

Deon Gericke

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Sent: Tuesday, 16 August 2022 12:36
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Cc: Sello Tshetlho; sello.tshetlho@webmail.co.za
Subject: RE: DJP'S DIRECTIVE IN TERMS OF SECTION 14(1)(a) OF THE SUPERIOR COURTS ACT, 10 OF 2013
Attachments: CCF_001023.pdf

Good day

I refer you to the attached directive for your attention.



Regards

Ms Avela Mbelani

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**OFFICE OF THE DEPUTY JUDGE PRESIDENT LEDWABA
HIGH COURT OF SOUTH AFRICA, GAUTENG PROVINCIAL DIVISION, PRETORIA**

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To: Professor DW Thaldar
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To: Professor M Labuschaigne
University of South Africa
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And to:

- a. **The Judges of the Gauteng Division of the High Court of S.A**
- b. **The Registrar of the Gauteng Division of the High Court of S.A.**
- c. **The Pan African Bar Association**
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- d. **The Johannesburg Bar Council**
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- e. **The Pretoria Society of Advocates**
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**IN RE: SEVERAL PENDING SURROGATE MOTHERHOOD AGREEMENT CONFIRMATION
APPLICATIONS - 10957/2022; 8749/2022; 9354/2022; 34190/2022; 55365/2020**

**DEPUTY JUDGE PRESIDENT'S PRACTICE DIRECTIVE IN TERMS OF SECTION 14(1)(a) OF
THE SUPERIOR COURTS ACT, 10 OF 2013**

This is a Directive issued in terms of section 14(1)(a) of the Superior Courts Act, Act 10 of 2013, read with section 173 of The Constitution of the Republic of South Africa. The purpose of this Directive is to provide for the constitution of a Full Court, to sit as a court of first instance, to decide on the legal issue identified below.

1. BACKGROUND

In *Ex Parte JCR* (51606/21), new requirements were set for surrogate motherhood agreement confirmation applications. The Court held that information should be placed before a court to safeguard the interests of any existing children of the surrogate and the commissioning parents. More specifically, the court held that it should be informed by a clinical psychologist who has consulted with the child(ren) of the commissioning parents and the surrogate parents that the child(ren) is prepared for the surrogacy and the outcome. The clinical psychologist may make any recommendation that is in the interests of the child(ren), including whether they may need further therapy, and must report on the effect that any previous surrogacy has had on the child(ren).

After the judgment in *Ex Parte JCR* (51606/21) was handed down, I was approached in my capacity as Acting Judge President by Professor Donrich Thaldar, representing the UKZIN group

of law academics, and Professor M Labuschaigne from UNISA. The concern was raised that the additional requirements are problematic for a few reasons, *inter alia*, that it constitutes an overreach in terms of the provisions of the Children's Act 38 of 2005; is intrusive and requires unjustifiable psychological assessment of existing children; may create financial obstacles for less affluent commissioning parents; has a discriminatory effect on infertile persons and gay men who rely on surrogacy to become parents because the law generally does not require fertile heterosexual parents to take their existing children to a clinical psychologist to prepare them for the birth of siblings.

I was requested to direct that the next surrogacy application filed in the Pretoria High Court be heard by a Full Court to consider the new requirements laid down by the court in *Ex Parte JCR* (51606/21).

2. LEGAL ISSUE RAISED:

The legal issue that is to be decided on by the Full Court is the following:

Should it, as a rule, be required that a clinical psychologist assess the existing child(ren) of commissioning and surrogate parents to determine whether they are prepared for the surrogacy and its outcome?

3. SEPARATION OF ISSUES

The legal issue stated above is separated from other issues to be decided on in the respective pending surrogacy applications. The legal issue will be adjudicated by the Full Court. The remaining issues will be dealt with by the judge to whom the surrogacy applications are allocated, after the Full Court has decided on the legal issue stated.

4. CONFIDENTIALITY

Due to the unique and confidential nature of surrogacy motherhood agreements, and the specific legal issue before the court, access will not be granted to the individual *Ex Parte* applications.


5. AMICI CURIAE

Professor M. Labuschaigne of UNISA, and Professor Donrich Thaldar on behalf of the UKZN group of law academics, are, as per their request, invited to apply to be admitted as *amici curiae* to assist the Full Court in assessing the legal and social consequences of the new requirements in the public interest.

6. DIRECTIVE

- 6.1. **Therefore**, in terms of section 14(1)(a) of the Superior Courts Act, 10 of 2013, I hereby constitute a Full Court for purposes of hearing and disposing of the legal issue referred to above;
- 6.2. After the legal issue is disposed of, a judge will finalise the pending surrogacy applications in chambers;
- 6.3. Van der Schyff J is appointed as the case manager to facilitate the adjudication of the legal issue and the consideration of the surrogacy motherhood agreements;
- 6.4. Van der Schyff J's Registrar created a CaseLines file with the prefix 'FULL COURT – Pending Surrogacy Applications August 2022', and invited the legal representatives of the applicants, the Chief Registrar and Ms. Mbali of this Office, to the CaseLine file with the necessary authorisation to invite other parties. Any party who proposes to apply to be admitted as an *amicus curia* must register as a CaseLine user and provide Van der Schyff J's registrar (sello.tshetlho@webmail.co.za; STshetlho@judiciary.org.za) with its e-mail address and a request to be invited to the CaseLine's file.
- 6.5. For purposes of service and filing of any process envisaged, such service and filing shall be by electronic email communication provided that the appropriate proof of delivery shall be provided, and through uploading to the electronic file on CaseLines;
- 6.6. All interested parties who wish to be admitted as *amici curiae* in this matter are directed to serve and upload their applications, setting out the basis why they wish to be so admitted as well as the full legal arguments / comprehensive heads of argument they intend to advance in support of their applications by 14h00 on Friday 26 August 2022;

- 6.7. Applicants shall indicate their consent / objection to an application for the admission of an *amicus curiae*, together with the basis for any objection, as well as any legal argument that the Applicant wishes to advance in this regard, by 12h00 on **Wednesday 31 August 2022**. Any reply must be filed by **Friday 2 September 2022** at 17h00. Applications to be admitted as *amici curiae* will be considered on paper by Van der Schyff J and the outcome will be communicated by Monday 5 September 2022 through publication on CaseLines;
- 6.8. In the event that any *amicus curia* wishes to file any affidavit(s), such affidavit(s) must be filed by **Friday 2 September 2022** at 17h00.
- 6.9. Applicants who wish to file supplementary affidavits with the sole intention to address the legal issue set out above, must file such affidavits, together with the legal argument they tend to advance/ heads of argument, by **Friday 9 September 2022**;
- 6.10. The provisional date on which the Full Court will hear the matter referred to it, is **Monday 12 September 2022** at 10h00 or as soon thereafter as the matter can be heard.



A P Ledwaba
Deputy Judge President
Gauteng Division of the High Court of South Africa
16 August 2022