, 323.

<sup>240</sup> However, in the case of *M v S (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232, 2007 (2) SACR 539 (CC) the CC held that the best interest principle is not absolute, is capable of limitation and other interests are not trumped in all matters concerning the child.

<sup>241</sup> *Minister of Welfare and Population Development v Fitzpatrick* 2000 (3) SA 422 (CC).

<sup>242</sup> *Bannatyne v Bannatyne* 2003 (2) SA 363 (CC); *Sonderup v Tondelli* 2001 (1) SA 1171 (CC); *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC); *Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC); *Fraser v Children's Court, Pretoria North, and Others* 1997 (2) SA 261 (CC); *Du Toit and Another v Minister of Welfare and Population Development and Others (Lesbian and Gay Equality Project as Amicus Curiae)* 2003 (2) SA389 (W); *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); *Bhe and Others v Magistrate Khayelitsha and Others (Commission for Gender Equality as Amicus Curiae; Shibi and Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South*

Despite the fact that ‘the literature on the “best interests is voluminous” and the criticisms of the concept are well-rehearsed...deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself’.<sup>243</sup>

In the matter of *S v M (Centre for Child Law as Amicus Curiae)*, the CC considered the best interest principle simultaneously with a child's right to family and parental care as contained in section 28 of the Constitution.<sup>244</sup> The CC held that ‘a truly child-centred approach requires an in depth consideration of the needs and rights of the particular child in the ‘precise real-life situation he or she is in. Thus to apply a predetermined formula [of what constitutes the best interests of the child] for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child’.<sup>245</sup>

A case which is relevant to the interpretation of the best interests of the other children to a surrogacy agreement is the case of *B v M*.<sup>246</sup> An improved employment opportunity in Cape Town resulted in a mother of two children wanting to relocate to Cape Town with her new husband. The Court granted the application of the mother. It held that despite the fact that this would separate the children of her previous marriage from their father (first husband), not being permitted to relocate would not be in the best interests of her child from the second marriage because such she would be separated from his father (second husband). Although not expressly provided for, the court interpreted the right to family and parental care to include the intention

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*Africa and Others* 2005 (1) SA 580 (CC); *Khosa v Minister of Social Development*; *Mahaule v Minister of Social Development* 2004 (6) SA 505 (CC); *Johncom Media Investments Limited v M and Others (Media Monitoring Project as Amicus Curiae)* 2009 (4) SA 7 (CC); *Director of Public Prosecutions, Transval v Minister of Justice and Constitutional Services and Others* 2009 (2) SACR 130 (CC) and *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and Reintegration of Offenders as Amicus Curiae)* 2009 (2) SACR 477 (CC).

<sup>243</sup> Freeman M *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 –The Best Interest of the child* (2007), 1.

<sup>244</sup> 2008 (3) SA 232, 2007 (2) SACR 539 (CC).

<sup>245</sup> Boezaart T *Child Law in South Africa* (2010), 283.

<sup>246</sup> (2006) 9 BCLR 1043.

that family units should be kept together and 'actions leading to permanent dislocation should not be allowed.'<sup>247</sup>

However the principle and right that the 'child's best interests are of paramount importance' does not mean that the best interest of the child can never be limited by the application of another right.<sup>248</sup> 'Although the word 'paramountcy' means that the interests of the child are more important than anything else, it does not mean that everything else is unimportant'.<sup>249</sup>

Taking into account the above, the author must submit that not only is the true constitution of the best interests' standard still unfolding, but in addition to this, when considering the best interest principle, one must also take cognisance of 'current' and 'future-orientated' interests.<sup>250</sup> With this in mind, the author will now endeavour to determine if the application of Chapter 19 of the Act affords adequate regard to the best interests of the child, or conversely if the application of some of the provisions found in Chapter 19 unwarrantedly limit the rights of the child born of the agreement and/or any other children of the surrogate mother or the commissioning parents who are already in existence.

### 3.8.2 Section 294: Genetic origin of the child

In paragraph 3.5.2.1 above it was determined that the limitation imposed on prospective commissioning parents through the application of section 294 of the Act was not proportionate to the purpose. The author concluded that without conclusive evidence to prove that where a genetic relation exists between the commissioning parent and the child born of the agreement then

<sup>247</sup> In *F v F* 2006 (3) 42 (SCA) the SCA dismissed an appeal lodged by a mother against a decision which refused her permission to relocate to England with her daughter on the grounds that it would not be in her daughters best interests to be separated from her father. Boezaart T *Child Law in South Africa* (2009), 285.

<sup>248</sup> *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2000 (3) SA 422 (CC); Boezaart T *Child Law in South Africa* (2009) 282.

<sup>249</sup> *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232, 2007 (2) SACR 539 (CC); Boezaart T *Child law in South Africa* (2010), 284.

<sup>250</sup> 'Current interests tend to be formulated in relation to experiential considerations: future-orientated interests, by contrast, focus on developmental considerations'. Freeman M A *Commentary on the United Nations Convention on the Rights of the Child: Article 3 – the best interest of the child* (2007), 3.

the surrogate mother will be more likely to fulfil her obligations to hand over the child upon birth, the justification that a genetic relation is required for the purpose of the protection of all the parties interests was not reasonable. The impact that section 294 had on the rights of single infertile persons and couples where both partners are infertile was not constitutionally warranted.

In addition to the above submission presented in favour of the requirement that at least one of the commissioning parents must contribute a gamete to the process of conception, the AHPC recommended that if the child born of the agreement was genetically related to at least one of the commissioning parents, such child would be ensured of growing up with at least one genetically related parent.

As it was stated in *S v M* a 'truly child-centred approach requires an in depth consideration of the needs and rights of the particular child in the 'precise real-life situation he or she is in.'<sup>251</sup> The 'precise real-life situation' of a child born of a surrogacy agreement is that he/she is brought into the world as a result of a real desire of their commissioning parents to have him/her. Children born of surrogacy agreements are comparable to many other children who are born as a result of natural conception: their parents sought to have them. However, in the case of surrogacy agreement, where no genetic relation exists between the child and at least one of the commissioning parents, the situation is not similar to a child born of normal conception, but is more akin to that of adoption.

Despite the fact that neither the Constitution nor the Act provides that a child has the right to information or knowledge regarding their genetic origin or parentage, the right to know one's genetic origins can be found in international treaties such as the UNCRC and the European Convention on Human Rights (hereinafter referred to as the 'ECHR').<sup>252</sup>

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<sup>251</sup> Boezaart T *Child Law in South Africa* (2010), 283.

<sup>252</sup> Article 7-1 of the UNCRC provides that 'as far as possible, [a child has] the right to know and to be cared for by his parents'. In the matter of *Odievre v France* Application no. 42326/93, 13 February 2003, the court acknowledged 'the existence of the vital interest protected by Article 8 of the ECHR in obtaining information necessary to discover the truth

In support of the right to know one's genetic origins, Richard J. Blauwhoff states as follows:

'In a wealth of social science and legal literature that deals with access to information on genetic descent, it has remained a contentious issue whether (all) children should be able to know the truth irrespective of their birth...two [justifications in support of the right to know one's genetic origin are] in the medical sense, in the prevention of hereditary diseases and incestuous relationships, and secondly, in the psychological sense, to enable a child to further develop [their] narrative identity...[children who are] deprived of this information may feel 'deracinated' or cut off from an essential part of themselves'.

Taking the above into consideration, although the author submits that it could be in interests of the child to be genetically related to at least one of their commissioning parents, not being genetically linked to his/her commissioning parent will not contravene the best interest standard. There are many children who are not genetically related to their parents, such as adopted children and foster children, and merely because they do not share a genetic link with their adoptive or foster parents do not mean that their best interests have been disregarded.

The AHPC recommended that the child born of a surrogacy agreement should have access to information regarding their genetic origin and the author submits that she agrees with this recommendation. It will be in the best interest of the child to have access to knowledge of his/her genetic origin, however access to such knowledge is not dependant on the fact that he/she is genetically related to at least one of his/her commissioning parents. Such knowledge is afforded to a child born of a surrogacy agreement through the application of section 41 of the Act.

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concerning important aspects of one's personal identity, such as the identity of one's parents'. Blauwhoff RJ 'Tracing down the historical development of the legal concept of the right to know one's origins- Has to 'know or not to know' ever been the legal question? In Boele-Woelki K *Debates in family law around the globe at the dawn of the 21<sup>st</sup> century* (2009), 145, 161.



Section 41 of the Act provides for 'Access to biographical and medical information concerning genetic parents', and thus the child born of a surrogacy agreement has the right to access information regarding his/her genetic origin. Though a child born of a surrogacy agreement is only entitled to medical information concerning his/ her genetic parents and is not entitled to information regarding the actual identities of his/her surrogate mother and/or his/her gamete donor, with this information, the author submits, the child born of the agreement will have some form of genetic 'link' with his/her genetic parents.<sup>253</sup> The AHPC did not state that such information only be available at the age of 18 years or that the access to such information be restricted to only the medical and biological aspects of the surrogate mother and/or the gamete donor.<sup>254</sup>

Hence it is again submitted that the constitutional implications arising out of the application of section 294 of the Act on the rights of would-be commissioning parents are unjustifiable. Taking into consideration the submission that it will be in the best interests of the child to be genetically related to at least one of his/her commissioning parents, the author concludes that the limitation which arises out of the application of section 294 on single infertile persons and couples (where both partners are infertile) far outweighs the purpose i.e. the protection of the best interests of the child which purportedly is ensured through the creation of a genetic link between at least one of the commissioning parents and the child born of the agreement.

To conclude, the author agrees that it will be in the best interests of the child born of the surrogacy agreement to have access to knowledge of his/her genetic relation. Nonetheless, the author submits that such access is not dependant on a genetic tie between the commissioning parent and the child born of the agreement. Section 41 of the Act provides for the right of a child

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<sup>253</sup> Section 41(1)(b) of the Act provides that access to such information will only be available to the child born of the surrogacy agreement from the age of 18 years. Louw *AS Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 369.

<sup>254</sup> Report of the Ad Hoc Committee on Report of SA Law Commission on Surrogate Motherhood (11 Feb 1999) available at <http://www.pmg.org.za/docs/1999/990211.saclreport.html> (accessed on 20 April 2011), 10.

born of a surrogacy agreement to access information regarding his/her genetic origin.

3.8.3 Section 295(a): Surrogacy is reserved for commissioning parents who are permanently and irreversibly unable to give birth to a child of their own

In paragraph 3.5.2.2 above the author found the limitation of the rights of potential commissioning parents arising out of the application of section 295(a) of the Act to serve a constitutionally unacceptable purpose. The author submitted that although fertile persons could make use of other means of conception, the limitation which arises out of the application of section 295(a) on the rights of single fertile persons and couples where both partners are fertile was not justifiable on the basis that fertile persons are not permitted to exercise their right to make decisions regarding reproduction in that they are prohibited from entering into a valid surrogacy agreement.

The AHPC submitted that if commissioning parents were not irreversibly and permanently unable to give birth, and subsequent to the birth of the child born of the surrogacy agreement, the commissioning parents later conceived through natural means, the child born of the surrogacy agreement 'may like Cinderella, face reduced parental investment after a genetic child enters the previously non-genetic household'.<sup>255</sup> Hence, in this respect, it could be argued that the inclusion of section 295(a) purports to protect the child born of the surrogacy agreement from future psychological harm.

The author respectfully disagrees with the above AHPC submission. All children experience a little bit of jealousy and sadness when a sibling enters their life, but it cannot be expected of commissioning parents (actually all parents) to only have a second child if the first child says that it is okay. In truth, this submission is actually nonsensical, and the author will not expend any more time examining it.

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<sup>255</sup> Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 345.

To conclude, the submission that the limitation arising out of the application of section 295(a) of the Act on fertile would-be commissioning parents is proportionate because it gives recognition to the best interests of the child (because he/she may be faced with reduced parental investment if his/her parents have a child through natural conception) is illogical and unreasonable. Hence, the author submits that the limitation which arises as a result of the application of section 295(a) on the rights of fertile would-be commissioning parents is unwarranted.

#### 3.8.4 Section 295(c)(viii): The surrogate mother must have a living child of her own

In chapter two and in paragraph 3.6.1 of this chapter, the author submitted that without conclusive evidence that a surrogate who does not have a child of her own will be more likely to renege on her obligation to hand over the child born of the surrogacy agreement at birth, the inclusion of section 295(c)(viii) and the limiting effect it has on the rights of would-be surrogates is unjustifiable and does not serve a constitutionally acceptable purpose.

Taking this into consideration, it is of significance to note that some of the SALC members were not in favour of the inclusion of this provision. Initially some members expressed the view that because the surrogate will have a living child of her own, the effect of having a child for the commissioning parents, and having to give up such child upon birth could traumatise her living child through the fear that he/she may also be given away.<sup>256</sup>

In addition to the above, there are two important provisions of the Act which also need to be taken consideration of in the determination of whether section 295(c)(viii) is in the best interests of the child. The first is section 295(e), which was briefly introduced in chapter two, paragraph [ ] [ ] [ ], where it was argued by the author that the phrase 'family situations' can be interpreted to

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<sup>256</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-12, 19-18.

include the children of the surrogate and the commissioning parents who are already in existence. The second important provision is section 10 of the Act which reads as follows:

'every child that is of such an age, maturity, stage of development as to be able to participate in any matter concerning that child, has the right to participate in an appropriate way, and views expressed by the child must be given due consideration'.

Having regard to section 295(e) and section 10, it is clear that the Act requires that the interests and considerations of all the children involved in a matter concerning them must be given due consideration.

Unlike the position of children born to the commissioning parents after the birth of the child of a surrogacy agreement (see discussion in paragraph 3.8.2), it is the authors submission that in the case of the living child of the surrogate, the effects of the birth of the child born of the surrogacy agreement will have far more implications on the interests of the child of the surrogate who is already in existence. In this instance, when the surrogate gives birth to the child of the commissioning parents, the living child of the surrogate may more than likely not comprehend the situation, and within this, he/she may truly fear that he/she will also be given away.

Thus, even though due regard is supposed to be afforded to the views and considerations of the living child of the surrogate (in terms of section 295(e) and section 10), the author submits that there is a less unproblematic manner in which to avoid a situation which could have terrible repercussions for the overall stability of the surrogates living child. The author submits that section 295(c)(viii) of the Act should be repealed.

Hence, in addition to limiting effect that the application of section 295(c)(viii) has on the rights of would-be surrogates to enter into a valid surrogacy agreement, the impact that the application of section 295(c)(viii) may have on the interests of the living child of the surrogate provides further substantiation for the unjustifiability of the inclusion of section 295(c)(viii). Not only can it not

be undoubtedly stated that a surrogate who does not have a living child of her own will be more likely to fail to honour her obligations to hand over the child born of the agreement to the commissioning parents upon birth, but there also exists a possibility that the living child of the surrogate may suffer psychological harm as result of the relinquishment of the child born of the surrogacy agreement.

### 3.8.5 The impact of the exclusion of age as determining factor in the suitability of a potential surrogate on the best interests of the child

The author submitted in paragraph 3.6.2 above that the exclusion of age as a suitability requirement in section 295 of the Act amounted to a failure of the legislature to take cognisance of the fact that older women are more likely to experience risks during pregnancy and child birth than younger women.<sup>257</sup> At this juncture, the author will now endeavour to determine if the exclusion of a maximum age limitation of potential surrogate mothers is in the best interests of the child.

It has been presented that not only are older women more at risk of death and injury as a result of pregnancy than younger women, but the child born of an older woman is also more likely to be stillborn, to have chromosomal abnormalities and to be born below birth weight than children born to younger women.<sup>258</sup> This is the case for all pregnant women, and in the case of surrogacy agreements, neither a partial surrogate nor a full surrogate is immune to the above-mentioned consequences which are associated with older pregnancies.

Taking the above into consideration, not only can it be said that it is not in the best interests of the child that older women are permitted to be surrogates

<sup>257</sup> 'Older women' are deemed to women over the age of 35 years.

<sup>258</sup> Grosvenor MB and Others *Visualising nutrition: Everyday choices* (2009), 381; Middleburg MI *Promoting reproductive security in developing countries* (2003), 28; Murray LJ and Others *The babycentre essential guide to pregnancy and birth: Expert advice and real-world wisdom from the top of pregnancy and parenting resources* (2005), 544; Kenner L and Wright Lott J 'Comprehensive neonatal care: An interdisciplinary approach' (2007) *Elsevier Health Science Journal*, 652.

(because of the risks to the health of the child), but on a whole, the entire enforceability of the agreement will be jeopardised because there is a risk that the surrogate may not even be able to become pregnant because her fertility levels are inherently lower than that of a younger woman. When the older surrogate does fall pregnant, there exists an additional worry that she may miscarry, and/or that the child will be stillborn and/or that the child born of the agreement may have chromosomal disorders.

To conclude, the author submits as she did in paragraph 3.6.2 above that the failure by the legislature to include a provision which limits the age of potential surrogates is a failure firstly recognise the risks inherent to both the surrogate and the child in 'geriatric pregnancy' and secondly, a failure to protect the interests of all the parties to the agreement.<sup>259</sup>

#### 3.8.6 The impact of the non-recognition of cultural surrogacy on the best interests of the child

In paragraph 3.7.3 above it was submitted that the non-recognition of cultural surrogacy in Chapter 19 of the Act amounted to unfair discrimination on the ground of culture and that it was an unreasonable limitation on the rights of potential commissioning parents and potential surrogates to make decisions regarding reproduction.

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<sup>259</sup> In chapter 2 the author also discussed the issue of an age limitation in respect of potential commissioning parents and reference was made to Sir Elton John and the birth of his son Zachary via surrogate motherhood. The author submitted that she could not outright conclude that there should be a maximum age limitation in respect of commissioning parents because unlike in the case of surrogate mothers, being a commissioning parent does not involve inherent health risks. Though some may submit that the older one is the less 'capable' one is of being a parent, the author submits that it would be difficult to say that age affects ones overall suitability to be a parent. Regarding the best interests of the child, it may be submitted that an older parent may be less likely to be able to engage with the child than a younger parent, and the older one is, there does exist the likelihood that such an older parent won't have as many years available to the child as a younger parent. However, the author does not believe that the imposition of a maximum age limitation for potential commissioning parents could amount to a constitutionally acceptable purpose without conclusive proof to show that older parents are less suitable for parentage than younger parents. Whether such a limitation should have been imposed on the grounds that it would be in the best interests of the child is also debatable.

In addition to the above, the author concluded that the non-recognition of cultural surrogacy was not in the best interests of the child, because non-recognition amounted to failure to provide clarity regarding the legal position of the child born of a cultural surrogacy agreement. However it is still necessary to determine in greater detail why the non-recognition of cultural surrogacy in Chapter 19 of the Act can be concluded to not be in the best interests of the child.

The purpose of Chapter 19 of the Act was to firstly permit people who were unable to have children by natural means to enter into a legally recognised surrogacy agreement, secondly, and this is significant to this examination, Chapter 19 was to provide legal clarity regarding the children born of surrogacy agreements.

Prior to the operation of Chapter 19 of the Act, children born as a result of a surrogacy agreement were seen as the child of the surrogate. The only manner in which the legal parentage of the commissioning parents would be recognised was via the process of adoption. Chapter 19 has altered this position as all children born of a valid surrogacy agreement are considered for all purposes the children of the commissioning parents. However, children born of cultural surrogacy agreements do not share in this legal certainty. Though children born of cultural surrogacy agreements are for cultural purposes considered the child of the commissioning parents, the position in terms of law is unclear as a result of the failure of the legislature to legally recognise cultural surrogacy as a form of assisted reproduction.

It is true that because cultural surrogacy is privately performed without medical intervention, it will not be easy to regulate, thus the recommendation in both chapter two and paragraph 3.7.3 above that maybe guidelines are the correct way to regulate and recognise cultural surrogacy. However, whether or not it will prove difficult to regulate cultural surrogacy, the interests of the child born of the agreement must be considered of paramount importance. And if such children are not afforded equal legal protection by comparison to those children born of valid surrogacy agreements, this cannot be said to



considering the interests of children born of cultural surrogacy agreements as paramount. Despite the fact that the community which they live in might regard them as the children born of their commissioning parents, legally this will not be the case.

The failure of the legislature to legally recognise cultural surrogacy as a form of assisted reproduction not only amounts to discrimination on the grounds of culture and an unwarranted limitation on the rights of potential commissioning parents and potential surrogates to make decisions regarding reproduction, but most significantly, the failure by the legislature to legally recognise cultural surrogacy as a form of assisted reproduction flies in the face of the principal of the best interests of the child.

### 3.9 The right of access to reproductive health care

After having considered the constitutional implications of the application of Chapter 19 of the Act on the rights and interests of all the parties, there remains one further constitutional right which needs to be examined in light of Chapter 19 of the Act: the right to access to reproductive health care. Bearing in mind the earlier discussion in chapter two in respect of State funded fertility clinics and in paragraph 2.2.6 above regarding reproductive rights, surrogacy can also be dealt with as a section 27 right. Section 27(1)(a) of the Constitution provides for the right to access to reproductive health care and places a duty on the state to take all reasonable legislative and other measures that are within its available resources to achieve the progressive realisation of this right.<sup>260</sup> The right to access to reproductive health care is a socio-economic right.<sup>261</sup>

The State has a positive duty to respect the right of access to reproductive health care services by not unfairly or unreasonably obstructing people in their

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<sup>260</sup> CTOP is an example of such a legislative measure.

