FOR THE SAKE OF SAVING A VIABLE LIFE: ARGUMENTS FOR COURT ORDERS PREVENTING TERMINATION OF PREGNANCY PROCEDURES AND THE FORCING OF *IN UTERO* SURGERY IN SURROGACY AGREEMENTS

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This article addresses two questions, namely, whether a court can prevent a surrogate mother from terminating a pregnancy and, secondly, whether a court can force a surrogate to undergo *in utero* surgery. To introduce the reader to a situation where the arguments of this article could become relevant, we add a hypothetical case.

A couple discover that they both have cancer. Their cancer treatment will result in them becoming sterile. Therefore, they decide to enter into a full surrogacy agreement, that is, where both their gametes are implanted in a third party's uterus. Before the cancer treatment begins, they donate the required genetic material. No further conception by way of full or partial surrogacy is possible. Just before birth it is discovered that the foetus has a severe defect. The surrogate mother wants to terminate the pregnancy, despite the fact that the defect may be corrected *in utero*.

The biological parents apply to court asking the court to:

(1) prevent the surrogate mother from terminating the pregnancy;
(2) compel the surrogate mother to undergo *in utero* surgery.

1 Preventing the termination of pregnancy procedure

The legal position regarding terminations of pregnancy is currently clear. In *Christian League of Southern Africa v Rall,*[1] it was ruled that the mother of a child categorically has the right to terminate her pregnancy, regulated by the provisions of the Choice on Termination of Pregnancy Act.[2]

Interesting questions arise in the case of surrogacy: who is the 'mother' for the purposes of terminating the pregnancy; what considerations must be kept mind in determining the rights of both the surrogate mother (referred to as the mother) and the biological

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1 1981 2 SA 821 (O).
2 Act 92 of 1996.

parents (referred to as commissioning parties or commissioning parents). This obviously raises the issues of the right of the mother to terminate her pregnancy by way of exercising her section 12 constitutional right to make reproductive decisions, as well as her right to bodily and psychological integrity,[3] which has to be weighed against the biological parents' rights to make decisions regarding reproduction.

At present, the law is unclear over the regulation of such circumstances. Should the entire Chapter 19 of the Children's Act[4] come into force, then the position will be positively regulated. The Children's Act provides that the woman may terminate the pregnancy and that such a termination ends the surrogacy agreement. However, at present, the relevant sections are not in force.

Should such a dispute come before the courts, then the matter will remain subject to existing legal principles. The most relevant of these would be a limitation of rights in accordance with section 36 of the Constitution as well as the law of contract.

Provided all the other relevant requirements for a contract are met, the crux of the matter would be whether the contract is lawful and moral. As surrogacy agreements do currently take place, it seems unlikely that they will be found to be in conflict with the *boni mores*. To declare such a practice unlawful would have serious implications and would in effect prevent surrogate pregnancies and as such is unlikely.

This then raises the issue over what the legal effect of such a contract would be. The most obvious answer to this question would be that a person cannot waive their constitutional rights. The other would be the doctrine of informed consent,[5] which holds that no person can agree to what they have not foreseen or been made aware of.

As the mother would not be able to waive her right to make reproductive decisions, she would still maintain this right, which in effect guarantees her the right to terminate the pregnancy.

In addition, the mother would not reasonably have foreseen that the foetus would become so severely injured that it would require surgery that poses a risk to her life of so great a degree that she would prefer to terminate the pregnancy. Thus, she would not incur contractual obligations to refrain from terminating the pregnancy.

It would appear the there would be no contractual grounds for preventing the mother from terminating the pregnancy.

3 Sec 12(2) of the Constitution.
4 Act 38 of 2005.
5 PA Carstens & D Pearmain *Foundational principles of the South African medical law* (2007) 877.

However, as constitutional rights come into conflict in these circumstances, one must evaluate which rights can and should be limited. The most obvious clash would arise over the right to reproductive decisions[6] of both parties as well as the implicit right of the mother to terminate the pregnancy.

