IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No: **038988/2022**

(1) REPORTABLE: YES/NO	
(2) OF INTEREST TO OTHER JUDGES: YES/NO	
(3) REVISED	
	07 MAY 2024
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SIGNATURE	**DATE**

In the matter between:

SURROGACY ADVISORY GROUP NPC Applicant

and

THE MINISTER OF HEALTH Respondent

This judgment is prepared and authored by the Judge whose name is reflected as such, and is handed down electronically by circulation to the parties / their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for handing down is deemed to be 07 May 2024.

JUDGMENT

RETIEF J

INTRODUCTION

[1] The applicant, the Surrogacy Advisory Group NPC [Surrogacy Group] raises this application in the public interest in terms of section 38(d) of the Constitution of South Africa [Constitution].[1] In so doing, the Surrogacy Group seeks to declare regulation 10(2)(a) of the Regulations relating to artificial fertilisation of persons [the regulations][2] of the National Health Act 61 of 2003 [the Health Act] unconstitutional. In its relief the Surrogacy Group suggests a remedy of the reading in of certain words into regulation 10(2)(a) [the impugned provision].

[2] The Minister cited, is the Minister responsible for the Health Act and who, in terms of section 68 is empowered to make regulations, in particular in terms of section 68(1)(l) dealing with the artificial fertilisation of persons. The impugned provision forming part of the regulations, the subject matter of this application. The Minister opposes the application.

[3] To contextualise the impugned provision is important at this stage. It appears under regulation 10 which deals with the control over artificial fertilisation, embryo transfer, storage and destroying zygotes and embryos. Regulation 10(2) is specifically aimed at medical practitioners specialising in gynaecology with training in reproductive medicine, medical scientist, medical and clinical technologists with training in reproductive biology and related procedures[3] [medical practitioners]. Subsection 2(a) places a prohibition of control over artificial fertilisation on such medical practitioners and the relevant portion states that:

> "*10(2)(a)* *A competent person **shall not** (own emphasis) effect in vitro fertilisation except for embryo transfer, to a specific recipient (own emphasis)and then only by the union of gametes removed or withdrawn from the bodies of-"*

[4] The Surrogacy Group in its founding papers contends that "*This application concerns IVF for intended parents who are considering surrogacy, but before the*

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1 Act 108 of 1996.

2 GNR 175 of 2 March 2012, Government Gazette No.35099.

3 Definition of competent person in terms of the Regulations Relating to Artificial Fertilisation of Persons in terms of the National Health Act 61 of 2003.

court has confirmed their surrogate motherhood agreement." This contention appears to be at odds with the concerns raised in the papers as a whole in that, the founding papers suggest that the concern is unrelated to the process of IVF nor for that matter, the ability for a pregnancy infertile intended parents to elect IVF in surrogacy, as the process and the right to elect remains extant. The concern is aptly found in paragraph 33 of the founding papers in which the Surrogacy Group states that it is: "*A time co-ordination problem between two scarce resources- a suitable egg donor and a surrogate mother- can be solved by creating embryo's and cryopreserving them for later use*." The concern firstly, is that the impugned provision is not a solution for the time co-ordination problem.

[5] The use of the phrase "-*them for later use*" in paragraph 33 suggests that the time co-ordination concern is not confined to "-*before the court has confirmed the surrogate motherhood agreement* " either, but in fact, to a time even before a voluntary surrogate mother has been found, before a surrogate motherhood agreement[4] has been concluded and before intended parents become commissioning parents.[5] The concern secondly, is that the impugned provision confines the time when the process of IVF can take place, namely when there is a "specific recipient".

[6] The use of the term by the Surrogacy Group of "*commissioning parents*" in its papers in fact is reference to intended parents and not "*commissioning parents"* as defined in the Children's Act 38 of 2005 [the Children's Act]. Counsel for the Surrogacy Group conceded the error pointed out to him and asked this Court to make the correct distinction. This was considered and done without opposition from the Minister.

[7] The actual concern of the timing co-ordination issue and what presently happens in practice was confirmed by the evidence of Ms Els-Smit, a medical biological scientist, medical practitioner in the fertility field, [Ms Els-Smit] when she stated that: "*To solve the timing issue, embryo freezing would be a preferred route*

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[4] A term used and defined in the Childrens Act 38 of 2005 to mean an agreement between a surrogate mother and a commissioning parent.

