The law of persons

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Legislation

The Mental Health Care Amendment Act 12 of 2014 ('the Amendment Act') amends the Mental Health Care Act 17 of 2002 ('the Act') to provide for the delegation of powers by the Director-General of the national Department of Health to officials in the department in order to improve the application and effective implementation of the Act (see s 1 of the Amendment Act, which inserts s 72A into the Act; para 1.1 of the Memorandum on the Objects of Mental Health Care Amendment Bill, 2012, attached to version 39B of the Amendment Bill). Section 2 of the Amendment Act further repeals Chapter 8 of the Mental Health Act 8 of 1973, thereby consigning the latter Act to history.

The Births and Deaths Registration Amendment Act 18 of 2010, which was discussed in 2010 *Annual Survey* 990, came into operation on 1 March 2014 (Proc R11 *GG* 37373 of 26 February 2014).

Subordinate legislation

The regulations issued in terms of the Births and Deaths Registration Act 51 of 1992 were replaced with effect from 1 March 2014 (reg 33). The replacement regulations were published in GN R128 *GG* 37373 of 26 February 2014.

Draft legislation

In November 2014, the Department of Health published draft amendments to the regulations issued in terms of sections 67 and 68 of the Mental Health Care Act 17 of 2002 (GN R874 *GG* 38182 of 6 November 2014). These amendments will come into operation after consultation with the members of the Executive Council.

Case law

Domicile

JC v DC 2014 (2) SA 138 (WCC) concerns the unlawful removal by a mother of her children from South Africa to Zimbabwe in breach of a divorce order made in the Western Cape division of the High Court. The children's father sought an order in the Western Cape division holding the mother in contempt of court without committing her to prison for the contempt. He also sought an order that, subject to any finding and order of the High Court of Zimbabwe in the pending application in terms of the Hague Convention on the Civil Aspects of International Child Abduction ('the Hague Convention'), the children should be returned to the Western Cape. The mother's legal representative contended that the court lacked jurisdiction because her client resided in Zimbabwe and was no longer domiciled in South Africa. The court dismissed this contention and found that it had jurisdiction in the matter. The family-law aspects of the judgment are discussed in the chapter on family law. For purposes of the law of persons, the court's statements on the mother's domicile are mentioned below.

The court indicated that section 3(3) of the Zimbabwean Immigration Act of 1979 provides that a person is not domiciled in Zimbabwe unless he or she has lawfully ordinarily resided in the country for a continuous period of two years. Since the mother had only been resident in Zimbabwe for a little over a year, she did not yet have a domicile in that country (para [34]). As section 3(1) of the South African Domicile Act 3 of 1992 provides that no one loses his or her domicile until he or she has acquired another domicile, the implication of the finding that the mother had not acquired a domicile in Zimbabwe was that she retained her South African domicile (para [34]). This conclusion by the court is logical and correct.

Insolvency

Vengadesan NO v Shaik & others 2014 (3) SA 14 (KZD) deals mainly with the law of insolvency. For purposes of the law of persons it need only be mentioned that Jeffrey AJ supported the view in *Acar v Pierce* 1986 (2) SA 827 (W) that it is the insolvent — not his or her estate — who is rehabilitated by the passage of time or by one of the other methods of rehabilitation specified in the Insolvency Act 24 of 1936. Consequently, the estate of a person

who dies while insolvent cannot be rehabilitated. Jeffrey AJ held that the decisions in which the opposite had been held were wrong (paras [12] [14]).