<sup>261</sup> Socio-economic rights have the objective of addressing the pressing social and economic needs that face ordinary South Africans everyday. In this, the Constitution does not merely recognise and emphasise rights which guarantee freedom and equality but places emphasis on the general welfare of the people.

access to existing health care services, whether in the public or private domain. In furtherance of its obligation to protect and promote, the State must continue to develop and implement comprehensive policy frameworks as well as implement mechanisms in order for individuals to realise these rights on their own.<sup>262</sup>

In paragraph 3.3 above, the development of reproductive rights was discussed. To recapitulate, the primary objection for the inclusion of section 12(2) of the Constitution is that section 12(2) recognises 'that some of the most devastating and socially entrenched forms of physical and psychological oppression and exploitation relate to reproduction and sexuality'.<sup>263</sup> Section 12(2) read with section 27(1)(a) acknowledges that in the past, women had very restrictive access to reproductive health. These sections intend to 'assist women to live out their fundamental human rights to dignity, autonomy and freedom, as well as to bring about gender equality'.<sup>264</sup>

Section 27 stipulates the general right of everyone to access health care services. The State's positive constitutional duties arising out of socio-economic rights were comprehensively discussed in the landmark socio-economic rights judgment of *Government of the Republic of South Africa v Grootboom* in which the CC established that the Constitution imposes an obligation on the State to develop and implement reasonable measures to

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<sup>262</sup> Between the period 1994 and 2004, the government had reached a number of general reproductive health milestones. For example in 1994 free public health services were introduced for pregnant women and children below 6 years; 1998 brought about the formation of the SA National Aids Council and in 2000 the National Guidelines for Cervical Screening Programme were launched. In 2002 the National Contraception Policy was launched and a year later, in 2003, the Government approved a plan to provide antiretroviral medication to people with HIV/Aids through the public health sector. Cooper D et al 'Ten years of democracy in South Africa: Documenting transformation in reproductive health policy' 2004 *Reproductive Health Matters Journal*, 70.

<sup>263</sup> Bishop M and Woolman S *Constitutional law of South Africa: Freedom and security of the person* 2ed (2007), 40-81.

<sup>264</sup> Section 12(2) and 27(1)(a) are in accordance with CEDAW, The Beijing Declaration and Platform of Action; The Declaration on the Elimination of Violence against Women and ICESCR. Hassim J and Others *Health and democracy: A guide to human rights, health law and policy in post-apartheid South Africa* (2007), 361, 362.

ensure that the socio-economic rights provided for in the Constitution are realised, and that such rights are justiciable.<sup>265</sup>

Importantly, the case of *Grootboom* provided clarity in respect of the extent and nature of the State's obligation regarding the realisation of such rights. Whilst the CC held that the needs of the poor require particular and special attention, the State's duty to realise such rights must be proportionate to the available means and resources available. Therefore, the fulfilment of socio-economic rights is qualified by the term "progressive realisation".

In the *TAC* case, the CC, although placing much reliance on the *Grootboom* decision, took a further step forward.<sup>266</sup> The CC held that, the State shoulders 'the primary responsibility as regards provision of basic health care for children when the implementation of parental or family care is lacking'.<sup>267</sup>

<sup>265</sup> 2000 (3) BCLR 227 (C). The applicants, as a result of poor living conditions, had moved to a piece of land which they had incorrectly thought to be vacant. Once evicted, they decided to return to their original place of residence, an informal settlement, however, the informal settlement was fully occupied and thus they were left with nowhere to reside. The High Court relied on the obligations created in section 28(1)(c) of the Constitution (the right of children to shelter) and held that such obligations were enforceable irrespective of the resources available to the State. The CC however reached a different conclusion. Despite the fact the CC found that the State's housing programme 'fell short' of compliance with section 26 (the right of everyone to have access to housing), the CC held that the obligation on the State was to undertake reasonable and legislative measures to progressively realise the right, and the State must 'devise, fund, implement and supervise measures to provide relief to those in desperate need'. The CC found no violation of section 28(1)(c) and held that such right was not automatically enforceable. ESCR-Net 'Government of the Republic of South Africa v Grootboom & Ors 2000 (11) BCLR 1169 (CC)' available at [www.http://escr-net.org/caselaw/show.html](http://escr-net.org/caselaw/show.html) (accessed on 20 April 2011); Liebenberg S *Socio Economic Rights: adjudication under a transformative constitution* (2010), 146 – 151; Liebenberg S 'Towards a transformative adjudication of socio-economic rights' in Osode PC & Glover G *Law and transformative justice in post-apartheid South Africa* (2010), 37; Govindjee A and Olivier M 'Chapter 6: Finding the boundary – the role of the courts in giving effect to socio-economic rights in South Africa' in Osode PC & Glover G *Law and transformative justice in post-apartheid South Africa* (2010), 86, 87.

<sup>266</sup> 2002 (5) SA 721 (CC). The Court was faced with two key issues, first: whether the State was entitled to limit the provision of neviraphine, and secondly, whether the State had 'devised and implemented within its available resources a comprehensive and coordinated programme to realise progressively the rights of pregnant woman and their children to have access' to such services. The Treatment Action Campaign (TAC) made a public challenge regarding the State's 'research and training' policy concerning neviraphine as an accepted antiretroviral. The CC held that the States limited administering policy was not 'inflexible', and because it was a potentially lifesaving drug that could be administered within the States available resources, such policy was unreasonable.

<sup>267</sup> Mbazira M and Sloth-Nielsen J 'Incey-wincey spider went climbing up again – Prospects for constitutional (re)interpretation of section 28(1)(c) of the South African Constitution in the next decade of democracy' (2007) 22 *Speculum Juris*, 146.

In respect of the above-mentioned judgments, the author submits that the CC, although yet to determine a matter regarding the implementation of reproductive health rights in South Africa, has presented us with some tentative guidelines to assist when determining if section 27 has in fact been infringed.

In light of the above, the author does however submit that in respect of access to surrogacy-enabling medical procedures such as artificial fertilisation, it cannot be said to be a 'desperate need' which, at this point in time, necessitates the State to 'devise, fund, implement and supervise measures' to progressively achieve access for all. As was concluded in chapter two, taking into account the limitations clause, the failure by the State to provide immediate access to methods of assisted reproduction (specifically surrogacy enabling methods such as artificial fertilisation) is arguably not a limitation on our right to access to reproductive health. With reference to the above-mentioned judgments, the State has limited resources and their duty only extends to progressively realising access to reproductive health services within available resources. Despite the fact that South Africa has a low fertility rate and that the procedure of artificial fertilisation is expensive, immediate access to surrogacy-enabling medical procedures cannot, at a point when the State has yet to get a grips on other reproductive health issues such as the combating of HIV/Aids, be seen to be a 'desperate need' which requires immediate implementation.

The State has taken measures and implemented legislation which affirms the right to make decisions regarding reproduction and which are progressively realising our right to access to reproductive health services.<sup>268</sup> Nonetheless, I submit that failure to implement policies and introduce legal mechanisms which would provide immediate access to methods of assisted reproduction is not an unwarranted limitation on the right to access to reproductive health. Within the limited resources of the State, the State's obligation to introduce such policies must be proportionate to the means. The State is required

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<sup>268</sup> An example of such legislation would be the CTOP.

merely to progressively realise the right to reproductive health, and it is my submission, that at this point, access to methods of artificial fertilisation is not a desperate need which requires immediate attention.

### 3.10 Conclusion

This chapter has reflected that the application of Chapter 19 of the Act has varying results on the rights of all the parties to surrogacy agreements. Although it can be said that Chapter 19 of the Act provides the necessary framework for the legalisation and recognition of valid surrogacy agreements in South Africa, a number of the provisions of Chapter 19 impose stringent limitations on the rights of the contracting parties. All the provisions which were examined were found to impose unwarranted limitations on the rights of the respective parties.

In addition to this, this chapter has illustrated that the legislature has been remiss in its task: it has failed to recognise cultural surrogacy as a form of assisted reproduction and in this, has failed to afford the parties of cultural surrogacy agreements the same protection which is afforded to other categories of persons who make use of formal surrogacy as a form of assisted reproduction. Not only does this have implications regarding the enforceability of the agreements, but it also does not uphold the principle of the best interests of the child and it can lead to criminal sanctions if cultural parties choose to continue to practice cultural surrogacy.

A further omission on the part of the legislature was failing to include a provision which provides that surrogate mothers would be subjected to a maximum age restriction. In this, the legislature has neglected to acknowledge that older women are more prone to experience risks as a result of pregnancy and childbirth than their younger counterparts, and consequently, not only does this have implications for the health of the surrogate and the child, but this may also have an impact on the outcome of the agreement.

Although it is an immense achievement when a country can recognise that assisted reproductive arrangements such as surrogate motherhood exist and that these agreements require regulation for purposes of legal certainty, it is nevertheless distressing that when faced with such a big issue (ethically, morally and legally) the legislature fell short of what was required to draft constitutionally adequate legislation.

Therefore the author submits that Chapter 19 does not in every respect fulfil its purpose. The author respectfully agrees that only commissioning parents who are permanently and irreversibly unable to conceive and give birth should be permitted to enter valid surrogacy agreements, and, similarly the author concurs that it will be in the best interests of all parties concerned if the child born of the agreement is genetically related to at least one of his/her commissioning parents. However, as a whole, Chapter 19 does not in fully recognise the right to make decisions regarding reproduction.

The subject of enforceability of the agreements was briefly discussed in paragraphs 3.5.2.1, 3.6.1 and 3.6.2 above. Nonetheless the impact of the enforceability of surrogacy agreements on amongst others, the right to make decisions regarding reproduction, does necessitate further examination. Consequently the focus now turns to the contractual aspects of surrogacy in South Africa.

## CHAPTER FOUR: THE CONTRACTUAL IMPACT OF CHAPTER 19 OF THE ACT

'If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and their contracts, when entered into freely and voluntarily, shall be held sacred and shall be enforced by Courts of Justice'.<sup>269</sup>

### 4.1 Introduction

The Bill of Rights recognises and protects, amongst others, individual freedom, equality, dignity and the right to engage in economic activity.<sup>270</sup> Many of these values, albeit in a different appearance, are innate to the law of contract in respect of the freedom to contract, enforceability of obligations and reasonableness.<sup>271</sup>

The law of contract revolves around the 'unconditional' twin principles of *pacta servanda sunt* and the freedom to contract. In simple terms, these two principles imply that the obligations arising out of contracts must be enforceable and that the parties are not restricted as to the terms upon which they contract.<sup>272</sup> 'Absolute freedom of contract...apparently means a meeting of free wills where neither party acts under the pressure of external forces'.<sup>273</sup>

Regrettably these two principles only exist in an illusory world. Both principles are subject to the 'values of society' and are affected by the substantial

<sup>269</sup> Barnard AJ *A critical legal argument for contractual justice in the South Africa law of contract* (unpublished LLD thesis, University of Pretoria, 2005), 83.

<sup>270</sup> Section 22 of the Constitution provides that 'every citizen has the right to choose their trade, occupation or profession freely. The practice of trade, occupation or profession may be regulated by law.'

<sup>271</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 12; Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 8.

<sup>272</sup> *Brisley v Drotosky* 2002 (4) SA 1 (SCA); *Napier v Barkhuizen* 2006 (4) SA 1 (SCA); *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). Van der Merwe S and Others *Contract general principles* 3ed (2007), 12; Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 737; Kerr AJ *The principles of the law of contract* 6ed (2002), 8, 129.

<sup>273</sup> Kerr AJ *The principles of the law of contract* 6ed (2002), 8.



inroads created by legislation and judicial decisions which establish limitations.<sup>274</sup>

'The rules of the law of contract reflect the attempts in the legal system to achieve a balance between relevant principles and policies so as to satisfy prevailing perceptions of justice and fairness...the very principles of moral or socio-economic expediency, which will in many circumstances support a policy favouring the exact enforcement of contracts freely entered into by consenting parties, may in particular circumstances require that less weight be attached to the ideals of individual autonomy and freedom of action.'<sup>275</sup>

Taking the above into consideration, the author intends to submit that Chapter 19 of the Act, which brought about the legal recognition of surrogacy in South Africa, is in itself legislation which substantially limits the absolute freedom and enforceability of contracts. Parties are not free to decide with whom they wish to contract, upon the terms on which they wish to contract nor can it be said that the contractual obligations are wholly enforceable.

In the case of breach of contract and the remedies which are provided by the general law of contract, the author intends to show that surrogacy agreements, unlike ordinary contracts, although they possess the usual requirements of a valid contract, are not 'ordinary' in the sense of general contract law. In the case of a surrogacy contract, breach and the issue of enforceability must be viewed from a different perspective. Surrogacy contracts are not contracts which deal with everyday objects or ordinary performance, surrogacy agreements are sui generis contracts. When a dispute arises out of a surrogacy agreement, we are faced with conflicting human rights and human interests. I intend to show that in the event of breach, the remedies provided by the general law of contract will not suffice. Nonetheless, before we reach that point in this research, it is first necessary

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<sup>274</sup> The recent promulgation of the National Credit Act 34 of 2005 and the National Consumer Protection Act 68 of 2008 have restricted the rights of parties to such an extent that in some circumstances, it is not the parties to the contract, but the legislature that determines the terms of the contract and the repercussions for breach.

<sup>275</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 11.

to determine whether surrogacy agreements are valid contracts for the purposes of contract law.

In determining whether a South African surrogacy agreement is in fact a valid and wholly enforceable contract, one has to start off with the basic principles and mechanisms of contract law.

#### 4.2 Cornerstones of a contract

Contracts are legally binding agreements which comprise of the following seven essential elements:<sup>276</sup>

- i) agreement to performance or non-performance,
- ii) capacity to contract,
- iii) intention,
- iv) possibility of performance,
- v) certainty,
- vi) formality, and
- vii) absence of illegality.



In the subsequent paragraphs, the author will examine the above-mentioned requirements and at the same time, determine whether a surrogacy agreement meets the requirements of a valid contract in terms of the general law of contract.

##### 4.2.1 Capacity

The requirement of capacity requires that the parties entering the agreement must be capable of contracting.<sup>277</sup> The capacity of persons to enter into legal

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<sup>276</sup> The following requirements are necessary in the conclusion of a contract: 1) parties must agree to perform or not perform; 2) parties must possess the requisite contractual capacity, 3) parties must have the intention to be bound (*animus contrahendi*); 4) the performance or non-performance must be possible; 5) the terms of the contract must be ascertained or readily ascertainable; 6) the contract must be absent of illegality and 7) the contract must fulfil the particular requirements of formality. Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 736-772; Van der Merwe S and Others *Contract general principles* 3ed (2007), 19-54; Kerr AJ *The principles of the law of contract* 6ed (2002); Treitel GH *An outline of the law of contract* 6ed (2004), 1.

transactions is determined by the law of persons where a distinction is made between no capacity to act, limited capacity to act and full capacity to act.<sup>278</sup>

In the case of surrogacy agreements, the capacity of the contractant is determined by section 295 of the Act which stipulates the suitability requirements necessary to become a party to the agreement.

#### 4.2.2 Agreement, intention and certainty

Once it has been determined that the parties to the contract possess the necessary capacity to contract, it will then be determined if the parties agree to performance or non performance, whether they intend to be bound by the obligations arising out of the agreement as well as if they are certain as to their legal obligations which will arise out of the operation of the contract. Hence these three requirements will be simultaneously examined.

When parties enter into a contract they agree to performance or non-performance, they intend their agreement to give rise to contractual obligations and in so agreeing, they intend to be bound by such contractual agreement (they have *animus contrahendi*).<sup>279</sup> In addition to agreement and intention, the parties to the contract must clearly define the legal consequences which will arise out of the contract i.e. they must be certain as to what their respective obligations will be. An agreement which does not exhaustively delineate the obligations of the parties may nevertheless still be valid if adequate provision is made for determination at a later stage.<sup>280</sup>

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<sup>277</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 853.

<sup>278</sup> An example of persons with no capacity to act would be an infans. Prodigals and minors are examples of persons who have limited capacity to act and adults, persons over the age of 18 years are presumed to have full capacity. Boezaart T *Law of Persons* (2010), 7.

<sup>279</sup> The parties must agree on the consequences they wish to create, must be aware of the agreement and must intend to bind themselves legally. *Bosman v Prokureursorde van Transvaal* 1984 (2) SA 384 (W); *Bourbon-Leftley v WPK (Landbou) Bpk* 1999 (1) SA 902 (C). Van der Merwe S and Others *Contract general principles* 3ed (2007), 23.

<sup>280</sup> For example, parties may include a clause in their contract that says the price of the product which is to be sold from contractant A to contractant B at X date will be 0.2 times the market value of that product on X date. *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669; *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A); *Shell SA (Pty) Ltd v Corbitt* 1986 (4) SA 523 (C); *Genac Properties Jhb (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A). Van der Merwe S and

#### 4.2.2.1 Offer and acceptance

Very often, prior to the coming into existence of a contract, there will be an offer (an invitation to consent to the creation of obligations between the parties) and a corresponding unequivocal acceptance (affirmative response) to the offer.<sup>281</sup> Generally contracts come into existence where consensus is reached i.e. as soon as the offeree accepts the offer by the offeror.<sup>282</sup> An offer must contain an affirmation of intention which sets out the essential and material terms of the proposed contract. The degree of such affirmation must be that mere acceptance will render the legal consequences of the contract ascertained or readily ascertainable.<sup>283</sup> An offer in itself does not give rise to contractual rights and obligations, it merely gives rise to an expectation or *spes* (promise) of a future right. Only once acceptance has occurred does the agreement convert into a contract which confers legal accountability.<sup>284</sup> An effective acceptance is one which corresponds with the terms as provided for in the offer.<sup>285</sup>

At the commencement of the 'negotiations', all of the parties are made candidly conscious of what a surrogate motherhood agreement entails. The surrogate mother agrees to undergo artificial fertilisation, gestate the unborn child and upon birth, relinquish all rights and responsibilities towards that child to the commissioning parent(s). In exchange, the commissioning parent(s) agree to compensate the surrogate for all the necessary expenses involved in

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Others *Contract general principles* 3ed (2007), 225, 226, 227; Kahn E *et al Principles of the law of Sale & Lease* (2008), 12, 13, 15; Kerr AJ *The law of sale and lease* 3ed (2004), 29, 34, 35, 37, 55, 98, 245, 259.

<sup>281</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 54; Treitel GH *An outline of the law of contract* (2004), 7.

<sup>282</sup> *Bloom v The American Swiss Watch Company* 1915 AD 100; *Seeff Commercial & Industrial Properties (Pty) Ltd v Silberman* 2001 (3) SA 952 (SCA); *Ideal Fastener Corporation CC v Book Vision (Pty) Ltd t/a Colour Graphic* 2001 (3) SA 1028 (D). Van der Merwe S and Others *Contract general principles* 3ed (2007), 55; Christie RH *The law of contract in South Africa* 3ed (1996), 29.

<sup>283</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 57; Kerr AJ *The principles of the law of contract* 6ed (2002), 64.

<sup>284</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 59; Kerr AJ *The principles of the law of contract* 6ed (2002), 63.

<sup>285</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 62; Christie RH *The law of contract in South Africa* 3ed (1996), 60, 64; Treitel GH *An outline of the law of contract* 6ed (2004), 10; Kerr AJ *The principles of the law of contract* 6ed (2002), 71.

the artificial fertilisation procedure and the pregnancy as well as to accept the child as their own upon birth. Nevertheless, in the case of South Africa, a surrogate motherhood agreement only becomes binding upon the parties once the Court has confirmed such contract which is formulated in a court order. As a result, the legal rights and obligations that emanate from a surrogacy contract are by no means immediately and automatically enforceable.<sup>286</sup>

#### 4.2.3 Possibility of performance

Even after the parties have agreed to performance, have agreed to be bound to the legal obligations arising out of the contract and are certain as to the obligations which are imposed, such contract will not come into being if the performance or non-performance to which the parties have agreed to is not possible. If the performance to which they have agreed to is wholly impossible i.e. no other person in the position of the debtor will be able to fulfil the obligations, then the agreement is void *ab initio* and all legal obligations will cease to exist.<sup>287</sup>

Possibility of performance may arise out of a surrogacy agreement if, after the parties have agreed to performance, the surrogate falls pregnant with her partner's child. In the ordinary law of contract, if the creditor is able to find another debtor to fulfil the original debtor's contractual obligations, the original debtor will be guilty of breach and liable to the creditor. However, in the case of surrogacy agreements, the agreement only becomes a valid and

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<sup>286</sup> In the instance of an ordinary contract, where a dispute arises as to whether the parties to the agreement possessed the necessary intention to be bound, a distinction will have to be drawn between implied and express terms. In the case of implied terms, 'the court must be able to conclude with confidence that the parties intended to create contractual obligations'. The onus rests on the party alleging the existence of the contract. In the case of express terms, it is the party denying the existence of the contract who has to discharge the onus of proof. Treitel GH *An outline of the law of contract* 6ed (2004), 58; Kerr AJ *The principles of the law of contract* 6ed (2002), 4, 41; Christie RH *The law of contract in South Africa* 3ed (1996), 29, 30-33.

<sup>287</sup> However, if the inability to perform is as a result of the debtor him/herself, this will not automatically amount to an impossibility of performance. The impossibility will have to be determined from an objective viewpoint i.e. if another person will be able to fulfil the debtors obligation then the original debtor will be liable for breach. Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 751, 2.

enforceable contract upon confirmation by the Court, and thus if the impossibility to perform arises before the agreement is confirmed and before it becomes a legally valid and enforceable agreement, the author presupposes that this would not amount to breach because there is no valid agreement. In view of the commissioning parents, it can be submitted that a reasonable likelihood exists that the commissioning parents will find another surrogate to gestate their child.