[5] A term used and defined in the Childrens Act 38 of 2005 to mean a person who has entered into a surrogate motherhood agreement with a surrogate. Implying already entered.

of treatment". She further states at paragraph 60: "*It is actually not uncommon for commissioning parents in a surrogate motherhood agreement confirmation application to already cryopreserved embryos stored at their fertility clinic".* This is before a gestational surrogate has been identified.

[8] This would explain why the Surrogacy Group confirmed that the trigger for the challenge was the interpretation given to the impugned provision in *Ex Parte* MCM[6] [MCM matter] by Van Der Schyff J [the perceived narrow interpretation]. The applicants in the MCM matter sought declaratory relief in respect of section 303(1) of the Children's Act. The interplay between section 303(1) of the Children's Act and the Health Act regards the prohibition of certain acts by any person including a medical practitioner. For present purposes what Van Der Schyff J stated about the legislative interplay regarding the surrogacy journey is of importance:

> "*[30] The interaction between the National Health Act and the Children's Act, as far as assisted reproduction by way of gestational surrogacy is concerned where no embryos were created in the period before it became apparent that the woman concerned would not be able to carry a foetus to full term pregnancy, is that a surrogate motherhood agreement needs first be confirmed by the court, before in vitro fertilisation can commence. Once the surrogate motherhood agreement is confirmed, the surrogate mother is identified and she will be included within the definition of recipient and more importantly, within the phrase 'specific recipient' as it appears in regulation 10(2)(a).*" (own emphasis)

[9] And further at paragraph 33:

> *"[33] … The Regulations Relating to the Artificial Fertilisation of Persons, as it currently stands, prohibit in vitro fertilisation except for embryo transfer to a specific recipient. In the absence of a constitutional*

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[6] ***Ex parte* MCM and Another** (28084/2022) [2022] ZAGPPHC 712 (26 September 2022) at para 30-32.

> *challenge to the Regulations* ***with interested and affected parties joined*** *to the proceedings, the application stands to be dismissed*." (own emphasis)

[10] The Surrogacy Group contends that as a result of the *Ex Parte* MCM, judgment the present constitutional challenge to the impugned provision "*is the only way for the applicants in Ex Parte MCM and all persons similarly situated to obtain relief*". The Surrogacy Group contending that the interpretation of the impugned provision infringes on 5(five) rights in the Bill of Rights, equality, section 9(1), non-discrimination which is (section 9(4)), dignity (section 10), privacy (section 14) and access to healthcare services (section 27(1)(a)) of the Constitution [infringed rights]. The Surrogacy Group contends further that the infringed rights as identified cannot be justified by a section 36 limitation analysis.

[11] The Surrogacy Group persists with this contention even though, the applicants in the MCM matter do not form part of these papers nor is it apparent from the papers that they have instructed the Surrogacy Group to challenge the impugned provision on their behalf to obtain relief.

[12] Furthermore, the apparent lack joining of all persons in a similar situation as the MCM applicants as interested parties or who support this challenge in the public interest, is one of the in *limine* points raised by the Minister. It is therefore opportune to deal with the in *limine* points first. Although the Minister raised 5 (five) in *limine* points, this Court is only now enjoined to consider 2 (two) as required in terms of the joint minutes and confirmed in argument. The Counsel for the Minister pointing out that in the event the Court finds in favour of the Minister it will be dispositive of the application without necessitating traversing the merits. This Court then deals with such points on that basis.

POINTS IN *LIMINE*

Should the Surrogacy Group have joined the Minister of Social Development as an interested and affected party?

[13] The legal framework which regulates and encapsulates the entire regularity journey for intended parents is the Health Act and the Children's Act. The legal framework appears to be drafted in such a way as to ensure that there is harmony between the rights and obligations of the healthcare providers, the healthcare users and the unborn children born as a result of this journey.