Motala & another NNO v Moller & others 2014 (6) SA 223 (GJ) concerns the effect of insolvency on the property of the solvent spouse in a marriage out of community of property. For purposes of the law of persons, the court's decision on the implications of the insolvency for the capacity of the other spouse (that is, the solvent spouse) should be noted. Section 21(1) of the Insolvency Act provides that the property of the solvent spouse vests in the trustee of the insolvent estate as if the property were part of the insolvent estate, and that the trustee has the power to deal with the property as if it were part of the insolvent estate. In *Motala*, the court held that even though the solvent spouse's property vests in the trustee of the insolvent estate, the solvent spouse is not prohibited from dealing with his or her property and that if he or she alienates his or her property, the alienation is valid unless, and until, the trustee of the insolvent estate successfully attacks it (para [15]). Therefore, although the insolvent spouse's capacity is curtailed by the insolvency, the solvent spouse's is not. (On the limitations insolvency places on the insolvent's capacity, see Trynie Boezaart *Law of Persons* 5 ed (2010) 138–42; Jacqueline Heaton *The South African Law of Persons* 4 ed (2012) 142–3; Hanneretha Kruger & Ann Skelton (eds) *The Law of Persons in South Africa* (2010) 154–7.)

Minority

Administration of a minor's funds by his or her guardian

The plaintiff in *Dube NO v Road Accident Fund* 2014 (1) SA 577 (GSJ) sued the Road Accident Fund for damages arising from injuries his minor child had sustained in a motor vehicle accident. The court awarded R3 150 488,80 to him in his capacity as sole natural guardian of the child, but was concerned about the way in which the funds were to be administered. Initially, the plaintiff proposed that the funds be paid into his attorney's trust account with no limitations on release of the funds. When the court expressed concern about this proposal, it was revised to a request that an order be made that the funds be paid into and be administered by a trust that was to be established. The board of trustees would include the plaintiff and persons who had knowledge and experience in the administration of funds. The plaintiff

agreed that his child's interests would be served best by the latter arrangement.

In her judgment, Fisher AJ stated that '[i]t is common for courts, on application and mero motu, to order that funds payable to minor children be administered by persons other than their guardians' (para [13]). She specifically referred to three cases in support of her view: *(a) Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A), where a trustee was appointed to administer a minor's funds because the minor's mother was neither competent nor qualified to do so; *(b) Van Rij NO v Employers' Liability Assurance Corporation Ltd* 1964 (4) SA 737 (W), where it was held that even if a minor had a guardian the court could, for good reason, appoint another person as a curator to administer all or part of the minor's property; and *(c) Southern Insurance Association Ltd v Bailey NO* 1984 (1) SA 98 (A), where the court found that the child's guardian had neither the ability nor the qualifications to administer the funds, and ordered that the amount awarded to the minor be paid into the trust account of the plaintiff's attorneys pending a further order the court would make after considering suggestions as to the appointment of a curator or trustee to administer the funds (paras [13]–[16]).

Fisher AJ then turned to the strange decision in *Ex parte Oppel & another* 2002 (5) SA 125 (C). In that case, Ngwenya J refused to appoint a *curator ad litem* to investigate the need to appoint a *curator bonis* to the estate of a minor in whose favour a substantial damages award had been made, even though the minor's parents sought the order because they did not have the expertise to manage their son's funds and feared that, through ignorance, they might make decisions that were not in their child's long-term interests. The minor's father had passed only Standard 4 (Grade 6). His mother had passed Matric (Grade 12) and was a nursing sister until she resigned in order to care for her son on a full-time basis. Ngwenya J declined to follow *Van Rij* and *Southern Insurance Association* on the ground that the statements in those cases regarding the administration of a minor's funds were *obiter*. He did not refer to *Woji* at all. He held that, generally, management of a minor's property is the preserve of the minor's guardian, and that the court should not appoint a *curator bonis* to administer a minor's estate unless it is satisfied that the guardian suffers from some or another disability which renders him or her incapable of managing the minor's estate (129G 131J). As Ngwenya J found that neither of the minor's parents suffered from

any disability, he dismissed their application. Fortunately, Fisher AJ found that these *dicta* in *Oppel* were wrong. She held that Ngwenya J was mistaken in his finding that the statements in *Van Rij* and *Southern Insurance Association* were *obiter* as they actually related to the facts of the particular cases (para [17]).