Once the agreement has been confirmed, in accordance with the general principles of the law of contract, the author submits that the surrogate could be liable for breach. However the Act does not make provision for such possibility and further examination will thus be carried out regarding this submission in paragraph 4.3.5.2 below (prevention of performance).

#### 4.2.4 Legality and Public Policy

After all of the above mentioned requirements are met it then becomes necessary to determine if the agreement and/or the obligations which arise from are legal, because illegal agreements do not constitute enforceable contracts. Illegality is present when the actual conclusion of the agreement is illegal, or the performance in terms of the agreement is illegal, or where the objective of the contract is prohibited by legislation or common law.<sup>288</sup>

##### 4.2.4.1 Statutory illegality

The voidability of contracts which contravene a statute will be dependant on the statute concerned. In some cases, the party who belongs to the class for whose benefit the statute was intended can choose whether to abide or resile from the contract, whereas in other cases, contravention renders the contract

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<sup>288</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 760; Treitel GH *An outline of the law of contract* 6ed (2004), 184; Christie RH *The law of contract in South Africa* 3ed (1996), 382- 4.

null and void and no opportunity for enforcement exists.<sup>289</sup> More often than not, the statute itself will specify the penalties applicable to contravention.<sup>290</sup>

#### 4.2.4.1.1 The effect of statutory illegality on the rights of the parties to the surrogacy agreement

In respect of surrogacy agreements, Section 305 of the Act stipulates the prescribed offences for when an agreement or any conduct arising out of such agreement is contrary to the Act. Persons who contravene section 301 - 303 will be liable for a fine and/or imprisonment of a period not exceeding 10 years. In the general law of contract, any act carried out in contravention of a statutory provision will have the effect of being null and void.<sup>291</sup>

The Act does not however provide details concerning the effect of illegality on the agreement itself. It is submitted that it is unclear whether such agreements are void *ab initio* (never came into existence), invalid (and then the same consequences of invalidity would apply) or whether the opportunity exists for parties to rectify their contravention and continue with the agreement as if the contravention never occurred.

For example, in terms of section 296, no person may artificially fertilise a woman in terms of a surrogate agreement before the confirmation of the agreement or after 18 months from confirmation. Section 303 provides that artificial fertilisation not authorised by the Court is an offence and punishable in terms of section 301. In this respect, one could presuppose that artificial fertilisation after 19 months would be in contravention of the Act, and similarly, so would be artificial fertilisation before the agreement is confirmed. The effect

<sup>289</sup> *Cape Dairy & General Livestock Auctioneers v Sim* 1924 AD 167; *Standard Bank of SA Ltd v Essop* 1997 (4) SA 569 (D). Christie RH *The law of contract in South Africa* 3ed (1996), 377-8.

<sup>290</sup> For example, Drugs and Drug Trafficking Act 140 of 1992, Tobacco Products Control Act 12 of 1999, Section 10(1)(a)(b) CTOP and Section 14 Sexual Offences Act 23 of 1957.

<sup>291</sup> This is not a hard and fast rule. The court will consider the subject matter of the prohibition, the purpose of the legislation, the available remedies in the case of breach, the nature of the mischief the provision aimed to avoid, and any inconvenience that may flow from finding that the agreement is invalid. Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 761.



of such contravention and the subsequent illegality is not stipulated in terms of the Act.

The ordinary principles of contract law provide that when an agreement is illegal, the agreement itself has no legal effect and is void. The parties to the contract are not permitted to bring an action founded on the contract and are thus not entitled to claim specific performance and/or damages or cancellation and/or damages.<sup>292</sup> However, if one party has 'innocently' performed in terms of an illegal agreement, that party may be able to claim relief in the form of unjustified enrichment, unless such party is of 'equal guilt'.<sup>293</sup>

Hence it can be submitted that, although it is not expressly provided for in the Act, any surrogacy agreement which is either entered into in contravention of the Act, or any conduct which flows out of such agreement which amounts to a contravention, would result in the agreement being void. The parties will not be able to rely on any remedy as provided for in terms of the general law of contract and, only in the case where only one of the parties were 'guilty', could the other party rely on unjustified enrichment to recover that which he/she has performed.<sup>294</sup> However, the law of unjustified enrichment provides that you can recover your performance or, if not possible, recover the monetary value of the performance and taking this into consideration I submit, as it will be argued later, that in the case of a surrogacy agreement, return of performance or a claim for the monetary value thereof will not adequately redress the harm or loss suffered as a result of performing in terms of the agreement.

#### 4.2.4.2 Common law illegality

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<sup>292</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 768, 769

<sup>293</sup> When parties to an illegal agreement are of equal guilt they are prohibited by way of the *par delictum rule* from recovering any of the performance that they have made. Thus if both the parties to the illegal agreement were aware that the agreement constituted an illegal agreement, neither party may at a later stage claim from the other recovery of any performance made. *Jajbhay v Cassim* 1939 AD 537; *Essop v Abdullah* 1986 (4) SA 11 (C); *Jordaan v Penmill Investments CC* 1991 (2) SA 430 (E). Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 769.

<sup>294</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 769.

When the purpose of the agreement and/or the performance required therein is seen to be opposed to the interests of the state, to the interests of justice or to the interests of the public, the agreement is regarded as one which is against public policy.<sup>295</sup> What constitutes public policy or the interests of the public varies from time to time as the opinions of generations vary. Today, the 'appropriate norms of the value system embodied in the Constitution' provides the basic frame of reference'.<sup>296</sup> Those agreements which interfere with the full exercise of a person's right or have the clear expected tendency to bring about a state of affairs which the law sees as harmful are regarded as agreements which are against public policy.<sup>297</sup> In any event, our courts are required always 'when interpreting any legislation, and when developing any common law or customary law... [to] promote the spirit, purport and object of the Bill of Rights'.<sup>298</sup>

In the 2007 case of *Barkhuizen v Napier*, the CC held public policy to encapsulate the following meaning:

'Public policy imports the notion of fairness, justice and reasonableness. Public policy would preclude the enforcement of contractual terms if its enforcement would be unjust or unfair. Public policy, it should be recalled, is the general sense of justice of the community, *the boni mores*, manifested in public opinion.'<sup>299</sup>

If the agreement offends one's conscience or sense of morality, such agreement is *contra bonos mores* or contrary to the legal convictions of society.<sup>300</sup> There is no clear-cut distinction between agreements which are against public policy and those which conflict with societies' convictions. In *Eastwood v Shepstone* 1902 TS 294, the court noted that it was not

<sup>295</sup> *Richards v Guardian Assurance Co.* 1907 TH 24; *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A); *Juglal NO v Shoprite Checkers t/a OK Franchise Division* 2004 (5) SA 1 (A). Christie RH *The law of contract in South Africa* 3ed (1996), 384.

<sup>296</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC); Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 763; Treitel GH *An outline of the law of contract* 6ed (2004), 188.

<sup>297</sup> *Barkhuizen v Napier* 2007 (5) SA 323 (CC); Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 765.

<sup>298</sup> Section 39(2) of the Constitution.

<sup>299</sup> 2007 (5) SA 323 (CC)

<sup>300</sup> 1902 TS 294 302. Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 768.

necessary to classify contracts which are contrary to common law or contrary to public policy or contra boni mores. The court held that:

'...[the court] has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals... once it is clear that any arrangement is against public policy, [the court] would be wanting in [its] duty if [it] hesitated to declare such arrangement void. [One must] look at the tendency of the proposed transaction, not its actually proved result.'<sup>301</sup>

Taking the above into consideration, it can be submitted that whether or not we choose to deal with public policy and good morals as one form of illegality or as separate forms, they are both in the process of being made redundant by the 'appropriate norms of the objective value system embodied in the Constitution'.<sup>302</sup> The core principles of equality, human dignity and freedom, as well as the limitations clause present us with a coherent system with which to determine whether or not the interests of society, the interests of justice or the boni mores have in any way been offended. In addition to the supreme law are the decisions by the CC which may assist us in determining what agreement is appropriate and just and what is not. As the opinions of people change daily and from generation to generation, the CC provides us with an up-to-date objective value system to assist in determining whether or not an agreement or the actual purpose thereof is illegal in terms of our common law.

In the heavily criticised judgment of *Barkhuizen v Napier*, a divided CC held that, on the basis that public policy had to be determined with reference to the Constitution, a time bar clause which had been incorporated into the short term insurance contract prohibiting the applicant from legally challenging a decision on the part of the insurer not to pay, unless the applicant had instituted the claim within 90 days after the rejection of the insurer, to be in accordance with public policy, accordingly reasonable and fair and resultantly enforceable.<sup>303</sup> Although in this case the applicant could not provide sufficient evidence as to why he had failed to comply with the time clause, the CC

<sup>301</sup> Christie RH *The law of contract in South Africa* 3ed (1996), 384, 385.

<sup>302</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 768.

<sup>303</sup> 2007 (5) SA 232 (CC).

reasoned that in ordinary circumstances, it would be inconceivable to deny the applicant a claim when his reasons for non-compliance with the clause were caused by factors beyond his control.<sup>304</sup>

The effect of such judgment for contract law as a whole is that 'for the first time, it will be necessary to analyse the circumstances under which the claimant failed to exercise his/her rights within the relevant time limits'.<sup>305</sup> In effect, this case means that 'the notion that people should almost always be allowed to contract as they wished – regardless of whether its terms operated unfairly or harshly against one party – is no longer the case'.<sup>306</sup>

#### 4.2.4.2.1 The effect of common law illegality on the rights of the parties to the surrogacy agreement

In light of the above, surrogacy contracts in themselves may perhaps be seen by many to be against public policy and contra bonis mores. The SALC and the AHPC dealt exhaustively with the ethical and moral issues of surrogacy in their 1991 Report and a detailed examination thereof would exceed the scope of this research. Nevertheless this research does necessitate some form of investigation into the 'common law illegality' aspects of surrogacy.

In paragraph 4.2.4.2 above, it was submitted that it is no longer required that common law illegality be categorised into agreements which are opposed to

<sup>304</sup> In the SCA case, reported as *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), the court also held that a time clause did not violate the terms of the Constitution. The matter was on appeal from the Pretoria High Court who had decided that the respective time clause violated section 34 of the Constitution in that it prevented the claimant from approaching a court to seek suitable redress, as well as it was against public policy.

<sup>305</sup> Chronis M 'Barkhuizen and Napier revisited – Not the final word by the Constitutional Court' (June 2007) Deneys Reitz general case law update <http://denysreitz.caselaw.barkhuizenandnapier-not-the-final-word-by-the-constitutional-court> accessed on 20 April 2011; Meiring I 'Constitutionality of a time-limitation clause in a contract: *Barkhuizen v Napier* 2007 (5) SA 323 (CC)' <http://www.itinews.co.za/print.aspx?type=2&i...> (accessed on 21 April 2011).

<sup>306</sup> De Vos P 'Freedom of contract no more: South Africa's Constitutional Court and the horizontal application of the Bill of Rights' (February 2009) <http://www.thecourt.ca/...freedom-of-contract-no-more/south-africa-s-constitutional-court-and-the-horizontal-application-of-the-bil-of-rights> (accessed on 21 April 2011); De Vos P 'Constitutionally speaking: R.I.P pacta sunt servanda' (April 2007) <http://www.constitutionallyspeaking.co.za/rip-pacts-sunt-servanda> (accessed on 20 April 2011).

the interests of the state, interests of justice, interests of the public or those which are contra boni mores. After 17 years of constitutional supremacy, we are able to determine so-called common law illegality with the aid of the Constitution, the limitations clause and judicial precedent. Any agreement which itself purports to be opposed to the full exercise of one's constitutionally entrenched rights, or has the expected tendency to bring about a state of affairs which the law sees as harmful or offends one's conscience or morality can be held to be illegal in terms of the common law.

A surrogate motherhood agreement is an agreement between a surrogate mother and a commissioning parent(s) whereby the surrogate agrees to be artificially fertilised for the purpose of bearing a child for the commissioning parent(s).<sup>307</sup> In this respect the surrogate is exercising her right to make decisions regarding reproduction. Surrogacy itself is a form of assisted reproduction which gives effect to this right on the part of the commissioning parents. The fact that surrogacy has sometimes been described as womb-leasing or baby trading is inaccurate (further argument in support of this statement will be provided in paragraph 4.6 below: commercial surrogacy). If surrogacy was illegal in terms of our common law, and more importantly, if surrogacy was in conflict with the rights as contained in the Constitution, Chapter 19 would not be in existence. The effect of Chapter 19 is that surrogate motherhood has been recognised by Parliament as a form of assisted reproduction. In this respect it is submitted that the practice of surrogacy itself is not in conflict with the interests of the public, state, justice or contra boni mores: chapter 19 gives expression to the needs, desires and interests of many to found a family and make decisions regarding reproduction.<sup>308</sup>

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<sup>307</sup> For the full definition see section 1(1) of the Act.

<sup>308</sup> Although the practice of surrogacy has been submitted to not be contrary to common law, there may be terms incorporated into the individual surrogacy agreement which could amount to be in conflict with the common law. For example, a term which stipulates that the surrogate mother must live in solitary confinement during the pregnancy may not only amount to an unwarranted limitation on her right to freedom, but in addition to this, solitary confinement of the surrogate mother may not be held to be in the interests of the public, the state, justice or the boni mores.

#### 4.2.5 Formalities

Once the requirements of capacity, agreement, intention, certainty, possibility and legality are fulfilled, the agreement must then conform to the required formalities. Contracts can take the form of written agreements with express and implied terms or alternatively, contracts can be entered into orally. Some contracts, such as deeds of sale and antenuptial contracts must be notarially executed.<sup>309</sup> Formalities can be imposed by the contractants themselves and/or by statute.<sup>310</sup> In the case of surrogacy contracts, the formalities required for confirmation are stipulated in sections 292 and 293 of the Act.

The contract will only be legally enforceable upon confirmation by the High Court with the necessary jurisdiction. The contract must be signed by all the parties and must be entered into in South Africa. Upon entering into the agreement, at least one of the commissioning parents and the surrogate must be domiciled in South Africa.<sup>311</sup> Where the commissioning parent and/or surrogate are married or involved in a permanent life partnership, the spouse or partner of the relevant party must provide his or her written consent.<sup>312</sup>

In addition to the formal requirements stated above, the substantive requirements of suitability and competency must also be present before the High Court will confirm the contract (these requirements were comprehensively examined in Chapter 2 and 3).

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<sup>309</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 759; Christie RH *The law of contract in South Africa* 3ed (1996), 142.

<sup>310</sup> For example, The Alienation of Land Act 68 of 1981 requires the alienation of all land to be in writing and signed by the parties or their respective agents. The National Credit Act 34 of 2005 requires all credit agreements to be in a documentary format, to comply with the various requirements as set out in the Act and to be delivered to the consumer in the prescribed manner. Van der Merwe S and Others *Contract general principles* 3ed (2007), 163, 164; Christie RH *The law of contract in South Africa* 3ed (1996), 122.

<sup>311</sup> The inclusion of the domicile restriction is to purportedly reduce the likelihood of foreign nationals seeking surrogate mothers in South Africa. On good cause shown, the court may dispense with the requirement that the surrogate be domiciled in South Africa upon commencement of the contract. Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-18.

<sup>312</sup> Section 293(3) provides that if the surrogate is not the genetic parent of the child to be born of the agreement, and the spouse or partner unreasonably withholds his or her consent, the court may dispense with this requirement.



#### 4.2.5.1 The effect of invalidity on the rights of the parties to the agreement

In the case of a surrogacy agreement, once all the above mentioned requirements are present, the Court will be tasked with making a finding regarding the validity of the agreement. If the agreement is found to have met all the requirements, the Court will make an order reflecting this. The effect of a valid and enforceable surrogacy agreement is that it is legally binding on all the parties to the agreement, and as it was stated in chapter 3, the child which will be born of the agreement will be seen as a child born of the commissioning parents.

However, if the agreement is found not to be in accordance with the Act and is resultantly invalid, the effects of such invalidity would be as follows. First, any surrogacy agreement which is not confirmed by the High Court is not considered as a valid and enforceable contract and has the effect that if a dispute were to arise at a later stage, the parties cannot rely on the contents of the agreement to protect their legal positions. Secondly, the effect of an invalid surrogacy agreement will be in accordance with the common law position which identifies the woman who gave birth to the child as the legal mother.<sup>313</sup>

An example of conduct which could invalidate the contract would be if the surrogate was artificial fertilised before the application for confirmation. The result of such invalidity would be that any child born of that invalid surrogacy agreement will be for all purposes the child of the surrogate, whether or not such child has a genetic relation with the commissioning parent(s). Thus, no parental rights and responsibilities will be conferred on the commissioning parents. The only avenue available to the commissioning parents (to acquire the child as their own) is to apply for the adoption of the child. However, without a valid agreement, the commissioning parents have no leverage to

<sup>313</sup> The common law position is encapsulated in the maxim *mater semper certa est*: 'the effect of...an invalid surrogate motherhood agreement [is that it] will reinstate the ordinary rules to determine the status of the child and the acquisition parental responsibilities and rights... [and such parental responsibilities and rights] will vest...in the surrogate mother who gave birth to the child'. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 357, 359.



compel the surrogate to relinquish the child, and in this respect, to consent to the child's respective adoption.

Making use of the same example of pre-emptive fertilisation, invalidity may have the effect that the commissioning parents change their mind and no longer want to have the child as their own. Thus an additional consequence of invalidity could be that the surrogate may be burdened with a child which she never intended to have. The outcome of this is that the child will be 'unwanted' and will more than likely be raised in a home where he/she is unwelcome. Where the surrogate is in a relationship it is unclear whether her partner will have to assume parental rights and responsibilities towards the child born of the agreement as well. There exists a dreadful possibility that the surrogate may die, the commissioning parents do not want the child and the partner of the surrogate finds him/herself in the position where he/she must now raise a child on his/her own.

In chapter two, paragraph 2.2.2.7, the requirement that the partner of the surrogate must consent to the agreement was discussed. It was noted that section 293 (which provides for the consent of the partner of both the surrogate and the commissioning parent) provides that if a surrogate is married or involved in a permanent relationship, the court may not confirm the agreement unless the surrogate's husband or partner provides his/ her written consent and becomes a party to the agreement.

With reference to the above, attention must be drawn to section 299 of the Act which deals with the effect of the termination of a surrogacy agreement. Section 299(c) provides that where the agreement is terminated, the surrogate and her husband/partner, if any, or if no surrogate and no partner, the commissioning father, are obliged to accept the obligation of parenthood. Effectively what this means is that if the agreement is terminated, and the surrogate has passed on or disappeared or does not want responsibility towards the child, the Act provides that the surrogate mother's husband or partner is obliged to accept parentage of the child born of the agreement.

Despite the fact that Dr Louw argues 'that the words "obliged to accept" in section 299(c) rules out [the] possibility [that the surrogate mother's husband or partner will have to accept parentage of the child]', the author submits that she disagrees. The word 'obliged' can have two meanings, first, to force, necessitate or to coerce and secondly, to please or indulge. In the author's opinion, section 299(c) does not ask the husband or the partner of the surrogate mother to think about taking on the parentage of the child born of the agreement, there is no request for gratification. In the author's opinion, section 299(c) places an obligation on the husband or partner of the surrogate to accept parentage of the child born of the agreement in the event of termination. If the husband or partner was not required to provide written consent to the agreement, then the author could submit that the word 'obliged to accept' could possibly amount to a request on the part of the legislature, nonetheless the husband or partner does become party to the agreement, and is, in terms of section 299(c) obligated to accept the parentage of the child born of the agreement in the event of invalidity.<sup>314</sup>

After having considered the seven requirements of a general contract, it is apparent that a surrogacy agreement, whether expressly or impliedly stated, also necessitates that these requirements be met. Nonetheless, although the Act provides for penalties in the case of contravention of the Act, the Act does not implicitly state what effect the illegality will have on the continued existence of the agreement. The author submitted that the effect of an illegal surrogacy agreement will mean that the agreement is void, and all the legal consequences which have arisen out of the operation of such agreement will cease to exist. In this respect, it is further unknown what the effect an illegal surrogacy agreement will have on the positions of the parties to the agreement. Does illegality have the same legal consequences as invalidity i.e the surrogate is deemed the mother of the child born of the agreement? This is an important question, one which the answer cannot be found in the Act, and resultantly will be further considered in forthcoming paragraphs.

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<sup>314</sup> Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 364.

### 4.3 Breach of Contract

After having discussed the seven requirements of a contract and the effect of invalidity and illegality, the author will now commence with a general discussion regarding breach of contract. The purpose hereof is first, to determine if surrogacy agreements can be 'breached' in the ordinary sense of the word and secondly, if the remedies which are available to normal contractants in the matter of breach are available to the parties of a surrogacy agreement.

Breach of contract has been said to encompass all acts of a contractant that infringe his/her co-contractants rights under the contract.<sup>315</sup> There are three categories of breach namely: negative performance (delayed performance by the debtor or the creditor), positive malperformance (defective performance by the debtor or creditor) and anticipatory breach (either in the form of repudiation or prevention of performance).<sup>316</sup> The act of breach entails wrongful conduct on the part of the guilty party.