[14] The connective statutory provision between the Health and Children's Act is section 296(2) of the Children's Act. This section states "*Any artificial fertilization 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)".* Applying the meaning attributed to artificial fertilisation of a surrogate mother referred to in section 296(2) by the Children's Act is to refer to the means by which a male gamete can be introduced into the surrogate's reproductive organs other than by natural means, copulation. Such means, an inclusive definition, is not limited to the introduction of a male gamete but includes the introduction of a product into the surrogate's reproductive organs. Such products created by the bringing together of gametes outside the human body, with the view of placing the product, in this case an embryo into the internal reproductive organ of a surrogate[7] or by placing the embryo into the internal reproductive organ of a surrogate. In consequence, the definition envisages the proses of IVF with a view of placing or the actual placing of the embryo into the womb of a surrogate. Such entire process to be conducted in accordance with the Health Act.

[15] The inescapable consequence is that no matter how one interprets the definition of 'artificial fertilisation' in the Children's Act, it makes provision for the process of IVF and in terms of section 296(2), it must be done in accordance with the Health Act. Furthermore, the intended parents referred to in this

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[7] The definition of artificial fertilisation in the Children's Act defining "artificial fertilisation" means the 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 –

(a) the bringing together of a male and female gamete outside the human body with the view to placing the product of a union of such gametes into the womb of a female; or

(b) the placing of the product of a union of a male and female gametes which have been brought together outside the human body in the womb of a female person.

application who will elect IVF to create embryos have no option but to choose surrogacy as a means to fulfil their fertility journey. The connectivity inevitable.

[16] Not only are the two pieces of legislation connected by the statutory provision of section 296(2) but by the inevitable consequence of the intended parents' choice then too. The outcome of the impugned provision challenge will have a direct and substantial effect on the harmony between the Health and Children's Acts. To prevent a piecemeal approach is to promote harmony in the entire process for all healthcare users and healthcare providers.

[17] The Surrogacy Group's argument is that because the Children's Act does not contain any provision that mirrors the impugned provision in particular, that the term 'specific recipient' referred to in the impugned provision is not mentioned in the Children's Act there exists no need to consider the connect or disconnect between the two pieces of legislation. This argument is illogical. Logically, reference to a surrogate in the Children's Act refers to a person who has already volunteered to be the recipient of the IVF process, such is the 'specific recipient' by any other name and, illogical because the definition of a surrogate in the Health Act is a voluntary recipient. This, on the face of it, appears to be specific enough by reference although not by the same term.

[18] The Surrogacy Group conversely and notwithstanding the warning in the judgment of the MCM matter[8] failed to join all let alone any other interested and affected parties other than the Minister. The Minister argues that the Minister of Social Development who is responsible for Social Development referred to in the Children's Act must be joined for comment having a substantial interest in the outcome. The Minister correctly raises the non-joinder of such Minister. The consequence is that the Minister of Social Development must be joined and such failure should be the end of the matter however, there is a need to address the remaining point *raised* and relied on.

[19] The necessity therein lies to demonstrate and reinforce the importance of statutory harmony of the entire legislative framework concerning

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[8] Footnote 6 at para 33.

surrogacy, if not, the devastating effects of confusion and disturbance remains unillustrated. This Court will do so by considering the Minister's last point in *limine*, being that the Surrogacy Group lacks standing to bring this application.

Who is the Surrogacy Group and did they bring this application in the public interest?

[20] To appreciate the manner in which the Surrogacy Group brought this application, the manner in which their founding papers were drafted and their complacency to comply with rule 16A is to appreciate the history that existed between the Surrogacy Group and the Minister regarding the regulations *per se*.

[21] In short, the Minister on 25 March 2021 published a proposed amendment to the regulations [draft regulations]. At the time the Surrogacy Group had been embroiled in litigation with the Minister in a constitutional challenge it brought against other provision of the regulations in this Court, the Surrogacy Advisory Group v Minister of Health [2020 matter].[9]

[22] The proposed draft regulations did not contain the impugned provision. To date, the regulations have not been amended and the impugned provision in its unamended form stands to be applied. From the Surrogacy Groups' papers and in particular from the evidence provided by both Ms Albertyn, an entrepreneur and co-founder of Nurture Egg Donors CC, and Ms Els-Smit, the IVF process for intended parents in the surrogacy process is being performed by medical practitioners without a known gestational surrogate. This is contrary to the impugned provision and in consequence unlawful. The unlawfulness not apparent to the medical practitioners according to the Surrogacy Group until this Court's narrow interpretation of the impugned provision in the judgment of the MCM matter.