She further held that in carrying out its function as upper guardian of minors, a court that awards substantial funds to a minor must consider the circumstances under which the funds are likely to be administered and used before it makes an order that the funds be paid to the minor's guardian (para [18]). The court must enquire into the circumstances relating to the person(s) to whom payment is to be made in order to satisfy itself that the best interests of the minor will be protected. If an order is sought that the funds are to be paid or released to the minor's guardian, the court must assess, among others, the motivations, qualifications, and ability of the guardian to administer the funds properly (para [19]). She continued

> [F]rom a general perspective, it should be said that some factors which would militate against a guardian receiving moneys (and these are not exhaustive) are: the natural conflict of interest which arises as a result of the guardian's respective duties both to maintain the child and administer his money; if there were more than one guardian; a lack of education or acumen in relation to financial matters on the part of the guardian; a poor relationship with the child; a poor relationship between co-guardians; the guardian having insufficient funds to meet his own obligations; criminal convictions; mental or physical illness; insolvency; lack of support structure; geographical distance from the child; and lack of independence of the guardian (para [20]).

Fisher AJ stated further that if the court decides that the minor's interests will probably be best served by not paying the funds to his or her guardian, it should enquire into the best method for the administration of the funds (para [21]). She indicated that a trust can be a protective and flexible vehicle for the administration of the funds. It can also provide a more inclusive approach than appointment of a curator or payment to the Guardian's Fund in terms of the Administration of Estates Act 66 of 1965, because the child's guardian*(s)* and/or other interested persons can actively participate in the administration of the trust property. Another advantage is that trusts are regulated by statute and are under the control of the Master of the High Court (para [22]).

She held that if the court concludes that a trust is the best method for the administration of the funds, it should not make an order unless the trust deed or a final draft of the proposed deed is

provided to the court and the court is satisfied that the terms of the deed provide for proper and secure administration of the funds (para [23]). The final terms of the deed should be circumscribed by the court order, as otherwise the parties can subsequently amend the deed and defeat the objects of the order (para [25]). Moreover, the approved deed should provide that it may not be amended or supplemented, except by way of a further order of court (ibid). Fisher AJ then listed several features any trust deed executed for the purposes of administering a minor's funds should ideally contain (para [26]). Finally, she made an order which mandated the creation of a trust on the terms set out in a trust deed she had drafted for the purposes of her order (paras [27] [28]). The deed incorporated the essential elements of a draft deed counsel for the plaintiff had submitted to the court. The final deed was annexed to the court order as Annexure A, but was not included in the reported judgment, probably due to length constraints.

Fisher AJ's judgment is balanced and well-considered. It clearly has the best interests of the minor at heart. Further, her finding that the decision in *Ex parte Oppel* is incorrect is very welcome. In *Oppel*, the best interests of the child were not properly served by the court. What made the finding in *Oppel* all the more glaring was the fact that the child's parents realised that they did not have the necessary knowledge and skills to administer their child's funds but the court nevertheless compelled them to take on this duty.

A final comment on *Dube* relates to the drafting of the trust deed by Fisher AJ. As the upper guardian of all minors within its area of jurisdiction, the High Court has the power to make any order which is in the best interests of the child. Drafting a trust deed and including it in the order of court fall within the ambit of this power. Fisher AJ must be commended for her conscientiousness in personally drafting a trust deed to protect the best interests of the child in the matter before her. However, parties should not, as a matter of course, expect the court as upper guardian to draft trust deeds. It is hoped that in future cases where a minor stands to receive a substantial amount in damages and a trust is the appropriate structure to protect the minor's funds, the guidelines provided by Fischer AJ will be used by parties to enable them to submit adequate and suitable trust deeds to the court.

