**THE SUPREME COURT OF APPEAL OF SOUTH AFRICA**

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

**From:** The Registrar, Supreme Court of Appeal

**Date:** 19 April 2024

**Status:** Immediate

***The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal***

*KB & Another v Minister of Social Development* (Case no 462/23) [2024] ZASCA 54 (19 April 2024)

Today the Supreme Court of Appeal (SCA) handed down judgment dismissing an appeal against the decision of the Mpumalanga Division of the High Court, Mbombela (the high court).

The facts in this matter were common cause. The appellants KB, the wife and HBB, the husband, were married to each other in December 2011. The appellants, together, have a son (minor son) who was born on 21 February 2018, after a fertilised embryo, created from two gametes not genetically linked to the appellants, was transferred to KB's uterus. KB had struggled with uterine growths which made it difficult to fall pregnant naturally. She had her first myomectomy in 2009 followed by further three myomectomies. HBB on the other hand, also had a previous vasectomy which was reversed. In 2000 he was diagnosed with testicular cancer which was medically treated. The appellants tried for five years to have children. They had numerous attempts through in vitro fertilisation (IVF) and intrauterine insemination (IUI) but were unable to fall pregnant. Their doctor advised them to make use of donor gametes to have children. They took the doctor's advice and found donors that suited their requirements and had seven embryos fertilised. KB underwent her first transfer which resulted in the birth of the minor child at thirty-three weeks. This was because her uterus was ruptured during the gestation period. Once she was medically treated and cleared, KB underwent the second transfer. This resulted in a positive pregnancy. However, at six months, she had to undergo emergency surgery because her life was in danger. She lost the baby during the process and her uterus was removed to the extent that she is unable to carry any of the remaining three embryos. The appellants were of the view that the only way for the embryos to be born would be by way of the surrogate motherhood process. They had found a willing surrogate who was prepared to assist them. A surrogate motherhood agreement had been drafted and awaited the granting of their application by the court, before they could sign.

In the high court, the appellants brought an application to declare that the provisions of s 294 of the Children's Act 38 of 2005 (the Act) that required that there must be a genetic link between the child to be born out of surrogate motherhood agreement and the commissioning parents violated the best interests of the minor child and his rights to dignity and equality. The respondent, the Minister of Social Development (the Minister), argued that the appellants had not made out a case for the relief sought. The high court agreed with the Minister and held that that the appellants failed to identify the right that was alleged to have been violated and to provide the basis for that violation. It as a result, dismissed the application which lead the appellants to bring the matter on appeal to this Court.

The issue before this Court was whether the right to have genetically linked siblings existed, what was the source of that right, if any, and how it related to surrogacy as provided in chapter 19 of the Act.

The SCA held that the limitation challenge brought by the appellants, was answered by considering what the purpose of the provision was. As already mentioned, the text, and context revealed the purpose. It was to protect the child to be born by ensuring that there existed a genetic link between the child and the parent/s when that child was conceived. It further created and established a genetic origin of a child to at least one of the parents which was important for the self-identity of the child. The

appellants' contention that the child to be born out of surrogacy could have obtained a genetic origin from its siblings was not supported by the text, context and purpose of s 294. What was evident was that it was a parent whose gamete was used that established the child's origin, in terms of that section, not the sibling's genetic origin. It was clear that the interests of the child spoken of in s 294 read in context, were not those of a child already born. That section had nothing to do with those alleged rights. Furthermore, the SCA concurred with the high court and stated that it was incumbent upon a party raising a constitutional challenge to identify the right that was alleged to be violated and the basis upon which it was contended that the right was violated. There was no right that can be constitutionally sourced for a minor child to have a sibling that was genetically related to them. The basis advanced by the appellants, for that right, was that a full biological sibling may be crucial in case of possible illness that the minor child may face later in life. While that argument may be compelling, its importance did not create a constitutional right. Furthermore, the SCA held the means chosen to achieve the purpose of enacting s 294 was the legislature's choice and courts could not interfere with that choice on the ground that it would have considered a different purpose and means. To do that, would be for the judiciary to usurp the powers given to the other arms of the state and a violation of the doctrine of separation of powers. In conclusion, the SCA held that the appellants were seeking an order that certain words be read into the provisions of s 294 of the Act to make provision that a surrogate motherhood agreement would be valid where the genetic origin of the child to be born was the same as any of her siblings. It followed that the reading in of words into a legislative provision had to be preceded by a finding of constitutional invalidity. Absent that finding, such reading in could not be made. As a result, the appeal was dismissed with each party to pay its own costs.

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