[23] The background history explains the cavalier approach to this constitutional challenge, the Surrogacy Group hoping that the Minister would not oppose this application. This speaks to why they felt it necessary to highlight what

[9] [2022] ZAGPPHC 558 (19 July 2022).

they termed "*the Minister's about-face*" and why the Surrogacy Group, as a voluntary association approached this Court in 2020 challenging the regulations.

[24] Initially the Surrogacy Group brought this application in the name of the Surrogacy Advisory Group, a voluntary association of medical-legal lawyers and individuals experienced in the field of infertility and surrogacy. As a voluntary association its chief advisor and duly appointed attorney Robynne Friedman of Robynne Friedman Attorneys [Friedman] stated that the Surrogacy Group, as a voluntary association had previously litigated in the public interest pursuant to section 38(d) of the Constitution. The matters cited were AB and another v Minister of Social Development [AB matter] [10] and the 2020 matter.

[25] Questioning who the Surrogacy Group factually was before this Court, absent its constitution and a list of members, the Minister, *inter alia*, challenged the Surrogacy Group's standing to, *inter alia*, bring this application in terms of section 38(d) of the Constitution in the public interest. Without privy to its constitution, the associations common objective unclear and an inability to assess whether Ms Albertyn, as its founder, possessed the requisite authority to bind all the members of the association by resolution as she did on the papers, was not possible. A constitution of a voluntary association, absent the necessary allegations in its founding papers, is the only way to establish whether the association itself possesses legal personality of its own as a *universitas*, cloaked with the necessary legal capacity. An important enquiry.

[26] This 'call' by the Minister in its answering affidavit stirred up a hornet's nest. No constitution was forthcoming but rather a notice of amendment in terms of rule 28(2) followed by the filing of a supplementary founding affidavit by Friedman as an attorney and the chief advisor of the Surrogacy Group.

[27] The nub of the supplementary founding affidavit was to confirm the factual position. The position was, as at the date of launching this application in the public interest, the Surrogacy Group, as a voluntary association did not exist. In fact, it did not exist when it launched the 2020 matter either. This fact was not

[10] [2016] ZACC 43

brought to the Minister's nor Court's attention in the 2020 at that relevant time. Friedman in her supplementary founding affidavit failed to deal with the glaring consequences. She merely explains how it came about that the incorrect citation of the Surrogacy Group occurred by stating that:

> "*6. In subsequent litigation, my legal representatives* (own emphasis) *used the citation of the Surrogacy Advisory Group in the founding papers filed in the AB and Another v Minister of Social Development as a template, not knowing that the Surrogacy Advisory Group had since been registered as a non-profit company."*

[28] However, from the papers and in this application she is the legal representative and her own firm the duly appointed attorneys of record. The filing notices indicates that Friedman's firm is the Surrogacy Group's attorneys and that Gouse Van Aarde attorneys are the correspondent attorneys. In the premise, to which legal representatives of her own does she refer? The answer is unclear and remains a mystery. No confirmatory affidavit by any other attorney is attached to clear this glaring factual inaccuracy up.

[29] Be that as it may, Friedman now states that the factual position is that the Surrogacy Group was subsequently registered as Surrogacy Advisory Group NPC (registration number 2014/163958/08) as far back as 21 August 2014, almost a decade ago. Of significance is that a voluntary association is recognised in common law and is not regulated by the provisions of the Companies Act 71 of 2008 [Companies Act]. Therefore one simply does not convert and association into a non-profit company nor can it simply undergo a name change. A new legal entity must be registered in terms of the Companies Act with its own Memorandum of Incorporation [MOI] as a non-profit company. One then accepts, although not demonstrated on the papers, that the members of the voluntary association elected not to continue with the association, it then ceased to exist. The registration of a new legal entity, albeit with the same name with its own objectives it elects ,is formed. The new entity now possesses legal personality by virtue of its registration in terms of the Companies Act.