Age of majority

Prescription usually takes place three years after the date on which a claim arises (s 11*(d)* of the Prescription Act 68 of 1969). However, section 13(1)*(a)* of the Prescription Act provides that in the case of a minor, prescription is postponed until at least one year after the minor becomes a major. Before 1 July 2007, when section 17 of the Children's Act 38 of 2005 lowered the age of majority from 21 to eighteen years of age, section 13(1)*(a)* of the Prescription Act meant that the end of the prescription period was postponed until at least a year after the minor had turned 21. In *Santam Versekeringsmaatskappy Bpk v Roux* 1978 (2) SA 856 (A), the then Appellate Division confirmed this interpretation of section 13(1)*(a)* by holding that the word 'minor' in the section related to a person who had not yet turned 21.

In *Malcolm v Premier, Western Cape Government* 2014 (3) SA 177 (SCA), the question arose whether the lowering of the age of majority entailed that prescription now occurs at least one year after a minor turns eighteen. The facts in this case were that in 1993, when M was six years old, he was allegedly negligently infected with Hepatitis B while he was being treated for another illness at a provincial hospital in Cape Town. He was diagnosed with Hepatitis B the following year. Within a year after having turned 21, M instituted an action to recover damages for the delict the hospital had allegedly committed against him. Relying on the lowering of the age of majority, the defendant raised a special plea of prescription, which the trial court upheld.

On appeal, the Supreme Court of Appeal held that, since the coming into operation of section 17 of the Children's Act, the word 'minor' in section 13(1)*(a)* of the Prescription Act has referred to a person under the age of eighteen years (paras [15] [16]). To this extent, the Supreme Court of Appeal departed from its earlier judgment in *Santam Versekeringsmaatskappy Bpk v Roux*.

The court then considered whether the new interpretation of 'minor' for purposes of section 13(1)*(a)* of the Prescription Act automatically applied to all unexpired periods of prescription that were running when section 17 of the Children's Act came into operation. It referred to the

common-law rule that an Act or a provision in an Act must not be interpreted as having retroactive effect unless there is an express provision to this effect in the Act or provision, or unless this result is unavoidable in the light of the language used in the Act or provision (see *National Iranian Tanker Co v MV Pericles GC* 1995 (1) SA 475 (A)). It held that this

principle should be appropriately adapted and should also apply to a changed interpretation of a provision in one Act that was triggered by a change brought about by another Act. (In this case, the changed interpretation of s 13(1)*(a)* of the Prescription Act was triggered by the lowering of the age of majority by s 17 of the Children's Act.) In accordance with the adapted principle, it should be presumed that the changed interpretation does not operate retroactively (para [18]).

The court applied this presumption to the changed interpretation of section 13(1)*(a)* of the Prescription Act. It indicated that the Children's Act is silent on the effect of the lowering of the age of majority on prescription. It held that, if anything, this silence points to the change in the law operating only in cases arising after the change had occurred (para [23]). It pointed out that persons who were over the age of eighteen when section 17 of the Children's Act came into operation, attained majority only on 1 July 2007 even though they had turned eighteen before that date (ibid). For this reason, contracts they had entered into without the required assistance before 1 July 2007 did not automatically become enforceable against them on 1 July 2007. (On the rule that, generally, a minor can incur contractual liability only if he or she is assisted by his or her guardian, see Boezaart *Law of Persons* 58–84; Heaton *Law of Persons* 89–103; Kruger & Skelton (eds) *Law of Persons* 116–128; Trynie Boezaart 'Child law, the child and South African private law' in Trynie Boezaart (ed) *Child Law in South Africa* (2009) 23–32.) Also, marriages they had entered into without the requisite assistance before that date did not suddenly become valid. (On the consent requirement in respect of a minor's marriage and the consequences of failure to obtain consent, see Boezaart *Law of Persons* 84–6; Jacqueline Heaton *South African Family Law* 3 ed (2010) 17–25; Heaton *Law of Persons* 104–7; Kruger & Skelton (eds) *Law of Persons* 129–131; Ann Skelton & Marita Carnelley (eds) *Family Law in South Africa* (2010) 37–41; Boezaart in Boezaart (ed) *Child Law* 32–3.) There was no reason why the position in relation to prescription should be any different (para [23]). The Supreme Court of Appeal further held that hardship would arise if the changed interpretation of section 13(1)*(a)* were to have retroactive effect, because the former minor would suddenly be denied a longer prescription period. The court provided several examples of instances where this hardship would arise (paras [19] [20]).