Before commencing an investigation into the types of breach it is foremost necessary to qualify what 'performance' entails in terms of a surrogate motherhood agreement. The surrogate mother agrees to perform as follows: she agrees to be artificially fertilised with the gametes of the commissioning parent, to gestate, if any, the foetus(es) which results from the fertilisation and to relinquish the child to the commissioning parents upon birth or as soon as reasonably possible thereafter. The fertile commissioning parent agrees to have his/her gamete used in the process of artificial fertilisation and then the commissioning parent(s) agree(s) to compensate the surrogate for all the necessary expenses incurred and to accept the child as his/her/their own upon birth or as reasonably soon thereafter. Cognisance must be taken of the fact that in the examples which are illustrated below, neither of the parties are assumed to take on the role of the creditor or debtor. The author has

<sup>315</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 326.

<sup>316</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 325; Kerr AJ *The principles of the law of contract* 6ed (2002), 575; Christie RH *The law of contract in South Africa* 3ed (1996), 571-4; Treitel GH *An outline of the law of contract* 6ed (2004), 369.

attempted, where possible, to formulate examples which both parties can take on either role i.e. in some case the surrogate will be the debtor and other the creditor and visa versa.

#### 4.3.1 Negative malperformance: Mora debitoris

Having regard to the above, the first type of breach that can occur is that of negative performance. Negative performance can occur when the debtor fails to tender performance timeously or renders defective performance timeously which the creditor rejects.<sup>317</sup> Mora can only occur where the performance is still possible despite the delay.<sup>318</sup> Nevertheless, even if the debtor performs after being in delay for some time, such performance does not repair the breach and he/she can still be held liable for loss suffered.<sup>319</sup> Notably, if performance becomes impossible after the debtor has fallen into mora, he/she will be guilty of prevention of performance.<sup>320</sup>

##### 4.3.1.1 Requirements of mora debitoris

The debtor must have failed or omitted to perform timeously as agreed to in terms of the contract. The debtor's failure or omission will however only be wrongful if the obligation to perform had become due and enforceable, or where a time has not been stipulated, a reasonable time has elapsed.<sup>321</sup>

In the case of a surrogacy agreement the parties may have committed breach in the form of mora debitoris as follows: the agreement may stipulate that the surrogate is to relinquish the child born of the agreement at birth or as soon thereafter as reasonably possible and the surrogate fails to do so. In this

<sup>317</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 338.

<sup>318</sup> *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1977 (4) SA 310 (T).  
Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 338.

<sup>319</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 338.

<sup>320</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 346.

<sup>321</sup> Three forms of mora are possible, namely mora ex re, ex persona and ex lege. To give rise to mora ex re, 'a precisely calculable' or specific date must have been stipulated. When a contract does not stipulate a time for performance, the creditor must place his debtor in mora by way of demanding performance. This is known as mora ex persona. Mora ex lege is when the debtor is placed in mora by operation of the law. *Broderick Properties Ltd v Rood* 1962 (4) SA 447 (T). Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 339.

instance the surrogate will be in mora because she has failed to perform timeously. In respect of the male commissioning parent/ donor gamete, he may fail to timeously fertilise the ovum.

#### 4.3.2 Negative malperformance: Mora creditoris

When a creditor wrongfully fails to render his/her co-operation to enable the debtor to perform, the creditor is placed in mora. Mora creditoris can occur before performance by the debtor is to occur or at the time when performance is to occur.<sup>322</sup> If performance becomes impossible after the creditor is placed in mora, the creditor is liable.<sup>323</sup>

##### 4.3.2.1 Requirements of mora creditoris

If a contract stipulates the exact time which a debtor must perform, or alternatively when the creditor has demanded performance by the debtor, that is the time when the creditor is obliged to cooperate and accept performance. If he or she fails to cooperate when required, he/she will be guilty of negative malperformance.<sup>324</sup>

A commissioning parent will be in mora if, when the time arises for the surrogate to undergo the fertilisation procedure, the commissioning parent is unable to produce one of his/her gametes for conception. Similarly, the surrogate may be guilty of mora creditoris if, when the time arises for her to undergo fertilisation, and the gamete of the commissioning parent is ready and available for implantation, the surrogate does not make herself available for fertilisation.

#### 4.3.3 Positive malperformance: Debtor

<sup>322</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 372.

<sup>323</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 374.

<sup>324</sup> *LTA Construction Ltd v Minister of Public Works & Land Affairs* 1992 (1)SA 339; *Nel v Cloete* 1972 (2) SA 150 (A); *Goldstein and Wolff v Maison Blanc (Pty) Ltd* 1948 (4) SA 446 (C).

The second type of breach is positive malperformance. For ease of reference the author has separated positive malperformance by a debtor and positive malperformance of a creditor.

A debtor is in breach by way of positive malperformance if for example he/she performs defectively or conducts himself/herself in a manner which is contrary to contractual prohibition. In the case of positive malperformance, the performance is tendered, however, it is not in compliance with the terms of the contract.<sup>325</sup>

#### 4.3.3.1 Requirements of positive malperformance: Debtor

The debtor must have performed and such performance must be defective. As a general rule, performance only becomes possible with the cooperation of the creditor.<sup>326</sup> Defective performance is one that does not conform to the united provisions of the contract.<sup>327</sup>

Some parties to a surrogacy contract include clauses which refer to the negative obligations of the parties. For example, in my personal experience, I dealt with a situation where a couple wanted to include a clause providing that the surrogate was not permitted to smoke, drink or have sexual intercourse during the pregnancy.<sup>328</sup> The effect of this clause was that the agreement would be breached if the surrogate chose to smoke, drink or have sexual intercourse. In this respect, a negative obligation was placed on the surrogate, whereby she would be guilty of positive malperformance if she carried out any

<sup>325</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 348.

<sup>326</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 350.

<sup>327</sup> *Sweet v Rageruhara* 1978 (1) SA 131 (D); *Shatz Investments (Pty) Ltd v Kalovymas* 1976 (2) SA 545; *SA Sentrale Ko-op Graanmaatskapy Bpk v Shifren* 1964 (4) SA 760 (A). Van der Merwe S and Others *Contract general principles* 3ed (2007), 352.

<sup>328</sup> The first two acts were understandable: medical practitioners strongly advise against smoking and drinking during pregnancy. However, the third act i.e. sexual intercourse during the pregnancy had to be qualified. The surrogate was fully aware of the fact that sex during the first few weeks after artificial fertilisation was dubious in respect of ensuring that the commissioning father and not the partner or spouse of the surrogate become the father of the child to be born of the agreement. However once the fertilisation becomes effective and a child is conceived, it should not be a problem if the surrogate chose to have sex with her partner or spouse. Nevertheless, the agreement was drafted to include the clause and the qualification that sex between the surrogate and her partner was prohibited for the first three months of the pregnancy.

of these acts. Her breach would result out of the fact that she had performed in a manner in which she was obligated not to do.

#### 4.3.4 Positive malperformance: Creditor

The circumstances in which a creditor can defectively perform are greatly limited, however it is possible.<sup>329</sup> Performance will be defective if such performance does not comply with the terms of the contract or the conduct itself is contrary to a contractual prohibition.

##### 4.3.4.1 Requirements of positive malperformance: Creditor

The requirements are the same as that of a debtor's positive malperformance: he/she must have performed defectively.

The commissioning parent(s) will be in mora if when the child of the agreement is born, the parent(s) fail to accept the child as their own upon birth or as soon as possible thereafter.

#### 4.3.5 Anticipatory Breach

The third form of breach is known as anticipatory breach, and it encompasses that which it says: anticipatory breach is breach which occurs prior to the rendering of performance.<sup>330</sup> Anticipatory breach creates either an uncertainty as to whether the party is going to perform or a certainty that he or she will not perform. Repudiation and prevention of performance are the forms of anticipatory breach. The meaning and requirements of repudiation and prevention of performance are different and will thus be examined in separate paragraphs below.

##### 4.3.5.1 Repudiation

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<sup>329</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 375.

<sup>330</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 357; Treitel GH *An outline of the law of contract* 6ed (2004), 346.



Repudiation has several meanings. It can be used to describe the refusal of one contractant to perform in terms of a legally binding contract, or the announcement by such party that he or she is unable to perform, or the refutation of the actual existence of the contract itself.<sup>331</sup>

#### 4.3.5.1.1 Requirements of repudiation

There is repudiation where the words or conduct, when interpreted from the position of a reasonable person in the position of the innocent party, demonstrate that the guilty party, without lawful grounds, has no intention to comply with his or her contractual obligations. Regarding the element of wrongfulness, repudiation is only wrongful if the infringing conduct comes to the attention of the innocent party and leaves him or her under the impression that the guilty party is not going to perform.<sup>332</sup>

In the instance of surrogacy agreements, both the surrogate and the commissioning parent(s) could be guilty of repudiation. The surrogate may, through her words or her conduct, create the impression that she has no intention to relinquish the child upon birth.<sup>333</sup>

<sup>331</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 363; Kerr AJ *The principles of the law of contract* 6ed (2002), 575.

<sup>332</sup> The difference between repudiation and prevention of performance: repudiation anticipates eventual malperformance with relative certainty, whereas prevention of performance anticipates malperformance with absolute certainty. *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA). Van der Merwe S and Others *Contract general principles* 3ed (2007), 363, 365.

<sup>333</sup> *S. Otto & another v D. Lessnar*. [298/2011 (D) unreported]. In a recent High Court application a couple approached the Court for an urgent order forcing the surrogate to hand over the child. The child was to be born within the next week. The couple had entered the agreement without the required High Court confirmation. The couple were anxious regarding the enforceability of the agreement. When they informed the surrogate that they were required to attend Court for confirmation, relations between the parties became 'somewhat strained' and the surrogate created a 'wish list' which included a new motor vehicle. The surrogate's conduct led the commissioning parents to believe that she was not going to adhere to her contractual obligations. In her affidavit before the court, the commissioning mother stated that because the surrogate had no genetic tie to child, she had 'absolutely no right to the child'. The child was born and Judge Trevor Gorven granted an order confirming the agreement between the commissioning parent(s) and the surrogate. The court held that in addition to the couple being the legal parents of the child, their full parental rights and responsibilities commenced at birth (the surrogate had withdrawn her intention to oppose and her 'wish list' was never produced). The importance of this case lies firstly in the fact that the Court gave effect to the contractual intention of the parties, and secondly, that although *de facto* confirmation was not envisaged by the Act, in this case, it was permitted.

On the other hand, the commissioning parents may create the impression that they have no intention to accept the child as their own upon birth. Importantly, in both situations, the words or conduct of the respective party must, on the basis of a reasonable person, be construed to mean that the guilty party does not intend to comply with his/her contractual obligations.

#### 4.3.5.2 Prevention of performance

The second form of anticipatory breach is prevention of performance. Performance will be prevented if the performance is in fact impossible or alternatively, despite performance being physically possible, for reasonable and practicable purposes it is deemed impossible.<sup>334</sup>

##### 4.3.5.2.1 Requirements of prevention of performance

Prevention of performance only amounts to breach if the conduct of the contractant infringes a contractual obligation. In effect, after the conclusion of the contract the debtor makes it impossible for him/her to perform or the creditor makes it impossible for him/herself to render cooperation to the debtor.<sup>335</sup> Performance will be prevented if the performance is in fact impossible or alternatively, despite performance being physically possible, for reasonable and practicable purposes it is deemed impossible.<sup>336</sup>

The surrogate may be guilty of prevention of performance if she continues to use contraception during the process of artificial fertilisation. In this respect, as a result of her own conduct, she has made her performance in terms of the contract impossible.

<sup>334</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 366.

<sup>335</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 366, 377.

<sup>336</sup> Performance will be prevented if the performance is in fact impossible or alternatively, despite performance being physically possible, for reasonable and practicable purposes it is deemed impossible. 'For purposes of this branch of law it is unnecessary to distinguish between *vis maior* or *casus fortuitus*, which between them include any happening, whether due to natural causes or human agency, that is unforeseeable with reasonable foresight and unavoidable with reasonable care'. Van der Merwe S and Others *Contract general principles* 3ed (2007), 366, 367; Kerr AJ *The principles of the law of contract* 6ed (2002), 527.

After having examined the three types of breach and their respective requirements, the author will now individually examine the three principal remedies for breach as provided for by the general mechanisms of the law of contract. Subsequent to each examination, the author will discuss each remedy in light of a surrogacy agreement and establish if in fact the remedies provided for in the general law of contract are adequate to remedy breach in the case of a surrogacy agreement.

#### 4.4 The primary remedies for breach

In South Africa, the law of contract provides three primary remedies in the instance of breach: specific performance, cancellation and damages. Specific performance is the most natural remedy available in respect of breach. It amounts to a claim for the fulfilment of the actual performance to which the contracting parties agreed i.e. the guilty party is ordered to perform in terms of his or her original contractual obligations.<sup>337</sup> Specific performance is not available when performance is impossible and a court will not easily grant it when it may cause great hardship to the guilty party or to society as a whole.<sup>338</sup> Cancellation is as the word itself states. The innocent party is afforded the opportunity to elect whether to abide by the contract or alternatively cancel.

Through abiding, the contract continues to exist as if no breach has occurred. With cancellation, restitution must occur. Lastly, damages are a form of patrimonial compensation awarded to the innocent party for harm or loss suffered as a result of the breach. All three remedies have their own specific requirements.

##### 4.4.1 Specific Performance

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<sup>337</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 381; Christie RH *The law of contract in South Africa* 3ed (1996), 571-4, 578-9.

<sup>338</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A). Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 872.

The first remedy available in the case of breach is that of specific performance. Often termed the most natural remedy because it gives effect to the original consequences of the agreement, an order of specific performance requires of the parties to perform as in terms of the original contract. The parties must perform specifically as they agreed to perform. In order for an innocent party to claim specific performance, such innocent party must establish that performance is possible. A reciprocal contract requires reciprocal performance: if the innocent party is unable to or refuses to perform himself/herself, the guilty party need not perform and a claim for specific performance will not be upheld.<sup>339</sup>

In the matter of *Benson v SA Mutual Life Assurance* the court provided guidelines regarding the granting of a claim for specific performance.<sup>340</sup> First, specific performance will not be ordered if it is impossible to perform and/or performance would result in a great hardship for a party or the public at large, secondly, a claim for specific performance may be refused if performance will be difficult to enforce, and thirdly, and this is submitted to be the most pertinent to this research, specific performance will not be granted if it concerns the freedom of the individual.<sup>341</sup>

If the court does grant an order for specific performance, it may be in the form of an order for absolute specific performance, or on the other hand, the court may order specific performance with the alternative of damages. The innocent party may also claim damages in addition to specific performance as a result of harm or loss suffered as a result of the guilty parties conduct. In some circumstances, the innocent party may also elect to claim damages as a substitute for specific performance: however loss, must be established.<sup>342</sup>

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<sup>339</sup> *Exceptio non adimpleti contractus* – the principle of reciprocity. The guilty party may rely on this exceptio as a defence when he has been ordered to perform and the innocent party has yet himself to do so. The guilty party can withhold performance. *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 1 SA 391 (A); *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

<sup>340</sup> 1986 (1) SA 776 (A).

<sup>341</sup> 1986 (1) SA 776 (A).

<sup>342</sup> Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 876; Van der Merwe S and Others *Contract general principles* 3ed (2007), 381.

#### 4.4.1.1 A claim for specific performance in the event of breach of a surrogacy agreement

In a surrogate motherhood agreement, specific performance would entail the following: the commissioning parents are obliged to compensate the surrogate for all the necessary and reasonable expenses incurred as a result of the medical procedures, treatments and tests and are held liable for the costs involved in the confirmation of the agreement. The commissioning parents must also accept the parental rights and responsibilities of the child upon birth. The surrogate is contractually obligated to gestate the child and to relinquish her rights and responsibilities towards such child upon birth or as soon as reasonably possible thereafter.

In addition to these clear obligations, the commissioning parents may also be obliged to obtain life and disability insurance for the surrogate in the event of her death or disability as a result of the pregnancy and birth of the child. The surrogate may also be required to adhere to a lifestyle which is conducive to a successful pregnancy i.e. the surrogate may agree to not smoke or to drink.

In the case of a surrogacy agreement, specific performance would necessitate that the surrogate and the commissioning parent(s) adhere to their original contractual duties. If the parties claim specific performance, the breach will not affect the continuity of the contract: the parties will continue as if the breach did not occur.

The author submits that despite the fact that a claim for specific performance is seen to be the most natural remedy available in the case of breach, it will be difficult to stipulate if the position will be the same having regard to surrogacy agreements. Although the topic will receive greater consideration in the discussion of enforceability, I submit that, in the case of surrogacy agreements, specific performance will not be wholly achievable. Specific performance will be almost unproblematic if the breach arises as a result of the commissioning parent's unwillingness to compensate the surrogate *after* the child is born and *after* the child has been handed to the parents. In this

situation, all that is required of the commissioning parents would be to monetarily reimburse the surrogate.

However, taking into consideration the guidelines provided by the Appellate Division in *Benson v SA Mutual*, the situation will not be the same if after the artificial fertilisation and before the birth of the child, the commissioning parents repudiate the agreement and no longer intend to raise the child as their own.<sup>343</sup> Despite the fact that section 297 provides that a full surrogacy agreement may not be terminated post artificial fertilisation, the question arises if a court would be in the position to compel the commissioning parents to accept the parentage of the child that they no longer desire? Will this not amount to granting specific performance at the risk of sacrificing the freedom of the individual? In this respect, I submit that a claim for specific performance will not be entirely possible in the case of a surrogacy agreement. As it will be shown below in the discussion regarding cancellation, I suggest that the likelihood of a claim of specific performance being upheld will be ultimately determinate on the degree, nature and materiality of the breach: i.e. what effect has the breach had on the 'substance' of the agreement.

#### 4.4.2 Cancellation

Taking into consideration that the author has just examined the most 'natural' remedy available to parties in the event of breach, and reached the decision, that in the case of surrogacy agreements, it is not truly 'natural' in the contractual sense of the word, the author now turns to cancellation: the most 'unnatural' form of contractual remedy.

In the event of breach, the innocent party may elect not to continue with the contract and choose to cancel. However, because cancellation is not seen as a 'natural' consequence of entering into a contract, cancellation will only be permissible in limited circumstances. In the general law of contract, the right to cancel will usually depend on whether a cancellation clause has been

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<sup>343</sup> *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

included in the contract, or in the absence of such a clause, the material effect the relevant breach has had on the substance of the contract.<sup>344</sup> Regarding the materiality of the breach, the innocent party must prove that the nature and extent of the breach is so serious that the substance or core of the contract cannot be repaired by any other available remedy. Unlike specific performance, cancellation does not require a court order and thus the innocent party need not acquire a court order permitting him/her to cancel.<sup>345</sup>

Cancellation has the effect that the primary obligations which were created in the contract are terminated, however the secondary obligations to pay damages and make complete restitution (restore the *status ante-quo*) continue to exist until they are fulfilled.<sup>346</sup>

#### 4.4.2.1 Electing to cancel in the event of breach of a surrogacy agreement

As is the case in all other forms of contract, if a party were to elect to cancel a surrogacy agreement, he/she would have to show that the breach was so serious that no other remedy would cure such breach. The effect of such cancellation, in ordinary contractual terms, will be that each party would be required to restore to the other that which the other party has performed.

I submit that although cancellation is not 'natural' in the ordinary contractual sense, in most cases of breach arising out of a surrogacy agreement, I submit that it would be quite unproblematic to show that the breach was so serious

<sup>344</sup> In the case of a cancellation clause or a *lex commissoria*, the innocent party may have to give notice to the guilty party that he or she is in breach and a certain period may be stipulated for rectification. A contract may also state that no notice is required and any form of default will be accepted as repudiation and the innocent party may elect to cancel automatically. Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 877; Van der Merwe S and Others *Contract general principles* 3ed (2007), 399 – 402; Christie RH *The law of contract in South Africa* 3ed (1996), 571- 4, 597.

<sup>345</sup> *Goldstein and Wolff v Maison Blanc (Pty) Ltd* 1948 (4) SA 446 (C); *Sweet v Ragereghara NO and others* 1978 (1) SA 131 (D); *Mahabeer v Sharma NO and another* 1985 (3) SA 729 (A). Du Bois F and Others *Willes principles of South African Law* 9ed (2007), 878; Van der Merwe S and Others *Contract general principles* 3ed (2007), 377-8.

<sup>346</sup> The right to resile may be excluded through waiver, estoppel, prescription or the inability to make restitution. *Coetzee v Impala Motors (Edms) Bpk* 1962 (3) SA 539 (T). Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 879, 880; Van der Merwe S and Others *Contract general principles* 3ed (2007), 402 – 5; Treitel GH *An outline of the law of contract* 6ed (2004), 378.



that it affected the substance of the contract. For example, when the parties enter into a surrogacy agreement and the surrogate refuses to relinquish the child to the commissioning parents upon birth, this would certainly amount to a material breach which would give the commissioning party the necessary 'proof' to establish that he or she is entitled to cancel the agreement.

Nonetheless, it would in truth be difficult to imagine how parties to a surrogacy agreement could effect restitution. The pregnant surrogate could not be expected to hand over the foetus which she is carrying. In this situation, unlike the situation in other day-to-day contracts, we are not faced with an object which can simply be restored to the other party. In ordinary cases of breach, parties can monetarily compensate one another for the costs incurred as a result of the agreement. I submit that, in the case of restitution arising out of a surrogacy agreement, this will not be the case.