[30] The citation error of the voluntary association instead of a non-profit company was referred to as a misnomer occasioned by a *bona fide* error by Friedman's legal representatives which she as the chief advisor only picked up when the Minister raised the Surrogacy Group's standing and required a copy of its constitution. In an attempt to correct the error, and amend the founding papers, Friedman stated:

> "*10. The correct citation of the applicant is accordingly as follows: the applicant is the* ***SURROGACY ADVISORY GROUP NPC****, an entity initially established as a voluntary association as set out in paragraph 5 of the founding affidavit, and registered as a non-profit company on the 21st of August 2014 with registration number 2014/163958/08 with offices situated at 27 Belvedere Road, Belvedere Estate, Durbanville, 7550."*

[31] The error simply being as a misnomer[11] as described is not supported in law as previously dealt with, albeit as a result of a *bona fide* error. The veracity and accuracy of Friedman's explanation for the oversight is rejected. However, the factual situation that the Surrogacy Group is a non-profit company is accepted. The Minister did not object to the proposed amendment when filed but argued that Friedman's actions as a legal practitioner and with insight into the Surrogacy Group and as a director and its chief advisor could never have made an *bona fide* error of this magnitude for a decade, since 2014. This is having regard to the 2020 matter too.

[32] Now applying the amendment to the evidence as advanced by Friedman in paragraph 10 of the supplementary founding papers is to correct the citation of the Surrogacy Group. The citation of the Surrogacy Group is found in paragraph 5 of the founding papers. If that is applied and replaced, the Surrogacy Group as cited is no longer a group of medical-legal lawyers and individuals experienced in the field of fertility and surrogacy protecting and promoting the interests of women considering surrogacy and persons considering becoming

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[11] "Misnomer" as a noun according to the Oxford dictionary means: "a name that does not suit what it refers to, or the use of such a name."

parents through surrogacy. The unamended citation is one sentence duly replaced by another. Although amended pages to the affidavit appear to have been filed, blank amended pages were filed onto caselines and blank amended pages were also inserted in the Court's bundle. This Court then accepts and comments on what has been filed.

[33] Therefore, on the papers filed, the facts relied on in the next paragraph, paragraph 6, which the Surrogacy Group relies on to bolster its interest in public interest litigation by referring to other matters does not apply to the duly amended Surrogacy Group. This is because factually the non-profit company has never been cited in any of the matters relied on. That being the AB matter nor the 2020 matter.

[34] The consequence of an amendment sought and brought in a piecemeal fashion results in a disconnect between the perceived objectives of the Surrogacy Group and what is accepted as the evidence as a whole. The entire 'evidence framework' is disjointed and causes an unsatisfactory outcome. A point this Court wishes to make having regard to the consequences of a constitutional challenge effecting the entire legal framework concerning surrogacy.

[35] To assist the Surrogacy Group, and again, absent its Memorandum of Incorporation [MOI] which the Minister contends it called for on 5 June 2023, the Court considers the content of the only document filed, the registration certificate. Unfortunately, under its main business/main objective no objectives are listed, it merely inserts a: "*NO RESTRICTION ON BUSINESS ACTIVITIES*". This Court accepts that the directors, Friedman, Ms Albertyn and Ms KL Lazarus are fully aware of the non-descriptive and non-restrictive business activities of the Surrogacy Group.

[36] In reply, the objectives are not pertinently verified but, Friedman in paragraph 11, when addressing the Minister's turnabout after the 2020 matter, not to "*-make the 2021 draft regulations into law-*" states: "*Accordingly, the applicant could simply not wait. <u>We had to act</u> (own emphasis) - aligned with the objective of*

the applicant to protect and promote the interests and rights of surrogacy commissioning parents - to challenge the impugned provision in court."

[37] With reference to *"We had to act",* the Minister persists that it is unable to verify whether the public interest application is properly authorised now by the 'We-" Surrogacy Group as a non-profit organisation with reference to annexure "RF1", the resolution. The Ministers further contends that it therefore cannot authenticate whether the Surrogacy Group is properly before the Court and whether the objectives of the now cited Surrogacy Group is to launch this application acting in the public interest, as claimed.