The court concluded that the new interpretation of 'minor' for purposes of section 13(1)*(a)* of the Prescription Act does not

apply to periods of prescription that were running before section 17 of the Children's Act came into operation. It allowed the appeal and altered the order of the trial court to one dismissing the special plea of prescription (para [24]). The outcome of the decision in *Malcolm* is that a minor whose cause of action arose before the coming into operation of section 17 of the Children's Act remains entitled to the same period of time in which to institute his or her claim for damages as he or she would have had, had the age of majority not been lowered.

In *Malcolm*, the Supreme Court of Appeal did not expressly deal with the issue of whether the decision in *Shange v MEC for Education, KwaZulu-Natal* 2012 (2) SA 519 (KZD) was correct. The decision in *Shange* had the same outcome as the decision in *Malcolm*. However, in *Shange* the court arrived at this outcome via a different route: instead of focusing on the meaning of section 13(1)*(a)* of the Prescription Act and the issue of whether the earlier interpretation of the word 'minor' in *Roux* should be amended, the court focused mainly on section 17 of the Children's Act and section 12(2) of the Interpretation Act 33 of 1957. The latter section provides that in the absence of a contrary intention appearing from the legislation, the repealing of a law does not affect the previous operation of the repealed law or anything duly done under the repealed law. It will also not affect 'any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed' or 'any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability ...'. The section further provides that 'any such investigation, legal proceeding or remedy may be instituted, continued or enforced ... as if the repealing law had not been passed'. Counsel for the former minor in *Malcolm* also relied on section 12(2) of the Interpretation Act. However, the Supreme Court of Appeal found this reliance to be misplaced, because '[t]he Prescription Act has neither been repealed nor amended' (*Malcolm* para [16]). The Supreme Court of Appeal pointed out that it was simply the *interpretation* of section 13(1)*(a)* of the Prescription Act that was at issue, not the repealing or amendment of the section (ibid). In making these statements about the incorrect reliance by counsel on section 12(2) of the Interpretation Act, the Supreme Court of Appeal seems impliedly to have held that the *rationes decidendi* in *Shange* were at least partially incorrect.

It should be noted that the Supreme Court of Appeal had earlier dismissed an appeal against the order in *Shange* without discussing

the merits of the *rationes decidendi* of the judgment of the High Court (*MEC for Education, KZN v Shange* 2012 (5) SA 313 (SCA) paras [13] [23] [25]). The Supreme Court of Appeal found that the High Court had unnecessarily investigated the effect of section 17 of the Children's Act on the running of prescription in respect of the particular respondent's claim, because the facts showed that the ordinary three-year period of prescription provided for by section 11*(d)* of the Prescription Act had not yet expired and the respondent had instituted action before the end of this period (*MEC for Education, KZN v Shange* paras [12] [13]). (On *Shange*, see further 2012 *Annual Survey* 703–5.)

Parental responsibilities and rights of unmarried parents

In *I v C & another* (KZD) 4 April 2014 (case 11137/2013), the court had to decide whether an unmarried father had parental responsibilities and rights in respect of his child (S). The issue arose because S's mother had removed S from South Africa to the United Kingdom when the child was four months old. The removal had occurred without the consent of S's father. S's father sought the child's return in terms of the Hague Convention on the Civil Aspects of International Child Abduction. The High Court of Justice Family Division in the United Kingdom asked the KwaZulu-Natal Local Division of the High Court to decide whether S's mother could lawfully have changed S's place of residence to the United Kingdom without the consent of S's father or a court. The answer to this question depended on whether S's father had parental responsibilities and rights. If he did, his consent to S's removal from South Africa and to obtaining a passport for S, would have been required in terms of section 18(3)*(c)*(iii) and (iv) of the Children's Act. As his consent had not been obtained, the change of S's place of residence to the United Kingdom would have been unlawful.