It is also difficult to ascertain what the commissioning parent(s) would have to give back to the surrogate. The surrogate cannot be given back the months of her life which she has spent undergoing artificial fertilisation and being pregnant. It could be said that she could be monetarily compensated for her loss as a result of the breach, but it would require a complex formula to determine the quantum of such loss.

For legal scholars, surrogacy agreements give essence to the saying that 'cancellation is an extraordinary remedy which is available only in exceptional circumstances'.<sup>347</sup> The effect of cancellation of a surrogacy agreement as a result of breach is unimaginable, in that restitution in the true sense of the word is not possible.

#### 4.4.3 Damages

The last remedy which will be discussed is that of damages. In the law of contract, innocent parties may only claim monetary compensation for actual

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<sup>347</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 398.

loss arising out of breach of contract, no damages can be awarded for intangible or non-patrimonial loss.<sup>348</sup> Damages are calculated according to positive interest i.e. the innocent party will claim damages sufficient to put him/her into the position he/she would have been had the contract been fulfilled.<sup>349</sup> Damages may not be too remote from the loss or harm: a causal connection must exist between the breach and the damage. The damage must flow directly from the loss or harm or it must have been reasonably supposed to have occurred in consideration of possible breach.<sup>350</sup> The innocent party is also obligated to minimise his loss.

#### 4.4.3.1 A claim for damages arising out of the breach of a surrogacy agreement

In the case of breach, a party who claims damages for the loss or harm suffered as a result of the breach will be awarded damages calculated in accordance with positive interest i.e. the monetary compensation which the party will receive will attempt to rectify the breach by placing the party in the position they would have been had the contractual obligations been properly fulfilled. In the case of a surrogacy agreement, it cannot be submitted that an award for damages on the basis of positive interest could be legally plausible. Damages are in any event only awarded for patrimonial loss, so the parties would not be able to claim for emotional shock or pain and suffering.

<sup>348</sup> Actions for pain and suffering, physical inconvenience, injured feelings and disappointment are only claimable in terms of the law of delict under the *actio iniuriarum*. Nonetheless, the author submits that no amount of monetary compensation will remedy the harm or loss suffered as a result of breach in the case of surrogacy agreements and thus, so as not to exceed the ambit of this research, no further discussion will be carried out regarding non-patrimonial loss. See for example Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 1166 – 1121 and Neethling J, Potgieter JM and Visser PJ *Law of Delict* 5ed (2005), 11 – 17.

<sup>349</sup> Actual and prospective damages are available to the innocent party. Actual damages refer to the damage concretely incurred, whilst in the case of prospective damages, the innocent party can claim for that which would have been. An example of prospective damages is loss of profit of earning capacity. In the case of surrogacy agreements, many parties include a clause in the agreement relating to loss of earnings as a result of the pregnancy. The surrogate is then entitled to compensation for this. *Lavery & Co Ltd v Jungheinrich* 1931 AD 156; *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines, Ltd* 1915 AD 1. Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 425, 462, 882; Van der Merwe S and Others *Contract general principles* 3ed (2007), 420.

<sup>350</sup> Van der Merwe S and Others *Contract general principles* 3ed (2007), 415 – 419; Treitel GH *An outline of the law of contract* 6ed (2004) 345; Du Bois F and Others *Wille's principles of South African Law* 9ed (2007), 883.

In respect of the surrogate, no amount of monetary compensation would any way cure the emotional loss or harm she may suffer as a result of the breach of the agreement. If a woman chose to be surrogate and the commissioning parents breach the agreement and subsequently an election is made to cancel, the surrogate may be burdened with a child who she would more than likely have had no intention to keep or to have. No amount of money will put her in the position she would have been if the contract had been successful.

The commissioning parents, on the other hand, find themselves in a much more propitious position than the surrogate in the case of breach. They can mitigate their emotional loss or harm through finding themselves another woman who is willing to be their surrogate. However, if this is not possible, once again, no monetary value will be able to place them in the position they should have been if the contract had been correctly performed. I submit that the award for damages as a result of breach of a surrogacy agreement will never be able to cure the emotional loss or harm suffered as no monetary value can be attached to such loss or harm.

Having considered the three types of breach and the three primary remedies available, I submit that, in the case of breach arising out of a surrogacy agreement, no remedy will suffice. A claim for specific performance will not amount to providing a natural remedy to parties, when specific performance will amount to creating hardship or in effect, specific performance will sacrifice the freedom of one party for the satisfaction of the other. Hence, specific performance in respect of surrogacy agreements will only be possible if the breach has yet to have a serious effect on the substance of the agreement.

In the case of cancellation, once again, it will depend on the nature and extent of the breach. Although I will discuss termination of the agreement in greater detail below, cancellation is different because unlike termination, cancellation arises out of breach, whereas termination is permitted in terms of the Act. In the case of termination, the respective positions of the parties are delineated in the Act. In the case of cancellation, the seriousness of the breach will

determine whether it is possible to simply 'restore the *status ante quo*', and hence it is unknown what effect cancellation will have on the legal positions of the respective parties.

Lastly, having regard to a claim for damages, the law of contract does permit a claim for damages arising out of emotional loss or harm and in this respect, I cannot submit that a claim for damages will remedy the breach. And even if the law of contract did permit claims for non-patrimonial loss, I cannot submit that any amount of monetary compensation will remedy the loss or harm suffered by the innocent party.

Surrogacy agreements do not deal with an every day ordinary object, surrogacy agreements deal with the future of a child and the future of his/her respective parents. Surrogacy agreements do not amount to ordinary contracts, and in that I conclude, that the ordinary remedies for breach of contract will not cure harm or loss suffered as a result of the breach by the guilty party to the surrogacy agreement.

#### 4.5 The enforceability of surrogacy agreements

After having reached the conclusion above that the ordinary remedies of the general law of contract will not adequately cure harm or loss suffered as a result of the breach of a surrogacy agreement, the author will now commence with a determination into whether valid surrogacy agreements are in fact enforceable in the ordinary contractual sense of the word. Whilst making such a determination, the author will also will examine the effect that termination of surrogacy agreements have on the positions of the parties and the implications, if any, that termination has on the principle of *pacta sunt servanda*. In the end, the author intends to show that surrogacy agreements are not wholly enforceable, they do not entirely protect the interests of the parties to the agreement, and ultimately, South African surrogacy agreements do not take into consideration the principle of *pacta sunt servanda*.

#### 4.5.1 The impact of section 298 and section 299 on the principle of pacta sunt servanda

In South Africa, a distinction is made between partial and full surrogacy. To recapitulate, partial surrogacy is when the surrogate mother is both the genetic and gestational mother and consequently there exists a genetic bond between the surrogate and the child to be born of the agreement. In the instance of full surrogacy there is no biological connection between the surrogate and the child to be born of the agreement: the surrogate is merely the gestational mother.

In both situations, the child born of the agreement is considered a child born of the commissioning parents and the surrogate is obliged to relinquish the child at birth or as soon thereafter as possible.<sup>351</sup> Consequently genetic relations do not have an effect on the legal status of the agreement.<sup>352</sup>

<sup>351</sup> Section 297(1)(a) of the Act. In terms of the current Assisted Reproductive Technologies Regulation Bill, 2010 of India (currently before parliament for promulgation), the legal status of a child born as a result of a surrogacy agreement is the same as that in South Africa. He or she is deemed to be 'the legitimate child of the intended parents, whether married or separated'. Note that unlike in South Africa, once the Bill is passed, homosexual couples will not be able to make use of Indian surrogates. Homosexuality is not a legally recognised sexual relationship in India. Rimm J 'Booming baby business: Regulating commercial surrogacy in India' (2008-2009) 30 *Pa Journal of International Law* 1429. Jha DN 'City gifts gay couple parenthood' (2011) available at <http://www.timesofindia.indiatimes.com/article/show/7511373.cms?prtpage=1> (accessed on 21 February 2011).

<sup>352</sup> Surrogacy in the UK is currently governed by the 2008 Human Fertilisation and Embryo Act (hereinafter referred to as 'HFEA'). In terms of the Act, despite surrogacy being legally recognised, the contract itself is not deemed legally enforceable. The child born of the agreement is the child of the surrogate mother and the commissioning parents must wait six weeks after the birth of the child before they may apply to court for a parental order having the effect of granting them full parental rights and responsibilities. Although commercial surrogacy is prohibited in the UK, on the grounds of it being contra boni mores, in the recent High Court matter of *Re: L (a minor)* 2010 EWHC 3136 (Fam), the court made it clear that the child's welfare is paramount and would trump public policy on payments. In this matter, the commissioning parents had entered into a surrogacy agreement in Illinois with an Illinois woman. In Illinois, commercial surrogacy is permitted. Upon returning to UK, the commissioning parents made an application for a Parental Order (Section 54 HFEA) which could grant them full parental rights and responsibilities of the child born of the agreement. The Court was aware that payments had been received by the surrogate which had exceeded the reasonable expenses incurred as a result of the pregnancy. However, the court held that on the basis of the child's best interest and general welfare, in this regard, these factors overrode the public policy ban on payments in respect of surrogacy agreements. Gamble N and Ghaeveart L 'In practise – the HFEA 2008: Revolution or evolution' (2009) available at <http://www.gambleandghaevent.com/assets/family%20law%20aug09.pdf> (accessed on 29 May 2010); Ghevaert L 'International surrogacy: Progress or media hype' (2011) available at [http://www.bionews.org.uk/page\\_85514.asp?print=1](http://www.bionews.org.uk/page_85514.asp?print=1) (accessed on 31 January 2011);

Genetic relations may however develop into a dilemma when it is necessary to determine the enforceability and performance obligations of the contract. Section 298 expressly provides that when the surrogate mother is also the genetic mother of the child to be born of the agreement, she has up until 60 days after the birth of the child to decide whether or not to terminate the agreement. A surrogate mother with no genetic relation to the child may not terminate the agreement after she has been artificially fertilised.<sup>353</sup> Hence, as noted by Professor Louw, a partial surrogate mother 'may terminate and withdraw from a fully enforceable surrogate motherhood agreement – an option which is by implication not available to a (full) surrogate mother who is not genetically related to the child'.<sup>354</sup> Hence, not only does Chapter 19 give rise to constitutional implications (as evidenced by chapter two and three), but the application of Chapter 19 also has contractual implications. Parties who choose full surrogacy agreements are afforded equal contractual protection in terms of the Act, whereas in the instant of partial surrogacy, the surrogate will always have the 'upper contractual hand'.

In addition to this, despite the fact that the Act expressly provides for the right of termination by the surrogate, it does not afford the commissioning parents a similar right, either in respect of full or partial surrogacy. Thus it is at this point the submission of the author that Chapter 19 of the Act, although it aims to provide protection for all parties to the agreement, fails to do so in that a potential partial surrogate mother will from the commencement of the agreement possess the ascendant position.

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Beckford M and Ross T 'Childless couples win right to pay surrogate mothers' (2010) available at [http://www.telegraph.co.uk/health/children\\_shealth/8190131/childless-couples-win-the-right-to-pay-surrogate-mothers](http://www.telegraph.co.uk/health/children_shealth/8190131/childless-couples-win-the-right-to-pay-surrogate-mothers) (accessed on 31 January 2011); Blackburn-Starza A 'Child's welfare is ruled 'paramount' in surrogacy case' (2010) available at [http://www.bionews.org.uk/page\\_83861.asp?print=1](http://www.bionews.org.uk/page_83861.asp?print=1) (accessed on 31 January 2011).

<sup>353</sup> This is of course made subject to section 300 and CTOP. Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-22.

<sup>354</sup> '[Full] surrogacy is legally a safer option when compared to [partial] surrogacy because under a [full] surrogacy arrangement, the child is not biologically related to the surrogate mother, and traditional western legal norms are more inclined to recognise the genetic parent as the legal parent'. Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-21; Burpee AL 'Momma drama: A study of how Canada's regulation of surrogacy compares to Australia's independent regulation of surrogacy' (2008 -2009) 37 *International and Comparative law Journal*, 229.



#### 4.5.1.1 Full surrogacy

In order for the author to further substantiate the submission that was made above, the differences in the legal consequences which arise out of partial and full surrogacy agreements will be examined below. The author will discuss the enforceability of the respective agreements as well as the impact that termination will have on the rights of respective parties.<sup>355</sup>

'In the case of full surrogacy, the agreement [is irrevocable] once the surrogate mother has been impregnated'.<sup>356</sup> In terms of the Act, the only possibility of termination post fertilisation is in terms of CTOP (section 300). The SALC defended the irrevocability of a full surrogacy agreement on the grounds that it would be in the best interests of the child to grow up with at least one commissioning parent.<sup>357</sup> The SALC submitted that if the surrogate were allowed to escape the agreement, the child would have no genetic tie to its mother.<sup>358</sup> With regard to commissioning parents, the Act is silent regarding the termination capacity of commissioning parents in the case of a full surrogacy agreement. In light of this, it is presupposed that they too cannot terminate the agreement post artificial fertilisation. Consequently, any form of contravention by either party after artificial fertilisation in a full surrogacy agreement will amount to a breach of the contract.

##### 4.5.1.1.1 The contractual implications of the termination of a full surrogacy agreement

Having regard to full surrogacy agreements and section 297 of the Act, post fertilisation of the surrogate mother, the principle of *pacta sunt servanda* appears to be the overriding consideration regarding the enforceability of the

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<sup>355</sup> The right to make decisions regarding reproduction (section 12(2) of the Constitution), and the impact that the application of Chapter 19 has on this right was examined in detail in the chapter 3 of this research.

<sup>356</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-23.

<sup>357</sup> This submission was examined in chapter three under the heading 'The constitutional implications of the application of Chapter 19 of the Act on the best interests of the child.'

<sup>358</sup> For further discussion see paragraph 4.5.1.2 below.



agreement. In terms of the Act, neither party may terminate the agreement after the surrogate mother has been artificially fertilised. Hence, it is submitted that any act or omission in contravention of the agreement by either of the parties to the contract would amount to breach.

In the instance of breach of a full surrogacy agreement, I submit as I did in previous paragraphs, that the ordinary remedies of the general law of contract will not cure the emotional loss or harm suffered as a result of the breach. However, if the innocent party were to claim specific performance, the materiality of the breach will be pertinent in the determination of whether the innocent party could rely on such a claim. As it has been stated before, a court will not grant an order for specific performance where the result thereof will cause hardship to the guilty party or the public at large, or, and this is particularly relevant to the case of breach in surrogacy agreements, the court will not make an order for specific performance which will result in unfairly burdening the freedom of the guilty party.

Taking the above into consideration, the question may be raised what impact might such specific performance have on, amongst others, the right to make decisions concerning reproduction? With regards to the commissioning parents, it is argued that their position remains the same as it was at the time of fertilisation. They entered the agreement in order to obtain a child, and at this point we can assume that their inability to conceive and give birth is still permanent and irreversible and that in this respect, their right to make decisions regarding reproduction has not in any way been infringed. If breach occurs post fertilisation, and specific performance is granted, the commissioning parents will still become the legal parents of the child upon birth. And if it is they who breached the agreement, say for example they indicated that they no longer want to raise the child of their own, the commissioning parents can always put the child up for adoption upon birth.

On the other hand, the surrogate still finds herself in a position where (despite the fact that she knowingly and voluntarily agreed to be in such position) she cannot, during the period in which she is acting as a surrogate,

make any further decisions regarding reproduction. She has exercised her freedom of contract and her right to make decisions regarding reproduction, but at the same time, any further decisions which she may want to make are limited post fertilisation. Although I intended to submit that on a whole, Chapter 19 may have the inadvertent effect that its application favours the contracting position of the surrogate, in the case of full surrogacy, I reluctantly submit that the commissioning parents may find themselves in a more auspicious position than the surrogate. If specific performance is ordered it will be the surrogate and not the commissioning parent's freedom which will be seriously jeopardised.

In conclusion, although the possibility of breach is always present, the Act expressly provides that the full surrogate (and hypothetically the commissioning parents) cannot terminate the surrogacy agreement post fertilisation. The agreement is fully enforceable against all the parties. If the surrogate wanted to terminate the agreement her constitutional rights are trumped by the same rights which the commissioning parent(s) hold. In this respect, the surrogate is not carrying her own child. To compel her to relinquish the child to the commissioning parent(s) upon birth would not amount to an infringement of her rights. It would be an infringement of the commissioning parent(s) rights if the surrogate were permitted to keep the child.<sup>359</sup> Parallel to this, if the commissioning parent(s) were to breach the contract and wanted to terminate the agreement, they would be contractually bound to continue with their contractual obligations. However, in this situation, we may be creating the possibility of a child being brought up by parents who no longer desire such a child. It is thus my submission that in the instance of full surrogacy agreements, the principle of *pacta sunt servanda* is the determining factor.

#### 4.5.1.2 Partial Surrogacy

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<sup>359</sup> *S. Otto v D. Lessnar* (298/2011 (D) unreported).

'It is argued that to compel a surrogate mother to surrender [her] child is to "sacrifice a woman's reproductive autonomy to the principle of 'pacta servanda sunt.'"<sup>360</sup>

The author will now discuss the enforceability and likelihood of breach in the case of partial surrogacy agreements.

Partial surrogates are genetically related to the child to be born of the surrogacy agreement which they concluded.<sup>361</sup> Partial surrogate mothers may terminate the agreement in terms of section 298 of the Act.

At present, the South African courts have not yet had the opportunity to determine whether partial surrogacy agreements are in fact enforceable. The Act, whilst clear on the fact that the partial surrogate has the right to 'opt out' of a valid surrogacy agreement, however neglects to provide whether the commissioning parents are afforded the same entitlement.<sup>362</sup> In this respect it is argued that because the surrogate has been afforded the right to terminate the agreement, although the ordinary rules of contract would provide that any act in contravention of the agreement would amount to breach, refusal by the surrogate to relinquish the child born of the agreement upon birth will not amount to breach of the agreement.

#### 4.5.1.2.1 The contractual implications of the termination of a partial surrogacy agreement

South African law requires that when concluding a surrogacy agreement, the surrogate has the intention to gestate a child for a person(s) who are on their own unable to do so. Upon entering the agreement it can be assumed that the

<sup>360</sup> Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-23.

<sup>361</sup> Partial surrogacy does not require any form of medical biotechnology and records of its application can be found as long ago as in the Old Testament (Genesis 16:1-2). Partial surrogacy is not permitted in India or Israel on the grounds that it amounts to an act similar to incest.

<sup>362</sup> The 60 day cool off period is a result of the SALC adopting a 'more child-centred approach [which] acknowledges that the child's best interests are closely linked to those of his or her parents and the interests of the family as a whole'. Louw A *Chapter 19: Surrogate Motherhood* in Davel CJ and Skelton A *Commentary on the Children's Act 38 of 2005* (2007), 19-23, 19-25.

surrogate has a virtuous aim and does not willingly choose to form a bond with the child.

The state of affairs is however altered when the child is in fact genetically related to the surrogate. It can be presupposed that when the child that you are carrying is in fact yours it will be additionally challenging to prevent yourself from forming a bond with such child.<sup>363</sup> The surrogate's thoughts and actions at birth cannot be predicted. 'Surrogacy agreements involve a precommitment to transfer parental rights to the intending parents.'<sup>364</sup> Frankly, a possibility exists that the surrogate may form an emotional bond with the child and changes her mind regarding the relinquishment of parental rights and responsibilities.

In the instance of partial surrogacy and having regard to her reproductive freedom, to force a partial surrogate to give up her genetic child could be said to forego her reproductive freedom to the enforceability of the contract. In this respect her reproductive rights will trump the principle of *pacta sunt servanda*. The surrogate will for all purposes be the legal mother of the child born of the agreement.<sup>365</sup> On the other hand, the conception of the child must take place with the gamete of at least one commissioning parent and in this respect it cannot be said that it is fair and reasonable to permit the surrogate to keep the child whilst the commissioning parent may not. Taking the child from one and giving it to another will have the effect that the dignity of the genetically related commissioning parent is impaired. It cannot be argued that either the rights and interests of the surrogate or the rights and interests of the

<sup>363</sup> 'A growing body of research about birthmothers supports neither the conclusion that women's feelings are unmaternal when they agree to act as surrogates, nor the idea that they invariably direct their flow of maternal feelings to conform to contractual intent'. Kandel RF 'Which came first: The mother or the egg? A kinship solution to gestational surrogacy' (1995) 47 *Rutgers Law Review*, 191.

<sup>364</sup> 'Such precommitment risks that a) the surrogates will initially fail to predict their level of attachment to the unborn child and will discount the risk that they will not want to surrender the child after birth and b) that nobody (including the surrogate) will be able to foresee how much the surrogate will value the child once she has gestated the child for nine months'. 'The entire process of reproduction is an inherent part of a woman's existence and that transferring a child to someone else upon birth is unnatural and psychologically damaging'. Burpee AL 'Momma drama: A study of how Canada's regulation of surrogacy compares to Australia's independent regulation of surrogacy' (2008 -2009) 37 *International and Comparative Law Journal*, 320.

<sup>365</sup> Section 299 (a) and (b) of the Act.

genetically related commissioning parent are greater than the other. Most importantly: this outcome cannot be said to take into account the best interests of the child. Hence, when a partial surrogacy agreement is terminated, the legal positions of all the parties are unknown. Even though the section 299 of the Act provides that the genetic surrogate will be the mother of the child, the Act does not stipulate what rights and responsibilities the genetic commissioning father may have in respect of the child. Hence, the application of section 299 of the Act, although it has been included to regulate the positions of the parties in respect of termination of the agreement, does not fulfil this objection. The rights of the commissioning father are indefinite and this and this cannot be said to fulfil one of the purposes of Chapter 19: to provide legal certainty in respect of the legal positions of all the parties to a surrogacy agreement.