[38] "RF1" is a resolution signed on 14 October 2022 by Ms Albertyn in her capacity as the founder of the Surrogacy Group as a voluntary association. Subsequent to the effected amendment and, absent any further resolution by the directors that such an application is to be brought and in the manner it has been brought, the Ministers persistence is well-founded. Both Friedman and Ms Albertyn are silent about the factual inaccuracies and consequences of "RF1". The meeting of the Surrogacy Group as a voluntary association could not have taken place in October 2022 on the facts as asserted and relied on."RF1" still on the papers.

[39] Again, an illustration of the consequences of amendments causing disjoint and disconnect with any of the perceived objectives of the Surrogacy Group, as no decision or document expressing a direct interest is pursuing a public interest challenge is before this Court. There are more questions than answers about how the Surrogacy Group conducts litigation.

[40] Furthermore, no direct interest either is voiced through the Surrogacy Group as the applicant by members of the public in whose interest this application is brought to support their allegations. Neither is this application supported by affidavits from any intended parent/s who subjectively express the untenable predicament they face or untenable position they are in as a direct result of the impugned provision nor for that matter, a supporting affidavit from any one of the applicants in the MCM matter. Their own disgruntlement did not appear to trigger this application. The only affidavits relied on by the Surrogacy Group is

opinion evidence. Opinion evidence which this Court is entitled to reject or to rely on depending on the content and its usefulness in the deliberation of the matter.

[41] Section 38 of the Constitution states that anyone who is listed in the section has a right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the Court may grant appropriate relief including a declaration of rights. Section 38(d) permits anyone acting in the public interest to approach the Court.

[42] Section 38(d)(d) which refers to public interest standing is in addition to those provisions that allow for actions to be instituted on behalf of other persons or on behalf of a class. Yacoob J, in the Lawyers for Human Rights v The Minister of Home Affairs[12] expanded by stating that: "*Subsection (d) therefore connotes an action on behalf of people on the basis wider than the class actions contemplated in the section. The meaning and reaching of the standing conferred by this paragraph must be determined against this backdrop*." For this reason, Yacoob J referred to the judgment of O'Regan J in Ferreira v Levin[13] in which the learned Judge advocated a particular approach to determine the reach of the provisions in the interim Constitution which were equivalent to section 38(d) of the Constitution as well as whether a person or organization could be said to have been acting in the public interest in a particular case. In that regard Yacoob J stated: "*This court will be circumspect in affording applicants standing by way of section 7(4)(b)(v) and will require an applicant to show that he or she is genuinely acting in the public interest (own emphasis). Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case*."

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12 [2004] ZACC 12.

13 [1995] ZACC 13 at par 234.

[43] The standing provision of the interim Constitution is for all practical purposes according to Yacoob J the same as section 38 of the Constitution and the approach applied by O'Regan J, although in the minority decision, was not rejected as factors and/or criteria by the majority. What is however clear is that a court must consider whether a party is genuinely acting in the public interest, that the factors are not exhaustive and to be applied case by case , be case specific.

[44] This case, specifically for all the reasons dealt with above, including applying the factors referred to in argument, written and otherwise (the relief and paragraphs 48-49 of the founding papers) lacks sufficient evidence to justify the outcome that the Surrogacy Group as a NPC is bringing this application genuinely acting in the public interest.

[45] It is on this procedural precondition, that the Minister contends the Surrogacy Group has failed to demonstrate a personal and a direct interest as acting in the public's interest in the challenge of the impugned rule, which is correct. The lack of standing argument for all the reasons alluded to must succeed.

[46] As stated, in the context of the multicentric legislation which forms an interrelated and independent legislative framework regulating surrogacy, the non-joinder point too, must succeed. The Surrogacy Group's founding papers are ill equipped to deal with the challenge, such position cannot nor should not be remedied by their replying affidavit. Simply, for the lack of the Minister's ability to deal with further allegations. Notwithstanding the Surrogacy Group's replying affidavit, does not take the veracity of the points *in limine* raised any further. The application fails on the points raised *in limine*.

[47] There is therefore no need to deal with the merits of the constitutional challenge itself.