In terms of section 21(1) of the Children's Act, an unmarried biological father acquires full parental responsibilities and rights in respect of his child

(a) if at the time of the child's birth he is living with the mother in a permanent life-partnership; or

(b) if he, regardless of whether he has lived or is living with the mother —

(i) consents to be identified or successfully applies in terms of section 26 to be identified as the child's father or pays damages in terms of customary law;

(ii) contributes or has attempted in good faith to contribute to the child's upbringing for a reasonable period; and

(iii) contributes or has attempted in good faith to contribute towards expenses in connection with the maintenance of the child for a reasonable period.

As S's parents were not living together when S was born, S's father did not qualify for automatic parental responsibilities and rights in terms of section 21(1)*(a)*. On the facts of the case, the court found that he had parental responsibilities and rights in terms of section 21(1)*(b)*. He had consented to being identified as S's father and had occasionally visited S until S was removed from South Africa. He had purchased items for S (including a pram and car seat); had built a changing table for S; had contributed to an endowment and education policy for S; had paid approximately 11,55 per cent of the costs of the pregnancy and had offered to pay the rest; had offered to put S on his medical aid; and had offered to pay maintenance for S. S's mother preferred to put S on her own medical aid and never provided S's father with her banking details so that he could deposit S's maintenance into the account. The court found that S's father satisfied the requirements in section 21(1)*(b)*(i), (ii) and (iii) (paras [34] [47] [60]–[63]). Consequently, it held that because S had parental responsibilities and rights, S's mother could not lawfully have changed S's place of residence to the United Kingdom without the consent of S's father or a court (paras [64] [65] [67], para *(a)* of the order). In view of the facts set out in the judgment, the court's finding is correct. The decision was confirmed on appeal (see *KLVC v SDI &*

another [2015] 1 All SA 532 (SCA)).

Surrogate motherhood agreement

Sections 292(1) and 295 of the Children's Act ('the Act') provide that the parties to a surrogacy arrangement must enter into a valid written surrogate motherhood agreement which must be submitted to the High Court for confirmation. Sections 296(1)*(a)*, 303(1) and 305(1)*(b)* read with section 305(6) prohibit and criminalise the artificial fertilisation of the surrogate mother before confirmation of the surrogate motherhood agreement. In *Ex parte MS & others* 2014 (3) SA 415 (GP), the question arose whether the court has the power to confirm a surrogate motherhood agreement entered into after the surrogate mother had been artificially fertilised and had fallen pregnant.

The commissioning parents in *Ex parte MS* had previously entered into two surrogate motherhood agreements that had been confirmed by the court. The first surrogate mother refused to honour the parties' agreement and was never fertilised. The second surrogate mother did not have a viable pregnancy. The commissioning parents entered into a verbal agreement with a third surrogate mother in September 2012 but, because of their past disappointments, decided not to contact their attorney until they were certain that a viable pregnancy had resulted from the artificial fertilisation. Once the third surrogate mother's pregnancy had stabilised, the commissioning parents contacted their attorney to formalise the surrogacy. Their attorney informed them that their failure to obtain a surrogate motherhood agreement that complied with the Act meant that the surrogacy was invalid (s 297(2)). Furthermore, they would not become the child's legal parents because section 297(2) of the Act provides that if a child is born of a surrogate mother as a result of an invalid surrogate motherhood agreement, the surrogate mother is the child's mother 'for all purposes'. The commissioning parents and the surrogate mother then entered into a written surrogate motherhood agreement and approached the court for confirmation of the agreement.

