With regard to the rights of the child, the Court emphasised that the rights of a child born out of a surrogacy arrangement were no different from the rights of any child recognised under national and international law. Other scenarios could be imagined that could complicate the case; for instance, in the case of Baby Gammy, an Australian couple had twins out of a surrogacy arrangement with a woman in Thailand, but decided to leave behind one of the twins because he had Down's Syndrome.[71] This case sparked debate but also revealed that failure to regulate surrogacy may allow loopholes and expose children to human rights violations.

From a reproductive rights point of view, the starting point could be the concept of the right to sexual and reproductive health, and reproductive rights as articulated at the 1994 International Conference on Population and Development (ICPD) that took place in Cairo. Reproductive rights were defined in the Program of Action (PoA) as "the basic right of all couples and individuals to decide freely and responsibly the number, spacing and timing of their children and to have the information and means to do so and the right to attain the highest standard of sexual and reproductive health."[72]

However, surrogacy was not on the agenda at the ICPD. Barbara Stark argues that to the extent that surrogacy enables persons to exercise their reproductive goals and to have children, the ICPD PoA supports surrogacy, or in the least would weigh against an outright ban of the practice.[73] Stark's view can be buttressed by the argument that surrogacy arrangements are a realisation of the right to enjoy the benefits of scientific progress[74] for persons who would otherwise not have had the chance to reproduce, and in some instances, have progeny that share their genetic identity.

Commercialisation of surrogacy is an important challenge because of the risk of coercion or undue influence on the surrogate. Global or transnational surrogacy agreements have therefore been criticised because they have usually involved rich prospective parents and poor potential surrogates. Vida Panitch is one thinker who believes that such transnational commercial surrogacy agreements should be criminalised as they involve exploitation of women by violating their reproductive rights to be free from violence and coercion.[75] She emphasises that the exercise of the right to reproductive choice (by the prospective parent or parents) should not result in the infringement of another person's reproductive right to be free from coercion (the surrogate). Yet, this approach could also be critiqued as assuming that individuals who are poor or otherwise marginalised are in all instances unable to exercise agency in deciding whether to become surrogates.

MIA v. State Information Technology Agency (Pty) Ltd.
[2015] ZALCD 20
South Africa, Durban Labour Court

COURT HOLDING

In applying maternity leave policy, an employer must recognise the status of parties to a civil union and recognise the rights of commissioning parents in a surrogacy agreement, including male parents in same-sex unions. The respondent's refusal to grant the Applicant paid maternity leave on the grounds that he was not the biological mother of his child therefore constituted unfair discrimination.

The right to maternity leave as created in the Basic Conditions of Employment Act is an entitlement not linked solely to the welfare and health of the child's mother, but which must also be interpreted to take into account the best interests of the child.

Summary of Facts

The Applicant, a male employee in a same-sex civil union, entered into a surrogacy agreement with a surrogate mother. The applicant asked his employer, the respondent, for paid maternity leave. However, the respondent refused to grant him paid maternity leave as per its policy because it understood "maternity" to apply to females only, and also did not recognise this as applying to commissioning surrogate parents.

The respondent's maternity leave policy mirrors the provisions of Section 25 of the Basic Conditions of Employment Act 1997; an employee is entitled to "paid maternity leave of a maximum of four months," such leave to be taken "four weeks prior to the expected date of birth or at an earlier date". The Applicant was initially offered unpaid "family responsibility leave," and subsequently two months' paid adoption leave and two months' unpaid leave. The Applicant sought an order directing the respondent to (1) refrain from unfair discrimination; (2) recognise the rights of those in the Applicant's position as natural maternal parents; (3) recognise the rights of those in the Applicant's position to receive paid maternity leave; (4) pay the Applicant two months of remuneration; (5) pay damages in the sum of R400,000; and (6) pay costs.

Issue

The issue before the Court was whether the application of the respondent's policy on maternity leave discriminates unfairly against employees who are in civil unions and are commissioning surrogate parents.

Court's Analysis

The Court expressed the view that the right to maternity leave as created in the Basic Conditions of Employment Act must consider the best interests of the child in addition to the welfare and health of the child's mother. This is consistent with the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act 2005, which specifies 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."[76]

Surrogacy agreements are regulated by the Children's Act. Pursuant to the terms of the surrogacy agreement entered into by the Applicant, the child was taken straight from the surrogate. Only one commissioning parent is permitted to be present at the birth; it was decided between the Applicant and his spouse that the Applicant would be present and would take immediate responsibility for the child. The Court was of the opinion that there is no reason why an employee in the Applicant's position should not be entitled to maternity leave for the same period and on the same terms as a "natural mother."

The Court therefore held that any policy adopted by an employer should recognise the rights that flow from the Civil Union Act and the Children's Act, so that same-sex parents and surrogate mothers should not be discriminated against.

Conclusion

The Court ordered the respondent to pay an amount equivalent to two months' salary to the Applicant and the Applicant's costs, but damages were denied.

Significance

This case is peculiar to South Africa because it is the only country in Africa that has legislation recognising same-sex marriages (civil unions) and surrogate parents. However, it is jurisprudentially noteworthy for more than these reasons.

The predominant construction of family is that it is a heterosexual institution. Women have thus been socially constructed as "mothers" so that anything to do with maternity is associated with the female species. Over the years, human rights norms have been extended to cover non-traditional family constructs, such as same-sex marriage. There is much resistance to this but, as illustrated in this case, certain boundaries are being extended nevertheless. In this case, the Court interpreted "maternity" to include male "mothers" and therefore that males may also be entitled to maternity benefits. The Court explained that the principle is those who take care of the infant as their "mother" are eligible to maternity benefits, their gender notwithstanding. Further, the Court recognised the principle that the best interests of the child are paramount also applies to the situation, so that concern is not just about who receives maternity coverage, but who also benefits from it.