Costs

[48] The Minister argued that the Biowatch principle[14] should not apply in this matter even though the subject matter of the application is clearly centred around a constitutional challenge of the impugned provision. Its Counsel argued that if one had regard to the chronology of the matter, in other words what had transpired in the matter after the founding papers had been filed. In this regard he referred to the warning the Minister gave to the Surrogacy Group to file its rule 16A notice [the notice].

[49] The application was filed on the time 27 October 2022. According to an affidavit deposed to by Ms M Van Aarde, [Van Aarde] an attorney in the employ of the Surrogacy Group's correspondent attorney. Van Aarde was not prepared to state under oath when the notice was handed to the registrar in compliance of rule 16A(1)(a) however, in terms of rule 16A(1)(c) the registrar shall on receipt and forthwith place the notice on the board designated for that purpose. Van Aarde under oath states that such notice was placed on the notice board by the registrar on 3 April 2023 and stamped on the same date. No allegations or complaint of the registrar's non-compliance of rule 16A(1)(c) was evident. In consequence non-compliance of the rule 16A notice persisted for 5 (five) months without any proper explanation from Van Aarde nor Friedman.

[50] The Minister's Counsel highlighted the conduct of the Surrogacy Group by not bringing this application by an entity which legally existed at the time and the fact that its conduct in the 2020 remains unexplained, all such conduct unbecoming deserving of sanction. The Minister he contended, acted in good faith by raising the points i*n limine* on the papers as they stood. Counsel for the Surrogacy Group argued that Friedman apologised and that the mistake was *bona fide*. Even so, the legal consequences and disjoint that flowed cannot be eradicated by an apology and remains a factor.

[51] In contrast argued Counsel for the Surrogacy Group that it was the Minister who in July indicated to Van Aarde that it anticipated that the draft regulations process, the internal analysis of comments received and consultations with civil societies, would be completed by December 2021. By November 2022

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[14] Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14

the process had not been completed and Van Aarde in a letter to the Minister, after instituting these proceedings, stated that there was no reason why the impugned provision should be kept in the final draft regulations and that these proceedings had been instituted due to the unfulfilled promises made. She furthermore suggested that, in line with the draft regulations, the Minister should not oppose this application and abide by the judgment of this Court.

[52] The Minister opposed the application in February 2023 and the Surrogacy Group's Counsel argued that it is the Minister who escalated the costs. Opposition does escalate the costs but in hindsight had it not been for the Minister this Court, like in 2020, may have still have considered the Surrogacy Group was as a voluntary association. Furthermore, a delay in the process of the Minster to finalise the draft regulations, does not translate into a capitulation on the merits of this application. To expand, all the Minister stated in the letter of 2021 was that the process may be completed by December 2021. A completed process and the outcome from comments and consultations unknown. It is presumptuous to accept that the draft regulations would be promulgated in the same form as published. This is simply because what would the purpose be for comment and consultation if not for the possibility of changing the published draft regulations in public interest, or for that matter, an entire turnabout face, to coin the phrase used in these papers

[53] Considering all the relevant factors as too, the outcome of this application, this Court exercises its discretion not to apply the Biowatch principle.

In consequence, the following order follows:

1. The Respondent is granted condonation for the late filing of its answering affidavit.

2. The application is dismissed with the costs of two Counsel, one a Senior Counsel. Senior Counsel's costs to be recovered and taxed on scale C and junior Counsel's costs to be recovered and taxed on scale B.

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L.A. RETIEF
JUDGE OF THE HIGH COURT
GAUTENG DIVISION

Appearances:

For the Applicant:	Adv C Woodrow SC Cell: 082 921 9191 Email: woodrow@advchambers.co.za Adv D Thaldar Cell: 083 306 9099 Email: donrich@thaldar.com
Instructed by attorneys:	Roynne Friedman Attorneys c/o Mareli van Aarde Incorporated Tel: 012 430 6737 Email: mareli@gvainc.co.za
For the Respondent:	Adv A Bhoopchand SC Cell: 082 577 468 Email: ajayb@africa.com Adv M Matlapeng Cell: 060 775 8671 Email: matlapengmichaelz@gmail.com
Instructed by attorneys:	The State Attorney, Pretoria Nangamso Qongqo

Tel: 072 277 1908
Email: NaQonggo@justice.gov.za

Matter heard:	11 March 2024
Date of judgment:	07 May 2024