Despite the fact that it could be submitted that the genetic commissioning father may be able to obtain parental responsibilities and rights towards the child born of the agreement via section 21 of the Act, the 'Parental responsibilities and rights of unmarried fathers' clause, the author would have hoped that the legislation would have incorporated a provision into Chapter 19 which expressly stipulates the rights and the position of the genetic commissioning father in the case of the termination of partial surrogacy agreements. This would have avoided the lengthy practical process which is associated with a section 21 application.

Nonetheless, although the partial surrogate has the right to terminate the agreement, the effect of termination is contrary to the whole purpose of Chapter 19: it does not protect the interests of the parties to the agreement, and the child born of the agreement will not be the child of the commissioning parents. The fact is that section 298 creates an imbalance between the parties to the surrogacy agreement. The surrogate is expressly permitted to terminate and the commissioning parents are not; if the surrogate does terminate then she is regarded as the legal mother of the child. However, there still exists the issue regarding the fact that one of the commissioning parents' gametes would have been used in the process of artificial fertilisation

and it cannot be said to be just and reasonable to proclaim that such commissioning parent has no right to the child to which he is genetically related to.

Taking the above into consideration, I therefore conclude that for purposes of legal certainty and for the sake of the protection of all parties to the agreement, partial surrogacy should on a whole not be permitted. Even if we were to rely on the remedies of breach, none of them would be appropriate. We cannot compel either party to specifically perform in terms of a partial surrogacy agreement, neither party can restore to each other that which the other has performed and even if the parties were permitted to claim monetary compensation, no amount will repair the emotional hardship suffered. Lastly, if the legislature does not perceive the interests of the parents of the child to be adequate reasoning to prohibit partial surrogacy, it is my submission that it should so be done on the basis of the best interests of the child.

In support of this recommendation, the following needs consideration:

'Arguably, the ban on partial surrogacy facilitates the process of establishing parental rights over the child born through surrogacy because it guarantees that at least one member among the commissioning participants will bear a genetic child and that the surrogate will not have a rivalling claim to parentage-on genetic grounds at least.'<sup>386</sup>

#### 4.5.2 Conclusion: The contractual implications of the application of Chapter 19 of the Act

The law of contract revolves around two principles: the freedom to contract and *pacta sunt servanda*. The idea is that parties have the right to choose with whom, about what and on which terms to contract and such contract is enforceable. When parties choose to enter into a surrogacy agreement they are required to meet a number of requirements before the Court will validate

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<sup>386</sup> Rimm J 'Booming baby business: Regulating commercial surrogacy in India' (2008-2009) 30 *Pa Journal of International Law*, 1439.

such agreement. Once the contract has been freely and voluntarily concluded the agreement is deemed to be legally enforceable.

Nevertheless, surrogacy contracts do not deal with an object of performance as is the case normally in contract law. Children are not commodities. And when one contracts to be a surrogate mother or a commissioning parent, it cannot be presupposed that simply because the contract is supposedly enforceable that the parties are going to fulfil their respective obligations.

To the legislature, it seems as though it was practically unproblematic to distinguish between full and partial surrogacy agreements. It was simply decided that where a genetic relation exists between surrogate and child, the surrogate will be afforded a 'cooling off period' and in the case where no genetic relationship exists, termination of the agreement can not occur after fertilisation. There are three potential problems with the Act in this respect.

Firstly, the Act does not make provision for the possibility of breach of the agreement. It is my submission that the general laws of contract are alone inadequate to legislate surrogacy disputes correctly and that it why it is of vital importance that Chapter 19 expressly provides for all possible issues that may arise out of a surrogacy agreement. The purpose of Chapter 19 was to give legal recognition to surrogacy agreements in South Africa and to provide protection for all parties concerned. Despite the Act acknowledging the right of the partial surrogate to terminate the agreement, it does not provide for breach and suitable remedies.

Secondly, section 298 does not make provision for termination by the commissioning parents. In this, it must be said that the legislature has presented us with an illusion that only the surrogate may want to terminate the agreement. This is surely not the case. Despite the precedent deficiency in respect of partial surrogacy, I submit that there may be occasions when the commissioning parents may also want to terminate. In this respect, it is thus my submission that failure to include provisions regarding termination by



commissioning parents leaves a vast lacuna in the law which may lead to future contractual disputes.

Lastly, I have to conclude that for purposes of contractual clarity and in the best interests of all parties concerned, that partial surrogacy should not be permitted in South African law.<sup>367</sup> Partial surrogacy presents a quandary from day one: there is no genuine protection afforded to the commissioning parent because the Act provides that the surrogate will always have the opportunity to escape performance, and on the event that the surrogate does choose to terminate and is subsequently 'awarded' parentage of the child, no provision is made for the rights of parentage of the genetic commissioning parent.<sup>368</sup>

It is therefore my submission that full surrogacy is the only way in which to prevent the formation of legal disputes at a later stage. The recent case of *S. Otto v D. Lessnar* (298/2011 (D) unreported) has shown a willingness by the Court to give effect to the contractual obligations of a surrogacy agreement and to compel full surrogate mothers to relinquish the child at birth. In this respect, formal surrogacy protects the interests of the commissioning parents insofar as they, as the genetic parents, are guaranteed that they will receive the child which is genetically linked to them. Full surrogacy also has the effect that the child born of the agreement will be raised by a parent who is genetically linked with them. This is, in the SALC and the AHPC's opinion, as in the best interest of the child.

Having regard to the above, the question may arise as to the surrogate's interests and if they are protected in the case of full surrogacy. The answer is

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<sup>367</sup> The SALC proposed a complete ban on partial surrogacy on the basis that international jurisprudence showed that the most problems arising out of the enforcement of surrogacy agreements was when the surrogate was also the genetic mother and 'it would be unconscionable to force a mother to part with her natural child and that a surrogate who is not genetically related to the child would be able to relinquish him or her more easily'. On the other hand the AHPC recommended both full and partial surrogacy. Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 341, 342.

<sup>368</sup> In the infamous case of *In re Baby M* 537 A.2d 127, 1234 (NJ 1988), the court upheld the partial surrogate mother's right to exercise her parental rights over the child born of the agreement based solely on the irrefutable fact that she, the surrogate, was the genetic mother of the child. Lee RL 'New trends in global outsourcing of commercial surrogacy: a call for regulation' (2009) 20 *Hastings Women's Law Journal*, 175.

yes, but only to a certain extent. Despite the fact that the surrogate receives reasonable compensation for the necessary expenses incurred as a result of the surrogacy, the surrogate may not be reimbursed for the time lost to artificial fertilisation procedures or medical examinations or other burdens that result from the pregnancy.<sup>369</sup> 'Pregnancy is not an intellectual experience which women (as surrogates) can control and therefore stand back and become an incubator for couples', pregnancy and artificial fertilisation could amount to 18 months of going to and from doctors, 18 months in a change of lifestyle, 18 months of not being truly free to live your own life. It is the surrogate and not the commissioning parents who undergo a transformation in the anticipation of the commissioning parent's child. It is the surrogate's body which experiences growth and maybe even pain. All the commissioning parents have to do is wait.

The author is not suggesting that the surrogate is forced into the agreement and that she is less 'enriched' by the process than the other parties. There are many women who are willing to sacrifice up to 18 months of their life to reproduce a child for another. Nonetheless, it is my submission that in order to enhance the protection of the interests of the surrogate and all other parties concerned, in addition to permitting only full surrogacy, commercial surrogacy should be permitted in South Africa.

#### 4.6 Commercial surrogacy and the right to occupational freedom

In the paragraph above, the author submitted that partial surrogacy should not be permitted and that, in order to provide sufficient protection for all the parties concerned, commercial surrogacy should be legally recognised and regulated in South Africa. Not only should the practice of commercial surrogacy be permitted on the basis of it being in the best interests of all the parties concerned, but in addition to this, commercial surrogacy should be permitted because it gives expression to the right to make decisions regarding reproduction and the right to freedom of trade, occupation and residence.

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<sup>369</sup> Some parties do agree to include a clause regarding loss of income.

#### 4.6.1 The right to occupational freedom

The right to make decisions regarding reproduction, as contained in section 12(2) of the Constitution, has been dealt with throughout this research, and thus the author does not intend to examine it anew. Chapter 19 has been submitted to have given effect, even if not in full, to our rights in terms of section 12 through affording legal recognition to surrogacy as a form of assisted reproduction.

Section 22 of the Constitution, or what is generally termed the 'economic rights clause', provides that everybody has the right to choose their trade, occupation or profession freely, however such trade, occupation or profession may be regulated by law. Section 22, although it is a 'substantially more limited right than its predecessor in terms of the Interim Constitution', aims to provide everyone with occupational freedom.<sup>370</sup> Having regard to the fact that article 12(1) of the German Constitution closely resembles that of section 22 of our Constitution, as well as the interpretation which the German Constitutional Court afforded to the meaning of the right to occupational freedom in the case of *7 BVerfGE 377* (1958), the authors of 'The Bill of Rights Handbook' submit that an occupation may be defined 'as an activity through which people seek to provide for their needs, not only in the material sense, but also in the more idealistic sense of pursuing their self-development.'<sup>371</sup>

In the 1997 case of *S v Lawrence* (decided in terms of the Interim Constitution), the CC held that the provisions of the Liquor Act 27 of 1989 did not infringe the appellants' right to freely engage in economic activity.<sup>372</sup> The applicants had been charged and convicted in a court *a quo* for contravening the Liquor Act. In making its judgment, the CC held that although the

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<sup>370</sup> The right to trade, occupation and profession in terms of section 26 of the Interim Constitution (IC) was wider than its successor, section 22. Section 26 of the Interim Constitution provided that every person had the right to freely engage in economic activity. Devenish GE *A Commentary on the South African Bill of Rights* (1999), 302; De Waal J and Currie I *Bill of Rights Handbook* 5ed (2010), 484, 491.

<sup>371</sup> De Waal J & Currie I *Bill of rights Handbook* 5ed (2010), 491,492.

<sup>372</sup> *S v Lawrence* 1997 (4) SA 1176 (CC).

Constitution provided that everybody had the right to engage freely in the economy, such freedom of economic activity could be regulated through constraints and limitations. These constraints and limitations will be permissible if the purpose thereof is to protect or improve the quality of life, human development, economic growth or any other purpose expressly provided for in the Constitution. In this case the CC recognised that although the effect of the operation of the Liquor Act limited the right to economic activity, the purpose of such limitation was reasonable in that it was enacted to protect and improve the quality of life.<sup>373</sup>

Having regard to the above it can therefore be submitted that illegal economic activity would not fall in the ambit of section 22. In the matter of *JR Investments CC v Minister of Safety and Security*, “the court referred to certain unspoken restrictions [in respect of section 22], such as the “absolute prohibition on unlawful income producing activities” like drug trafficking, blackmail and child prostitution.”<sup>374</sup>

Taking the above into consideration, it can thus be concluded that the right to occupational freedom as found in section 22 of the Constitution, encompasses the right of all citizens to seek not only an occupation which will satisfy their material needs but, in addition to this, everyone is entitled to seek an occupation which assists in their further self-development. However, as it was stated in *Lawrence*, and as is the case with all other rights, the right to occupational freedom is not absolute and can be limited if there is a reasonable constitutionally acceptable purpose for such limitation.

#### 4.6.2 The right to compensation for reproductive services

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<sup>373</sup> In the case of *S v Jordan* 2002 (6) SA 642 (CC), the CC once again held that the infringement on the right to economic activity was justified because the purpose of the limitation was reasonable. The appellants in this case were a brothel-keeper, the brothel's employee and a sex worker who had all been convicted in the court *a quo* for contravention of the Sexual Offences Act. This case was decided on the basis of the IC because the cause of action arose in 1996. The case dealt with a challenge against the prohibition of prostitution and brothel-keeping on the basis of the right to economic activity.

<sup>374</sup> 1997 (7) BCLR 548 (N). De Waal J and Currie I *Bill of rights Handbook* 5ed (2010), 491.

With reference to the above discussion, the author submits that payment to a surrogate in exchange for her services as a surrogate can be said to amount to giving effect to the right to economic activity. The occupation in this sense would be to gestate a child for the commissioning parents who are unable to conceive and give birth to a child on their own. By means of acting as a surrogate, the surrogate will both satisfy her material and her personal needs. Despite the fact that every constitutionally afforded right may be limited, at this juncture, the author submits that prohibiting the practice of commercial surrogacy cannot be said to amount to a constitutionally acceptable limitation. Before a conclusion can be made regarding whether the prohibition of commercial surrogacy fulfils a constitutionally acceptable purpose, one must first take into account the arguments for and against the practice of commercial surrogacy.

#### 4.6.3 Arguments in favour of and against commercial surrogacy

Keeping in mind that for many people surrogacy presents a myriad of difficult philosophical, social, legal, moral and ethical issues, the practice of commercial surrogacy is even more controversial. Despite the fact that it is practiced in a number of countries world wide, critics draw comparisons between commercial surrogacy and other stigmatised market transactions that involve the exchange of money for use of another person's body.<sup>375</sup> [Acts

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<sup>375</sup> Countries such as India, Israel, Russia, Slovenia and the states of California and Nevada, USA have recognised commercial surrogacy as a legal form of assisted reproduction. India is the number one international destination for transnational commercial surrogacy agreements. People travel from near and far to take advantage of 'high quality health care, western trained doctors, inexpensive medical treatment and legislation which, [at the point of writing this,] neither prohibits nor permits commercial surrogacy agreements. In India, reproductive tourism, in the form of surrogacy, is amongst the top 10 highest contributors to the country's economy and despite the fact that legislation is currently before parliament which seeks to regulate the practice of commercial surrogacy, such legislation will not have the effect of prohibiting commercial surrogacy outright. In India, unlike in South Africa, the lack of legal regulation permits that perfectly healthy fertile women are able to commission surrogates. At present, the 2005 Indian Council of Medical Research Guidelines regulates fertility services. These guidelines are not legally binding. Presently the 2010 Artificial Reproductive Technologies Regulation Bill is before Parliament. Rimm J 'Booming baby business: Regulating commercial surrogacy in India' (2008-2009) 30 *Pa Journal of International Law*, 1430; Hand J 'Surrogacy in Israel: A model of comprehensive regulation of new technologies' (2005) 5 *UTS Law Review*, 111.

such as] prostitution, baby-selling, organ sales [and human trafficking] are believed to be by some akin to that of commercial surrogacy.<sup>376</sup>

Commercial surrogacy is often outlawed on the grounds that it 'reflects an improper motivation to gestate a child, introduces commerce into matters of sexual behaviour, and commodifies mothers and children'.<sup>377</sup> Opponents of commercial surrogacy often express concerns that it 'reinforces a perception of women as mere "baby-making machines", promotes a view of children as marketable "goods" or products and fears that women who enter these agreements do so of economic necessity, without fully understanding the psychological and physical burdens that they stand to endure in the process'.<sup>378</sup> Some commentators suggest that commercial surrogacy agreements may have the ultimate result that lower income women may turn into 'human breeders' for fertile women who do have the desire to be mothers but do not wish to sacrifice their careers, their physique or undergo the discomfort and inconvenience of pregnancy.<sup>379</sup>

In favour of commercial surrogacy, it has been said that women should not be denied their freedom to contract merely because they are tempted by financial incentives.<sup>380</sup> 'The key enabling condition for a women's sexual rights to be lived, is to control and make decisions about [their] own bodies and

<sup>376</sup> Firstly, the underlying objective of prostitution is pleasurable sexual intercourse, which is vitally different to that of a surrogacy agreement where the objective is to procreate but through artificial means. Secondly, surrogacy is not saving a current life but creating a new one. Rimm J 'Booming baby business: Regulating commercial surrogacy in India' (2008-2009) 30 *Pa Journal of International Law*, 1436, 1450; Burpee AL 'Momma drama: A study of how Canada's national regulation of surrogacy compares to Australia's independent state regulation of surrogacy' (2008 - 2009) 37 *International and Comparative Law Journal*, 326.

<sup>377</sup> Rimm J 'Booming baby business: Regulating commercial surrogacy in India' (2008-2009) 30 *Pa Journal of International Law*, 1436, 1443; Hand J Surrogacy in Israel: A model of comprehensive regulation of new technologies (2005) 5 *UTS Law Review Journal*, 111.

<sup>378</sup> Rimm J 'Booming baby business: Regulating commercial surrogacy in India' (2008-2009) 30 *Pa Journal of International Law*, 1444.

<sup>379</sup> Some interpret commercial surrogacy agreements as commercial contracts under which the gestational mother forfeits her parental rights which creates the risk of commercialising reproductive capacity and commodifying children' in that the 'female reproductive capacity and the child become alienable and negotiable products and services'. Kandel RF 'Which came first: the mother or the egg? A kinship solution to gestational surrogacy' (1995) 47 *Rutgers Law Review*, 202.

<sup>380</sup> Kandel RF 'Which came first: the mother or the egg? A kinship solution to gestational surrogacy' (1995) 47 *Rutgers Law Review*, 212.



sexuality'.<sup>381</sup> Many surrogates say that being paid for their services is not degrading but rather rewarding knowing that they have assisted a couple escape a childless fate. Surrogates are able to improve their lives and the lives of the commissioning parents through 'their work'.<sup>382</sup>

In addition to this, it has been submitted that 'rich South Africans and reproductive tourists have access to a market of reproductive technologies as buyers, but poor people who want to donate eggs or to become surrogates are prevented from legislation from profiting' from their services.<sup>383</sup> 'The expressed morality is that "it is against public policy to place a price on human life," but this applies unequally to the women donating eggs and bearing babies, and not to the medical facilities and businesses that make huge profits from reproductive technologies.'<sup>384</sup>

Thus it can be submitted that on the one hand, those that are opposed to the practice of surrogacy see it as a commodification of reproductive organs and ultimately children, hence the comparison to human trafficking. Whereas on the other hand, supporters of commercial surrogacy are of the opinion that women should be able to choose what they want to do with their bodies, and if they choose to be surrogates, they should be entitled to be sufficiently compensated for their services.

Keeping in mind that the right to occupational freedom can be limited if the limitation serves a reasonable and justifiable purpose, the author will now

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<sup>381</sup> van Zyl M 'Beyond the Constitution: From sexual rights to belonging' (2007) available at <http://www.hsrcpress.co.za> (accessed on 13 April 2011).

<sup>382</sup> Rimm J 'Booming baby business: regulating commercial surrogacy in India' (2008-2009) 30 *Pa Journal of International Law*, 1451, 1452; Hand J 'Surrogacy in Israel: A model of comprehensive regulation of new technologies' (2005) 5 *UTS Law Review*, 111.

<sup>383</sup> 'The National Health Act 61 of 2003 expressly regulates the use of oocytes [(female gametes)] as part of human tissue regulation, but there is no mention of sperm regulation. Sperm donors are paid well for their sperm, but oocyte donors have to comply with rigorous evaluations and tests and may only be compensated "for expenses incurred during the procedure but may not receive any other form of compensation for their actual egg donation".' van Zyl M 'Beyond the Constitution: From sexual rights to belonging' (2007) available at <http://www.hsrcpress.co.za> (accessed on 13 April 2011).

<sup>384</sup> van Zyl M 'Beyond the Constitution: From sexual rights to belonging' (2007) available at <http://www.hsrcpress.co.za> (accessed on 13 April 2011).



determine if the prohibition on commercial surrogacy, as an occupation, is a warranted limitation on the right to occupational freedom.

In *Lawrence*, the CC held that the right to occupational freedom can be limited if the purpose of the limitation is to protect or improve the quality of life, human development, economic growth or any other purpose expressly provided for in the Constitution.<sup>385</sup> In this respect, I submit that the limitation on the practice of commercial surrogacy as an occupation is unwarranted. I cannot agree that in permitting commercial surrogacy, any of these above mentioned factors are placed at risk. In fact, I submit that in prohibiting commercial surrogacy, the quality of life of many people and human development as a whole is not protected and improved, the economy is not given the opportunity to grow and the right to make decisions regarding reproduction is unjustifiably limited. In conclusion, it is the author's submission that to afford protection to these listed qualities (and the right to occupational freedom as a whole), commercial surrogacy should be recognised as a legal form of assisted reproduction. The legislature, through the enactment of the Constitution and specifically the CTOP, has acknowledged that South African women are vulnerable members of society who are subject to exploitation. Hence it is the authors submission that commercial surrogacy should be permitted and regulated through legislation.

If prohibition of commercial surrogacy makes exploitation of vulnerable persons more likely, non-regulation increases the likelihood of abuse and no recourse for the parties.<sup>386</sup> At times, financial compensation is necessary in assuring the positions of the parties to *any* contract are secured. It has already been argued in paragraph 4.5.1.2.1 that partial surrogacy, for reasons of certainty and protection of all parties should not be permitted. Full commercial surrogacy agreements on the other hand are viable. In a third world country like South Africa, women should be afforded the opportunity to

<sup>385</sup> *S v Lawrence* 1997 (4) SA 1176 (CC).

<sup>386</sup> 'It is imperative that governments...understand that refraining from regulating commercial surrogacy due to the moral debate surrounding the issue will serve only to exacerbate the problems of [commercial surrogacy] as a growing industry'. Lee RL 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 20 *Hastings Women's Law Journal*, 275; Weisberg K *The birth of surrogacy in Israel* (2005), 14.

earn money which will assist them in placing themselves and their families in better financial positions.