Keightley AJ held that, although 'the general scheme of the Act is to require judicial confirmation of the surrogacy agreement before any steps are taken to give effect to the arrangement between the parties', the Act does not expressly indicate whether the court has the power to confirm a surrogate motherhood agreement after the surrogate has conceived a child for the commissioning parents (paras [3] [28]–[30]; the quoted phrase appears in para [29]). (For valid criticism of the court's view that the Act does not indicate clearly whether the court has the power to confirm a surrogate motherhood agreement after the surrogate has fallen pregnant, see A Louw '*Ex parte MS 2014 JDR* 0102 Case No 48856/2010 (GNP)' (2014) 47 *De Jure* 110 114.)

Keightley AJ stated that 'one of the central requirements' which the Act imposes for recognition of surrogacy is that the surrogate motherhood agreement must be formally concluded and must be confirmed by the High Court before the surrogate mother is fertilised (para [8]). She explained the reason for this requirement as follows

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

> surrogate motherhood agreement, his or her future rights and interests are the most important of all the rights and interests involved. To ensure that they are adequately protected, the law requires certainty and judicial scrutiny of the proposed surrogacy arrangement before there is even any prospect of a child coming into being (para [9]; see also para [38]).

She held that a surrogate motherhood agreement is 'ultimately aimed at ensuring the best interests of the child to be born from a surrogacy arrangement, and at protecting and advancing his or her right to family and parental care' (para [34]; the right to family or parental care is enshrined in s 28(1)*(b)* of the Constitution of the Republic of South Africa, 1996). The agreement also advances the parties' right to dignity and their right to make decisions concerning reproduction, and the surrogate mother's right to security in and control over her body (para [35]; these rights are enshrined in ss 10, 12(2)*(a)* and 12(2)*(b)* of the Constitution).

Keightley AJ argued that, because the main objective of the prohibition on fertilisation of a surrogate mother in the absence of a confirmed surrogate motherhood agreement is to ensure that there is certainty as to the parties' legal relationship even before the child is conceived, the prohibition serves the interests of all the parties and advances the best interests of the child (para [38]). Although this certainty should ideally exist before the surrogate mother is fertilised, 'this does not mean that the best interests of the child may not also be served by a subsequent confirmation of the surrogacy agreement' (para [39]).

Based on her analysis of the wording of the Act, the objective of the Act, and the fundamental rights of the parties and the child to be born, Keightley AJ concluded that the Act does not preclude post-fertilisation confirmation of a surrogate motherhood agreement (paras [43] [56]). With regard to the wording of the Act, she pointed out that although section 295*(b)*(ii) requires that the court must be satisfied that the commissioning parents are in all respects suitable to accept 'the parenthood of the child that *is to be conceived*' (emphasis added), section 295*(d)* and *(e)* requires the court to be satisfied concerning the provision made in the agreement for the care, upbringing, welfare and interests of 'the child that *is to be born*' (emphasis added). The latter category includes children who are already conceived but have not been born at the time that confirmation of the surrogate motherhood agreement is sought (para [40]). Consequently, section 295

appears to cover both the situation where a child has not yet been conceived and the situation where a child has already been conceived but has not yet been born (para [41]). Furthermore, neither section 292 nor section 295 requires the court to be satisfied that the surrogate mother has not yet been artificially fertilised and has not yet fallen pregnant as a result of the fertilisation (para [42]). (For trenchant criticism of the court's selective reading of ss 292 and 295, see Louw (2014) 47 *De Jure* 114.)

Keightley AJ also found that the provisions prohibiting artificial fertilisation of the surrogate mother in the absence of a confirmed surrogacy agreement do not render a post-fertilisation surrogate motherhood agreement invalid and incapable of subsequent confirmation. In this regard she argued that the Act imposes a clear criminal sanction for artificial fertilisation of the surrogate mother in the absence of a confirmed surrogate motherhood agreement without making it unlawful for the parties subsequently to enter into a surrogate motherhood agreement, rendering the agreement invalid, or making it clear that the court is precluded from confirming a post-fertilisation surrogate motherhood agreement (paras [45] [46] [48]).