#### 4.6.4 Commercial surrogacy in Israel

It has been submitted above that commercial surrogacy is a permissible occupation which, if legally permitted, will bring about expression both to the right to make decisions regarding reproduction and to the right to occupational freedom. However, because commercial surrogacy does involve payment for reproductive services, there does indeed exist the possibility of exploitation of women. Thus, if the legislature is going to afford legal recognition to the practice of commercial surrogacy, adequate legislation will have to be enacted to truly protect the rights of all the parties concerned. It is with this in mind that the author will briefly examine Israel and its commercial surrogacy legislation.

As far back as 1992, the Israeli government realised that surrogate motherhood, and in that commercial surrogacy, could not be ignored and that the need for adequate regulation was imperative.<sup>387</sup> It has been said that 'Jewish tradition takes a natural understanding of human needs...Israel is not burdened by the belief that children are only legitimately conceived naturally, between husband and wife...Jewish tradition recognises the importance of building a family.'<sup>388</sup> Effectively, Israel recognises the importance of finding a balance between the government's interest in regulating human reproduction while at the same time respecting personal autonomy and privacy. In this respect, although commercial surrogacy is permitted, the practice is subjected to the strict overview of the Approvals Committee.

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<sup>387</sup> 'Israel unequivocally formed a policy position to legalise and regulate commercial surrogacy in order to protect birth mothers, commissioning parents, children and the general public from the effects of surrogacy'. Lee RL 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 20 *Hastings Women's Law Journal*, 293.

<sup>388</sup> Lee RL 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 20 *Hastings Women's Law Journal*, 294.

In a country such as Israel, commercial surrogacy agreements are permitted and only full surrogacy is legitimate.<sup>389</sup> The laws of Israel and the regulatory procedures which are practised have created a system of clarity, certainty and effectiveness. Similar to the South African position on High Court sanctioning, surrogacy agreements in Israel must be approved by the Approvals Committee who ensure that the agreements are favourable for all parties.

Unlike South Africa, Israel's surrogacy legislation expressly provides that through Israel's public healthcare system, all parties must be screened and counselled before they may commence artificial fertilisation procedures.<sup>390</sup> After screening, the Approvals Committee performs a judicial review procedure of the surrogacy agreement. The agreement is examined to ensure that all the parties' interests have been considered and the parties understand the minutiae of the agreement.

In respect of the surrogate's compensation, although no express guidelines exist and all parties are left to their own devices to determine the figures, the Approvals Committee are tasked with reviewing the compensatory amount to ensure fairness. The result of this is that it is extremely difficult to exploit either the surrogate or the commissioning parents. Compensation is paid in monthly instalments and apart from compensation for the costs involved in the fertilisation and pregnancy, the surrogate is also compensated for, amongst others, insurance, time spent, pain, change in lifestyle, loss of earnings and earning capacity. Israeli law also makes express provision regarding the protection of the commissioning parents: Israel seeks to protect 'their

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<sup>389</sup> Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756 - 1996. Only the sperm of the intended father may be used in the process of artificial fertilisation, reflecting the Rabbinates concern regarding illegitimacy and incest. Hand J 'Surrogacy in Israel: A model of comprehensive regulation of new technologies' (2005) 5 *UTS Law Review*, 111; Weisberg K *The birth of surrogacy in Israel* (2005), 17.

<sup>390</sup> Screening and counselling was suggested by both the SALC and the AHPC, however this was not incorporated into the Act. For further discussion see Louw AS *Acquisition of parental responsibilities and rights* (unpublished LLD thesis, University of Pretoria, 2009), 347-348.

emotional vulnerability as well', in that, surrogates may only terminate the agreement in extreme circumstances of risk to their or the child's health.<sup>391</sup>

Taking this into consideration, the surrogacy laws of Israel have provided a workable, efficient basis for the regulation of commercial surrogacy agreements. Israel has recognised the right of the parties to make decisions regarding reproduction as well as having recognised the right of the surrogate to economic activity. The surrogacy laws of Israel do not permit partial surrogacy, only recognise termination of the agreement on the basis of health (thus giving effect to the principle of *pacta sunt servanda*), compel parties to undergo screening and counselling programmes before, during and after the duration of the agreement and has established the Approvals Committee which is officially tasked in ensuring that the parties are adequately protected and that the surrogate is sufficiently compensated for her services.

With regard to the above, it is apparent that commercial surrogacy can be adequately regulated. Thus it is the authors final submission that commercial surrogacy should be permitted in South Africa. Parties should be able to make decisions regarding reproduction and women should be able to choose surrogacy as an occupation. Commercial surrogacy is an occupation which will not only provide material satisfaction, but will provide the surrogate mother with a sense of self-satisfaction in that she knows that she has given the gift of life.

Commercial surrogacy is not prostitution, trafficking or womb-renting. It is neither about sexual pleasure nor about selling children. Commercial surrogacy is providing a child to those who are either unable to have one themselves or choose not to for other reasons. Recognising a women's right to contract, including the right to receive economic compensation for the supply of reproductive services does not enslave but rather empowers. The fact that the surrogate is financially rewarded for her services is really a non

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<sup>391</sup> Lee RL 'New trends in global outsourcing of commercial surrogacy: A call for regulation' (2009) 20 *Hastings Women's Law Review Journal*, 297, 298; Hand J 'Surrogacy in Israel: A model of comprehensive regulation of new technologies' (2005) 5 *UTS Law Review*, 111.

issue when you consider that without her, these people will not be able to have their own genetically related child.

#### 4.7 Conclusion

At the beginning of this chapter the author set out to determine whether or not surrogacy agreements are wholly enforceable between parties and in the event of breach, what remedies the parties would be able to make use of. The chapter began with a brief discussion regarding the principles of freedom to contract and *pacta sunt servanda* and from there a succinct explanation of the requirements of a general contract and a surrogacy contract took place.

The author came to the conclusion that surrogacy agreements fulfil the requirements of a valid contract in accordance with the general rules of South African contract law. Keeping this in mind, the author then examined the three types of breach, negative malperformance, positive malperformance and lastly, anticipatory breach. At the end of each examination, the author provided probable examples of breach in the case of a surrogacy agreement. This evidenced the fact that breach is possible in the case of a surrogacy agreement.

Thereafter, the author discussed the three primary remedies for breach, namely, specific performance, cancellation and damages. Similarly, the author once again gave examples of probable breach in the case of a surrogacy agreement and examined the consequences of the application of the respective remedies on the rights of the parties. Overall, it was concluded that the remedies which are available to contractants in the case of breach of an ordinary contract are not suitable remedies in the case of surrogacy agreements. None of the remedies take cognisance of the emotional harm which can be suffered as a result of the breach, and even if they did provide for non-patrimonial damage, no amount of monetary compensation would be able to place the parties in the position they would have been had the surrogacy agreement been fulfilled.

With this in mind, the author then turned to section 297, 298 and 299 of the Act. Section 297 provides that all surrogacy agreements are enforceable after artificial fertilisation has taken place. Section 298 stipulates that a partial surrogate has 60 days after the birth of the child to determine whether or not to terminate the surrogacy agreement and thus raise the child as her own. Lastly, section 299 deals with the effect of termination on the legal positions of the party.

The above discussion formed the crux of the chapter. This was where it was concluded by the author that full surrogacy agreements provide better protection for all the parties concerned because post fertilisation, the agreement cannot be terminated. Thus in respect of the enforceability of a surrogacy agreement, full surrogacy agreements ensure that the commissioning parents will receive a child which is genetically related to at least one of them, the surrogate will be reasonably compensated for her services, and finally, the child born of the agreement will be genetically related to at least one of his/her parents. Finally, it was concluded that full surrogacy agreements give meaning to the principle of *pacta sunt servanda*.

Having regard to partial surrogacy, and specifically section 298, the author concluded that the regulation of partial surrogacy has the contrary effect to that which is the purpose of Chapter 19: partial surrogacy does not protect all the parties to the agreement and creates an automatic unequal contractual standing from the moment that the agreement commences. The author submitted that partial surrogacy should not be permitted by legislation because of the unfavourable nature that a partial surrogacy agreement consists of from day one. First, the surrogate will always have the opportunity to terminate the agreement, and secondly, if the surrogate exercises her right to termination, the genetically related commissioning parent is not afforded the same automatic rights as the surrogate mother in respect of legal parentage. Partial surrogacy agreements do not give expression to the principle of *pacta sunt servanda*.

In conclusion, the author submitted that commercial surrogacy is a favourable practice which should be afforded legal recognition. The author substantiated this submission on the basis of the right to make decisions regarding reproduction, and more importantly, the right to occupational freedom. The author concluded that commercial surrogacy is not a practice which can bring harm to others; in fact commercial surrogacy can improve and develop the way of life and the economic circumstances of many women, and if women choose to use their reproductive organs as a mechanism for making money, they should not be barred from doing so. Women have the freedom to make decisions regarding reproduction, regarding their occupation, trade and profession and women have the freedom to contract. To give meaning to their right to dignity and equality, the legislature should regulate commercial surrogacy.

In support of the submission that commercial surrogacy be permitted, the author made brief reference to the surrogacy law which is currently in operation in Israel and proved that through proper regulation, commercial surrogacy can be used to further the interests of women, and to protect the parties to a surrogacy agreement even better.

Having regard to the all the submissions made in this chapter and the submissions made in chapter two and three, the final chapter of this thesis will attempt to provide recommendations for the appropriate manner in which to legislate surrogacy agreements in South Africa.



## **CHAPTER FIVE: CONCLUSIONS AND RECOMMENDATIONS**

### 5.1 Introduction

This research sought to investigate the constitutional and contractual implications of the application of Chapter 19 of the Children's Act 38 of 2005. Its objectives, as provided for in chapter one was to examine, assess and consider the constitutional and contractual implications of the application of Chapter 19 as legislation which affords surrogacy agreements in South Africa with legal recognition.

### 5.2 Legislative history of surrogate motherhood in South Africa

The objective behind chapter two of this research was to provide a foundation upon which the constitutional and contractual issues of surrogacy in South Africa could be examined. Chapter two commenced with a brief description of the terminology found in surrogate motherhood agreements and thereafter the author examined previous surrogate motherhood regulatory policies. It was shown, and subsequently submitted, that prior to the promulgation of the Children's Act, no legislation expressly provided for surrogacy agreements in South Africa. Although it was said that the definitions of artificial fertilisation as provided for in the Human Tissues Act 65 of 1983 and Children's Status Act 82 of 1987 were wide enough to incorporate surrogate motherhood, the legal positions of the parties to surrogacy agreements was still unlegislated and thus unclear.

#### 5.2.1 The AHPC's recommendations

With this in mind, the author then investigated the recommendations of the 1999 AHPC Report on Surrogate Motherhood. Attention was directed to the recommendations which dealt with the types of surrogacy agreements practiced in South Africa, the qualifications required of the parties to enter into the agreement, the rights and obligations which the parties would accrue as a

result of the agreement and the prohibition of payments in respect of surrogacy. A brief discussion was carried out in respect of the best interests of the child and the possibility of State funded fertility clinics.

Having examined the above mentioned recommendations, the author came to the following initial conclusions:

Firstly, cultural surrogacy had neither been expressly permitted nor prohibited in the recommendations, and the author submitted that such exclusion may give rise to future constitutional disputes. Secondly, it was submitted that the recommendation by the AHPC that partial surrogacy be permitted only in the case where full surrogacy was possible was favourable. This was motivated by the fact that in partial surrogacy, it would be difficult to compel a genetic mother to hand over the child born of the agreement to the commissioning parents upon birth, and on the basis of the inability to compel a partial surrogate to give up her own child at birth, such agreements cannot be said to be legally certain.

Having regard to the qualifications of potential surrogate mothers, the author agreed with the following recommendations. First, potential parties should be screened for suitability before they are permitted to enter in to surrogacy agreements, and secondly, that potential surrogate mothers should be subject to an age limitation. Thirdly, it was agreed that neither marriage nor sexual orientation should be considered in respect of the suitability of potential surrogates, and fourthly, because of the possible implications on the rights of the partner of the surrogate, the author concluded that she was in agreement with the recommendation that the consent of the surrogate's partner was necessary for confirmation of the agreement. However the author did not agree with the recommendation that potential surrogates must have a living child of her own and was concerned by the exclusion of the AHPC regarding a possible age limitation in respect of potential surrogate mothers.

Having regard to the commissioning parents, the author agreed with the following recommendations. First, the author agreed that surrogacy should be

a last resort for persons wanting to have a child by other than natural means, and secondly, that commissioning parents are to be screened for suitability. Thirdly, the author agreed that marriage and sexual orientation were not to be seen as qualifications of commissioning parenthood and fourthly, that the commissioning parent's partner must consent to the surrogacy agreement. However, the legislature should have provided what 'a partner' means in terms of the Act

The author was however uncertain regarding the exclusion of the recommendation regarding an age limitation of commissioning parents and submitted that the application of the recommendation that at least one commissioning parent must be genetically related to the child born of the agreement may amount to differentiation on an unjustified ground.

The next aspect of the recommendations which were discussed was the rights and obligations which the parties incur as a result of the application of the agreement. The author submitted that full surrogacy is the better option for prospective commissioning parents because the recommendations provided that a child born of the agreement would be considered the child of the commissioning parents from birth, whereas in the case of partial surrogacy, the position was the opposite. In partial surrogacy it is uncertain as to who would be responsible for the child during the sixty-day period which the surrogate mother is afforded to determine whether she will keep the child or hand the child over to the commissioning parents. Hence as a result of the application of the AHPC recommendations, the rights and the legal position of the parties to full surrogacy agreements and partial surrogacy agreements were completely distinct.

Thereafter, the author examined the AHPC recommendation that payments in respect of commercial surrogacy be prohibited, the impact that the recommendations had on the best interests of the child and an initial submission was made as to whether State funded fertility (surrogacy) clinics were not feasible.

Lastly, the author submitted that she did not agree that the SALC and the legislature have chosen to incorporate the regulation of surrogate motherhood agreements in the Children's Act. The author submitted that the legislature should have followed through with the AHPC's proposed Surrogacy Act for the reason that surrogate motherhood agreements do not only involve the rights of children, but also the other constitutional and contractual rights of the other parties to the agreement.

### 5.3 The constitutionality of Chapter 19

Using the foundation established in chapter two, chapter three of this research set out to determine the true extent of the constitutional implications of the application of Chapter 19. The intention of the author was to illustrate the impending results on the right to make decisions regarding reproduction, the right to equality, the right to dignity, the right to culture and the best interests of the child which arises out of the application of Chapter 19 of the Act. Ultimately, the author anticipated that Chapter 19 of the Act would give rise to future constitutional challenges.

#### 5.3.1 The Bill of Rights

After a brief introduction to the basic principles of the Constitution, as well as an examination of the rights to equality, dignity and freedom of security and person, the author commenced with an examination regarding reproductive rights in South Africa. The purpose of the discussion regarding reproductive rights was that the author submitted that surrogacy is a reproductive issue and that Chapter 19 gives effect to the right to make decisions regarding reproduction. The right to make decisions regarding reproduction formed the primary right of the research.

#### 5.3.2 The rights of the potential parties to a surrogacy agreement

Thereafter, the provisions of Chapter 19 which were identified in chapter two as being possible candidates for constitutional scrutiny were once again

examined. However, in this chapter they were examined in much greater detail having regard to, amongst others, the rights of equality (the *Harksen* test) and dignity and the right to make decisions regarding reproduction, as well as the limitations clause. The author separated the examination into three sections. First the application of Chapter 19 in respect of the rights of potential commissioning parents was addressed, thereafter; the rights of the surrogate, and lastly, the possible implications of the application on the best interests of the child was examined.

### 5.3.3 The rights of potential commissioning parents

#### 5.3.3.1 Section 294

In respect of potential commissioning parents, two provisions were identified as being constitutionally suspect, namely, section 294 and section 295 of the Act. The examination commenced with a brief discussion regarding the possibility of the right of persons to a child. Utilising the CC decision of *Dawood* and the right to make decisions regarding reproduction, the author concluded that, despite the CC having held that the right to dignity 'extends at the very least to the protection of the core elements of marriage-like institutions', the word protection could not be interpreted to mean that there is a right to a child.

With this in mind, the author then turned to section 294 of the Act and the possible limitation its application placed on potential commissioning parents. It was concluded that the application of section 294 of the Act, and the limitation which it imposes on infertile persons (single fertile persons and couple where both partners are infertile) was unwarranted on the basis that it amounted to discrimination as well as it did not such persons the opportunity to exercise their right to make decisions regarding reproduction. Thus it was held that the limitation on these persons did not serve a constitutionally acceptable purpose.

#### 5.3.3.2 Section 295(a)

Thereafter section 295(a) was examined (the corollary of section 294). Section 295(a) provides that only persons who are irreversibly and permanently unable give birth to a child are permitted to enter into valid surrogacy agreements. The author submitted that the effect of section 295(a) was that single fertile persons and couples where both partners are fertile are excluded from entering into valid surrogacy agreements. The author concluded that her initial conclusion that the limitation which arose as a result was justifiable was incorrect. Although it was submitted that one of the initial purposes of Chapter 19 was to provide persons who were unable to conceive and give birth by natural means a method in which to have genetically related children who were legally recognised as their own, the application of section 295(a) means that persons who are fertile cannot exercise their right to make decisions regarding reproduction merely because of their ability to produce on their own. Therefore, section 295(a) was found to be constitutionally unacceptable.

#### 5.3.4 The rights of potential surrogate mothers

##### 5.3.4.1 Section 295(c)(viii)

Thereafter the author directed the readers' attention to provisions of the Act which may have the potential to limit the rights of the surrogate. In this respect, the author first examined section 295(c)(viii) and the requirement that a surrogate must have a living child of her own. It was concluded, that without any irrefutable proof illustrating that a surrogate who has a child of her own will be more likely to relinquish the child born of the agreement at birth than a surrogate without a child, the limitation which the application of section 295(c)(viii) has on the rights of potential surrogates without a child of their own is unwarranted.

##### 5.3.4.2 Exclusion of age as suitability factor for surrogate

Secondly, the author considered the exclusion of the legislature of an age limit for potential surrogates. The author concluded that not only is the health of the surrogate at risk when she is over the age of 35 years, but the health of

the child to be born of the agreement as well. With this in mind, it was submitted that considering the risk to the surrogate and the child, it would be in the best interests of all the parties concerned if a maximum age restriction was implemented in respect of would-be surrogates. In addition to this, the author concluded that despite age being a listed ground of discrimination, such discrimination would be a reasonable limitation on the rights of potential surrogate mothers considering that the purpose of the limitation was to protect the lives of potential surrogates and the lives of future children born of surrogacy agreements. The author concluded that an additional benefit of the inclusion of such limitation would be that the enforceability of the agreement would be strengthened because with the imposition of a maximum age limitation, the probability of the surrogate miscarrying or the child being still born are greatly reduced, thus enforceability is enhanced. Hence, the exclusion of age as a restricting factor amounted to a failure on behalf of the legislature.

#### 5.3.5 The rights of potential commissioning parents and potential surrogate mothers

##### 5.3.5.1 Non-recognition of cultural surrogacy

The final exclusion of the legislature which was examined was that of the non-recognition of cultural surrogacy in the Act. Referring to the right to make decisions regarding reproduction and the right to culture (as provided for in section 30 and 31 of the Constitution) the author concluded that the non-recognition of cultural surrogacy as a form of assisted reproduction was an unwarranted limitation on the rights of both potential commissioning parents and potential surrogate mothers to practice their culture. The author submitted that without evidence to show that the practice cultural surrogacy was contrary to values of the Bill of Rights, it could not be said that the practice of cultural surrogacy was inconsistent with the Constitution.

With this in mind, the author then examined the implications that the non-recognition of cultural surrogacy may have on the cultures that practice it. The



author concluded that through failing to legally recognise cultural surrogacy, the children who are born as a result of cultural surrogacy agreements are not afforded the same legal status as those children born of valid surrogacy agreements. Not only was this found not to be in the best interests of such children, but it was found to be an unwarranted limitation on the rights of parties to cultural surrogacy agreements. Effectively, the non-recognition of cultural surrogacy creates more uncertainty now regarding the positions of the parties to these agreements than it did before the Act came into operation. Thus for purposes of legal clarification and more importantly, in the best interests of the child, if the legislature truly intended cultural surrogacy be excluded, it should have been expressly provided as such. Lastly, it was stated that it was unknown if persons who practiced cultural surrogacy would be subject to criminal sanctions because they contravened the Act.

#### 5.3.6 The best interests of the child

After having considered the possible constitutional implications of the application of Chapter 19 of the Act, as well as the possible implications of the exclusions of the legislature on the rights of potential commissioning parents and potential surrogate mothers, attention was directed to the implications such provisions and exclusions may have on the best interests of the child.

The issue commenced with an examination of the best interests of the child principle. The author noted that the principle, as provided for in the Constitution as well as the Act, was not novel to South African or international law, and numerous precedents existed regarding the interpretation of the right.

Having regard to the above, the author then commenced with a re-examination of all the provisions and exclusions which had been discussed previously.