Furthermore, if the court did not have a discretion to confirm a post-fertilisation surrogate motherhood agreement, the dignity of the commissioning parents would be violated because they would be denied the opportunity to experience a family life of their own; their right to make reproductive choices would be violated because their only recourse would be to seek to adopt the child born to the surrogate mother; the surrogate mother would be saddled with full parental responsibilities and rights in respect of the child in violation of her constitutional right to make her own decisions regarding reproduction; and the child who was to be born would be denied the family life that was planned for him or her. Most importantly, the child's best interests would be violated (paras [51]–[55]). To protect the constitutional rights of the parties and, in particular, those of the child, and to comply with the broad objective of the Act of protecting the rights and interests of all parties, the court must have a discretion to confirm a post-fertilisation surrogacy agreement (paras [49] [50]).

However, Keightley AJ warned that her decision that post-fertilisation confirmation is possible does not mean that the general requirement of pre-fertilisation confirmation can be ignored or that parties may assume that the court will assist them

if they neglect to comply with the statutory requirements as to pre-fertilisation confirmation. She held that the court's discretion to confirm post-fertilisation agreements 'should only be exercised in exceptional circumstances, and when the best interests of the child demand confirmation' (para [57]; see also para [70]). The facts must guide the court in each case (para [59]). In addition to all the information the court normally requires in a confirmation application, parties who seek post-fertilisation confirmation must place sufficient facts before the court to explain why confirmation is being sought and why confirmation is warranted despite the violation of the statutory provisions (para [62]). The parties must also satisfy the court that, from the outset, the surrogate motherhood arrangement was permissible (para [63])

> Evidence of a pre-existing verbal or written agreement between the parties, which would have been a valid surrogacy agreement but for the absence of confirmation of the Court, would be a good indicator that the parties are *bona fide* in their application.
>
> On the other hand, if the pregnancy was not the result of artificial fertilisation and the real purpose of the application is to allow the

'commissioning parents' to circumvent adoption processes, the Court would not confirm the agreement (paras [65]–[66]).

Further, confirmation of a surrogacy agreement cannot be sought or granted after the child has been born (para [67]). Finally, because of the serious implications of surrogacy and the need to provide the court with enough time to consider the application and to make a properly considered decision, the application for post-fertilisation confirmation must be made 'timeously, and as soon as practically possible in the circumstances' (para [71]).

In this case, the applicants provided sufficient information to enable the court to decide their application. The commissioning parents also attached copies of their previous two surrogacy confirmation applications. They had twice before been found to be suitable parents as envisaged in the Act. They provided recent psychological reports confirming that they remained suitable parents and that the present surrogate mother was suitable (para [73]). All along, the applicants had intended to enter into a lawful surrogacy arrangement, they took the court into their confidence in explaining their failure to apply for pre-fertilisation confirmation, and they were *bona fide* in their application for confirmation of their surrogate motherhood agreement (para [74]). In the light of all the facts, Keightley AJ concluded that

validation of the applicants' surrogate motherhood agreement through its confirmation by the court was in the best interests of the child who was to be born (para [75]). She accordingly confirmed the agreement (paras [76] [77]).

It might be asked whether Keightley AJ could not have arrived at the same result by the much simpler route of invoking the power of the High Court as upper guardian of all minors to make any order that is in the best interests of the child. However, the answer is in the negative, for the High Court's power as upper guardian applies only to a child who has already been born (*Ex parte Swanepoel* 1953 (1) SA 280 (A)). (In some instances, the child's birth can fictitiously be deemed to have occurred at the time of its conception: see the discussion of the *nasciturus* fiction in Boezaart *Law of Persons* 13–22; Heaton *Law of Persons* 12–28; Kruger & Skelton (eds) *Law of Persons* 23–32; Boezaart in Boezaart (ed) *Child Law in South Africa* 5–11.)

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