##### 5.3.6.1 Section 294

With regard to section 294 of the Act, read with section 41 of the Act (the right to information in respect of genetic origin), the author concluded that the limitation which is imposed as a result of the application of section 294 on the rights of all the parties, specifically in respect of the best interests of the child born of the agreement, was not justifiable. The author concluded that although it will be in the best interest of the child if he/she has access to information regarding his/her genetic relation, such access was not dependant on sharing a genetic relation with his/her commissioning parent. Resultantly, the limitation which arises out of the application of section 294 on the rights of potential commissioning parents was not found to be justifiable on the basis that it was in the best interests of the child.

#### 5.3.6.2 Section 295(a)

Pertaining to the inclusion of section 295 of the Act, the author discussed section 295(a), section 295(c)(viii) and section 295(e) simultaneously. The rationale of examining the impact of section 295 (a) and (c)(viii) on the best interests of the child together was that both of these provisions had received similar concerns regarding their application. Section 295(e) and section 10 of the Act were used in support of the best interests of the child principle.

Section 295(a) was found to impose an unjustifiable limitation on the rights of would-be commissioning parents. When examining the provision anew and in light of the best interest of all the children party to the agreement (section 295(e)), the author reached the same conclusion. The author submitted that even if the commissioning parents were not permanently and irreversibly unable to conceive and to give birth and thus a likelihood existed they may choose at a later stage to have a child through natural conception, this did not justify the exclusion of fertile would-be commissioning parents from the application of the Act. The submission that there existed a risk that the child born of the surrogacy agreement may feel substandard because he/she is not completely genetically related to his/her parents and left out if a 'genetically related' sibling is born was illogical. Parents cannot be expected to ask their children's permission to have another child. Thus it was concluded that the

inclusion of section 295(a) on the basis of the best interests of the child was unreasonable and section 295(a) placed an unwarranted limitation on the rights of potential commissioning parents to exercise their rights to make decisions regarding reproduction.

In respect of section 295(c)(viii), the authors preliminary observations were that the limitation imposed on potential surrogate mothers who did not have a child of their own was unwarranted. The author submitted that without decisive proof showing that a surrogate who has a child of her own would be less likely to refuse to hand over the child upon birth than a surrogate without a child of her own, the limitation imposed by the application of section 295(c)(viii) did not fulfil a constitutionally acceptable purpose.

Having regard to section 10 of the Act (the right of a child to participate in all matters concerning themselves) and section 295(e) (the family members and circumstances of the parties must be taken into consideration), the author concluded that the provision requiring that a surrogate mother should have a child of her own was not in the best interests of the other children to the agreement. The author made use of case law and literature which showed that there exists the likelihood that the children of the surrogate may not comprehend what their mother (the surrogate) is doing. On the day upon which she hands over the child to the commissioning parents, they may fear being 'rejected' too. Hence the author concluded that it would not be in the best interests of the child if a surrogate had a child of her own, and ultimately, the limitation arising out of the application of section 295(c)(viii) resulted in an unwarranted limitation of the rights of all the parties to surrogacy agreements.

#### 5.3.6.3 The exclusion of age as a suitability requirement for the s surrogate mother

Subsequent to the discussion on section 295 of the Act, the author discussed the implication of the exclusion of the maximum age limitation on the best interests of the child. As previously stated, the author found that the exclusion by the legislature to include such a clause amounted to a failure to recognise

the inherent risks to both the surrogate and the child in a 'geriatric pregnancy'. Having regard to the best interests of the child principle, such exclusion was found to be in conflict with the best interests of the child.

#### 5.3.6.4 The non-recognition of cultural surrogacy

Lastly, the author examined the impact that the non-recognition of cultural surrogacy may have on the best interests of the child. It was concluded that despite the fact that cultural surrogacy may be difficult to regulate, it was not in the best interests of the child to exclude children born of a cultural surrogacy agreement from the legal protection which Chapter 19 affords all other children born of valid surrogacy agreements. Hence, the author concluded that the legislature had failed to take cognisance of the best interests of the child principle when it chose not to recognise cultural surrogacy as a form of assisted reproduction.

#### 5.3.7 The right of access to reproductive health services

The last part of the chapter examined section 27(1)(a) of the Constitution as another right which affords recognition to the right to reproductive autonomy. Although the Act does not provide for the right to access to surrogacy-enabling medical procedures, section 27(1)(a) was examined because of the initial AHPC recommendation that provision should be made for State-funded fertility clinics to assist those who cannot afford medical procedures associated with the fulfilment of surrogate motherhood.

The section commenced with an investigation into socio-economic rights judicial precedent. Having regard to this, the author concluded that access to any socio-economic right was limited by the qualification of progressive realisation, restricted state funding and the qualification 'desperate need'. Hence, the author concluded that the right of access to surrogacy-enabling reproductive technologies did not qualify as a desperate need which required the implementation of immediate legislative frameworks which would require nationwide surrogacy assisting clinics.

#### 5.4 The contractual issues of Chapter 19 of the Act

After having examined the constitutional impact of the application of Chapter 19 of the Act on the rights on parties to a surrogacy agreement, the purpose of chapter four of this research was to illustrate that in addition to constitutional implications, Chapter 19 of the Act also gives rise to contractual consequences for the parties to the surrogacy agreement. The author intended to show that Chapter 19 of the Act does not permit the parties to a valid surrogacy agreement to choose with whom they wish to contract and on what terms they wish to contract. Ultimately, the author proposed that Chapter 19 of the Act does not give rise to wholly enforceable surrogacy agreements and therefore Chapter 19 does not protect the interests of all the parties concerned. As a final point, the author intended to illustrate that commercial surrogacy should be permitted and with reference to international legislation, commercial surrogacy can be adequately regulated.

##### 5.4.1 Cornerstones of a contract

The chapter commenced with a brief discussion regarding the principles of freedom to contract and *pacta sunt servanda*. Thereafter, the author examined the seven requirements of a valid contract in terms of the general law of contract, whilst simultaneously applying these requirements to a surrogacy agreement. Whilst it was concluded that surrogacy agreements do amount to valid contracts in light of the seven requirements of the general law of contract, the author did raise concern concerning the omission by the legislature to stipulate what would become of the rights and obligations of the parties to an illegal surrogacy agreement.

##### 5.4.2 Breach of contract

Having determined that a surrogacy agreement constitutes a valid contract in terms of the law of contract, the author then introduced the concept of breach of a contract. The author established that the law of contract provides for three remedies for breach, namely, negative malperformance, positive

malperformance and anticipatory breach, and in most cases, both the debtor and creditor can be guilty of these three forms of breach. Whilst examining the requirements of negative malperformance, positive malperformance and anticipatory breach (repudiation and prevention of performance), the author simultaneously applied possible scenarios which may arise in the case of breach of a surrogacy agreement. With this, it was clear, and it was concluded as such, that there may be situations which give rise to breach in the case of surrogacy agreements.

#### 5.4.3 Remedies for breach

Once it had been concluded that breach was possible in the case of surrogacy agreements, the author then commenced with an examination into the three primary remedies of breach as provide for in the general law of contract, namely, specific performance, cancellation and remedies. Whilst discussing these remedies, the author simultaneously applied probable cases of breach arising out of surrogacy agreements. The purpose of this application was to determine if the three primary remedies could assist parties to a surrogacy agreement in the case of breach. The author concluded that the ordinary remedies available to contractants in the case breach will not amount to adequate redress for innocent parties in the case of breach of surrogacy agreements. The author concluded that because surrogacy agreements do not deal with everyday objects, but with the rights and interests of a child and his/her parents, the remedies available to ordinary contractants will not be able to place them in the position they would have been had the surrogacy agreement been fulfilled.

#### 5.4.4 The enforceability of surrogacy agreements

After having concluded that breach can occur in the case of surrogacy agreements and that the primary remedies which are available to ordinary contractants in the case of breach will be ineffectual, the author then directed the discussion to the crux of the chapter: enforceability of surrogacy

agreements and the implications that the application of section 298 and 299 of the Act has on such enforceability.

#### 5.4.4.1 The contractual implications of termination of full surrogacy agreements

Having regard to the fact that in terms of the Act, surrogacy agreements are supposedly wholly enforceable and cannot be terminated post fertilisation, the author concluded that full surrogacy agreements cannot be terminated post fertilisation. This was based on the submission that because a genetic tie did not exist between the surrogate and the child to be born of the full surrogacy agreement, the surrogate could be compelled to relinquish the child to the commissioning parents on birth. Hence, it was concluded, that it would be in the best interests of all the parties concerned that full surrogacy, because it can be enforced, is the more favourable type of surrogacy agreement.

#### 5.4.4.2 The contractual implications of termination of partial surrogacy agreements

Despite the fact that the Act provides that valid surrogacy agreements are fully enforceable post fertilisation of the surrogate mother, section 298 of the Act provides that a partial surrogate mother (i.e. a surrogate who is both the genetic and gestational mother of the child to be born of the agreement) can terminate the agreement up until 60 days after the birth of the child. In this respect, the author concluded that the partial surrogate cannot be compelled to give up a child which is genetically related to her if she decides that she does not want to. On the basis of this, the author concluded that it would be in the best interests of all the parties concerned that partial surrogacy agreements not be permitted in terms of the Act. This was because of the fact that first, the surrogate cannot be compelled to give up her own genetically related child and secondly, because partial surrogacy agreements will never be fully enforceable. Thirdly, if the surrogate decided to keep the child and raise it as her own, the parentage position of the commissioning parent who was genetically related to the child was not stipulated in the Act. Finally, the



uncertainty which arises out of the practice of partial surrogacy agreements could not be said to be in the best interests of the child. Hence, it could not be concluded that partial surrogacy was in the best interests of all the parties concerned.

#### 5.4.5 Compensation for reproductive services

Throughout chapter two and three, the author submitted that partial surrogacy agreements do not provide protection for the interests of all the parties to the surrogacy agreement. The author concluded that full surrogacy agreements were more favourable to the contractual and legal positions of the parties. In addition to this, the author submitted that full surrogacy, incorporating commercial surrogacy, was the manner in which to sufficiently protect the interests of all the parties concerned.

##### 5.4.5.1 The right to occupational freedom

The author referred to section 22 of the Constitution and the right of everyone to choose their occupation, trade and profession. With this, the author referred to case law pertaining to the right to economic activity (section 26 of the Interim Constitution) in which the courts found that the right to economic activity could be limited if the limitation fulfilled a suitable purpose. In addition to this, the author referred to German Constitutional case law which defined 'occupation' as both the manner in which to gratify material and self-satisfaction needs.

Taking the above into consideration, the author concluded that the prohibition on commercial surrogacy (the right to be compensated for reproductive services) was unwarranted because not only could commercial surrogacy amount to an occupation which could satisfy both material and self-development needs, but the principle of the freedom of contract necessitated that women be permitted to choose which contracts they want to enter into, with whom they want to contract and upon which terms they want to contract. In this light, both the right to make decisions regarding reproduction and the

right to occupational freedom gave rise to the right to be compensated for reproductive services.

#### 5.4.5.2 Commercial surrogacy in Israel

To conclude the chapter, the author made reference to Israel and the Surrogate Motherhood Agreements (Approval of Agreement and Status of Newborn) Law 5756 of 1996 to illustrate that through appropriate legislation, commercial surrogacy could be used to protect the interests of all the parties concerned, and that exploitation of the parties was not always the case with commercial surrogacy.

### 5.5 Recommendations

This research has reflected that there are a number provisions of Chapter 19 of the Act which, when applied, may amount to a limitation on the rights of the parties to a surrogacy agreement, as well as have an impact on the principles of freedom of contract and *pacta sunt servanda*. After having examined these provisions in detail, the author recommends that Chapter 19 of the Act be repealed and that the proposed Surrogacy Act, which was recommended by the AHPC, and which envisaged the regulation of surrogacy agreements in a specialised piece of legislation, is drafted. Alternatively, the following is recommended:

- (i) The Act should be amended to include a provision stipulating the cultural surrogacy is also recognised as a form of surrogacy in South Africa, and the provisions of the Act, where possible, apply equally to all forms of surrogacy practice.
- (ii) The Act should be amended to include a provision that partial surrogacy is not a recognised form of surrogacy in South African law, and that partial surrogacy agreements will not be deemed as legally valid and enforceable for the purposes of the Act.

(iii) The Act should be amended to include a provision that provides that the suitability and competency of all the parties to the agreement will be determined through a screening and counselling process. The screening and counselling will be performed by certified medical practitioners, such as psychologists, who will be determined from time to time by the Minister in the Regulations to the Act.

(iv) The Act should be amended to include a provision which provides that the surrogate must be of an age, determined from time to time by the Minister in the Government Gazette, which is deemed to be suitable in respect of the physical and psychological aspects of pregnancy.

(v) The Act should be amended to exclude the requirement that a surrogate mother must have a documented history of pregnancy and a child of her own.

(vi) The Act should be amended to exclude all provisions which differentiate between termination of a full surrogacy agreement and termination of a partial surrogacy agreement.

(vii) The Act should be amended to read that the effect of all valid surrogacy agreements is that the child born of the agreement will be for all purposes the child of the commissioning parents.

(viii) The Act should be amended to exclude any provision which directly or indirectly refers to the compensation of the agreement. The Act must be amended to read that the surrogate shall be entitled to both the reasonable compensation for her services as a surrogate as well as to the reasonable compensation for those expenses which the surrogate incurred as a result of the agreement. Lastly, a provision must be included that the parties are to determine the reasonable compensation for the surrogate's services amongst themselves. However, the High Court who confirms the agreement will determine if such compensation is just and reasonable considering the respective positions and resources of the parties.

This research has presented an argument and reached the conclusion that the application of Chapter 19 of the Act does provide grounds for possible future constitutional challenges and contractual implications, and consequently, several of the provisions incorporated into Chapter 19 of the Act do impose unreasonable and unjustifiable limitations on the rights of potential parties to a surrogacy agreement. In this, the research question which was posed in chapter one, has been answered in the affirmative.

The recommendations which have been provided are aimed at establishing greater legal certainty in respect of the rights of all the parties to the surrogacy agreement, providing improved contractual protection for all the parties concerned, and to ensure that the best interests of the child is given due consideration.



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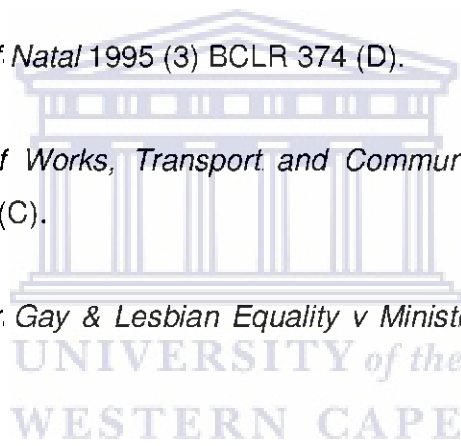
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**CHAPTER 19**  
**SURROGATE MOTHERHOOD (ss 292-303)**

**292 Surrogate motherhood agreement must be in writing and confirmed by High Court**

(1) No surrogate motherhood agreement is valid unless-

- (a) the agreement is in writing and is signed by all the parties thereto;
- (b) the agreement is entered into in the Republic;
- (c) at least one of the commissioning parents, or where the commissioning parent is a single person, that person, is at the time of entering into the agreement domiciled in the Republic;
- (d) the surrogate mother and her husband or partner, if any, are at the time of entering into the agreement domiciled in the Republic; and
- (e) the agreement is confirmed by the High Court within whose area of jurisdiction the commissioning parent or parents are domiciled or habitually resident.

(2) A court may, on good cause shown, dispense with the requirement set out in subsection (1) (d).

**293 Consent of husband, wife or partner**

(1) Where a commissioning parent is married or involved in a permanent relationship, the court may not confirm the agreement unless the husband, wife or partner of the commissioning parent has given his or her written consent to the agreement and has become a party to the agreement.

(2) Where the surrogate mother is married or involved in a permanent relationship, the court may not confirm the agreement unless her husband or partner has given his or her written consent to the agreement and has become a party to the agreement.

(3) Where a husband or partner of a surrogate mother who is not the genetic parent of the child unreasonably withholds his or her consent, the court may confirm the agreement.

**294 Genetic origin of child**

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.

#### **295 Confirmation by court**

A court may not confirm a surrogate motherhood agreement unless-

- (a) the commissioning parent or parents are not able to give birth to a child and that the condition is permanent and irreversible;
- (b) the commissioning parent or parents-
  - (i) are in terms of this Act competent to enter into the agreement;
  - (ii) are in all respects suitable persons to accept the parenthood of the child that is to be conceived; and
  - (iii) understand and accept the legal consequences of the agreement and this Act and their rights and obligations in terms thereof;
- (c) the surrogate mother-
  - (i) is in terms of this Act competent to enter into the agreement;
  - (ii) is in all respects a suitable person to act as surrogate mother;
  - (iii) understands and accepts the legal consequences of the agreement and this Act and her rights and obligations in terms thereof;
  - (iv) is not using surrogacy as a source of income;
  - (v) has entered into the agreement for altruistic reasons and not for commercial purposes;
  - (vi) has a documented history of at least one pregnancy and viable delivery; and
  - (vii) has a living child of her own;
- (d) the agreement includes adequate provisions for the contact,



care, upbringing and general welfare of the child that is to be 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

- (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.

#### **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;
- (b) after the lapse of 18 months from the date of the confirmation of the agreement in question by the court.

(2) Any artificial fertilisation of a surrogate mother in the execution of an agreement contemplated in this Act must be done in accordance with the provisions of the National Health Act, 2003 (Act 61 of 2003).

#### **297 Effect of surrogate motherhood agreement on status of child**

(1) The effect of a valid surrogate motherhood agreement is that-

- (a) any child born of a surrogate mother in accordance with the agreement is for all purposes the child of the commissioning parent or parents from the moment of the birth of the child concerned;
- (b) the surrogate mother is obliged to hand the child over to the commissioning parent or parents as soon as is reasonably possible after the birth;
- (c) the surrogate mother or her husband, partner or relatives has no rights of parenthood or care of the child;
- (d) the surrogate mother or her husband, partner or relatives have no right of contact with the child unless provided for in the agreement between the parties;

- (e) subject to sections 292 and 293, the surrogate motherhood agreement may not be terminated after the artificial fertilisation of the surrogate mother has taken place; and
- (f) the child will have no claim for maintenance or of succession against the surrogate mother, her husband or partner or any of their relatives.

(2) 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.

#### **298 Termination of surrogate motherhood agreement**

(1) A surrogate mother who is also a genetic parent of the child concerned may, at any time prior to the lapse of a period of sixty days after the birth of the child, terminate the surrogate motherhood agreement by filing written notice with the court.

(2) The court must terminate the confirmation of the agreement in terms of section 295 upon finding, after notice to the parties to the agreement and a hearing, that the surrogate mother has voluntarily terminated the agreement and that she understands the effects of the termination, and the court may issue any other appropriate order if it is in the best interest of the child.

(3) The surrogate mother incurs no liability to the commissioning parents for exercising her rights of termination in terms of this section, except for compensation for any payments made by the commissioning parents in terms of section 301.

#### **299 Effect of termination of surrogate motherhood agreement**

The effect of the termination of a surrogate motherhood agreement in terms of section 298 is that-

- (a) where the agreement is terminated after the child is born, any parental rights established in terms of section 297 are terminated and vest in the surrogate mother, her husband or partner, if any, or if none, the commissioning father;

- (b) where the agreement is terminated before the child is born, the child is the child of the surrogate mother, her husband or partner, if any, or if none, the commissioning father, from the moment of the child's birth;
- (c) the surrogate mother and her husband or partner, if any, or if none, the commissioning father, is obliged to accept the obligation of parenthood;
- (d) subject to paragraphs (a) and (b), the commissioning parents have no rights of parenthood and can only obtain such rights through adoption; and
- (e) subject to paragraphs (a) and (b), the child has no claim for maintenance or of succession against the commissioning parents or any of their relatives.

### **300 Termination of pregnancy**

(1) A surrogate motherhood agreement is terminated by a termination of pregnancy that may be carried out in terms of the Choice on Termination of Pregnancy Act, 1996 (Act 92 of 1996).

(2) For the purposes of the Choice on Termination of Pregnancy Act, 1996, the decision to terminate lies with the surrogate mother, but she must inform the commissioning parents of her decision prior to the termination and consult with the commissioning parents before the termination is carried out.

(3) The surrogate mother incurs no liability to the commissioning parents for exercising her right to terminate a pregnancy pursuant to this section except for compensation for any payments made by the commissioning parents in terms of section 301 where the decision to terminate is taken for any reason other than on medical grounds.

### **301 Payments in respect of surrogacy prohibited**

(1) Subject to subsections (2) and (3), no person may in connection with a surrogate motherhood agreement give or promise to give to any person, or receive from any person, a reward or compensation in cash or in kind.

(2) No promise or agreement for the payment of any compensation to a surrogate mother or any other person in connection with a surrogate motherhood agreement or the execution of such an agreement is enforceable, except a claim for-

- (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and the confirmation of the surrogate motherhood agreement;
- (b) loss of earnings suffered by the surrogate mother as a result of the surrogate motherhood agreement; or
- (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy.

(3) Any person who renders a bona fide professional legal or medical service with a view to the confirmation of a surrogate motherhood agreement in terms of section 295 or in the execution of such an agreement, is entitled to reasonable compensation therefor.

### **302 Identity of parties**

(1) The identity of the parties to court proceedings with regard to a surrogate motherhood agreement may not be published without the written consent of the parties concerned.

(2) No person may publish any facts that reveal the identity of a person born as a result of a surrogate motherhood agreement.

### **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.

(2) No person may in any way for or with a view to compensation make known that any person is or might possibly be willing to enter into a surrogate motherhood agreement.