Therefore: the nature of the right, the importance and purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and the existence of less restrictive means to achieve the purpose must be considered when considering whether it is reasonable and justifiable in an open and democratic society.[7]

The nature of the right to reproductive decisions is affected by the fact that it stems from the right to bodily and psychological integrity.[8] Thus, it applies in a more direct manner to the mother as it relates specifically to her body. Nonetheless, of course, the right does protect the right to make reproductive decisions and, as the child will eventually become the biological child of the commissioning parents, their rights are also protected to a degree.

The purpose of the limitation would be to protect the rights of the commissioning parents by preventing the termination of the pregnancy or to protect the rights of the mother by allowing her to terminate the pregnancy.

The relationship between the limitation and its purpose when applied in relation to the commissioning parents creates a variety of unique circumstances. If the foetus has an injury of a life-threatening nature, preventing the termination of pregnancy would not necessarily achieve the purpose of providing the parents with the child. For the pregnant mother, obviously, a limitation to the rights of the commissioning parents would achieve its purpose of allowing the woman to exercise her right to make reproductive decisions.

Obviously for the purpose of allowing a woman to terminate her pregnancy, there is no less restrictive means to achieve this purpose as the only way would be to allow her to terminate the pregnancy. For the purposes of protecting the rights of the commissioning parents, if there is no possibility of another child being conceived (by either full or partial surrogacy) the only way to enforce this right would be to prevent the termination.

Thus, it can be seen that the situation could become quite delicate, especially if the circumstance would prevent the conception of another child. Thus, the matter would effectively hinge on which right is more important to protect. Part of such a decision would be

6 Sec 12(2)(a) of the Constitution.
7 Sec 36(a)-(e) of the Constitution.
8 Sec 12(2) of the Constitution.

the fact that, should the termination take place, the rights of the commissioning parents will be permanently extinguished, whereas the rights of the mother will only be limited for the duration of the pregnancy.

The legal position is clear that in most circumstances the right of a woman to terminate a pregnancy trumps other rights. This is confirmed in *S v Mashumpa,*[9] which states that even though the community considers the killing of a foetus after 25 weeks to be murder, the mother would still be allowed to terminate the pregnancy. However, the issue over the rights of commissioning parents has never come before the courts.

Thus it would seem that if shortly before the birth is due the foetus is viable and no risk is posed to the mother, it would be possible to prevent the termination from taking place. One must note in this conclusion that it is crucial that there be no risk to the mother as the law would not be likely to compel a person to incur a risk to their life.

2 Compelled surgery

With any pregnancy, there is always the risk of possible complications arising regarding the development of the foetus. Medical technology, such as *in utero* surgery, offers many remedies that can correct possible defects or ailments of the foetus. But what may the commissioning parents in a surrogacy agreement do if the surrogate mother refuses to undergo these procedures on the grounds of possible medical risk or any other personal conviction? This article will discuss a possible legal remedy to be used by the commissioning parents to compel a surrogate mother to undergo a medical procedure. We first look at past court orders for forced surgeries, and then we discuss an argument in favour of compelling a surrogate mother to undergo *in utero* surgery.

South African court orders compelling a person to undergo surgery beneath the skin remain particularly scarce, considering the obvious constitutional clashes with the ever-developing medical technology. The most important right which is infringed in the case of any forced surgery is the section 12(2) constitutional right to bodily and psychological integrity and, more specifically, the right to security and control over the body.[10]

There have only been two reported cases in South Africa where a person has been forced to undergo surgery. These were *Minister of Safety and Security v Gaqa*[11] and *Minister of Safety and Security v*

9 Unreported case CC27/2007 ZAEHC 23 48 http://www.saflii.org (Accessed 23 May 2007).
10 Sec 12 of the Constitution.
11 2002 1 SACR (C).

Xaba.[12] In both these cases, the matter dealt with an application for the forced surgical removal of a bullet from the respondent's leg in the light of the Criminal Procedure Act 51 of 1977. These cases, although seemingly far removed from forced *in utero* surgery, remain the closest precedent for any forced surgery beneath the skin. In *Gaqa*, the court granted the order, whereas in *Xaba* the court refused the order and stated that the question should rather be left to the legislature. Distinguished authors such as Carstens prefer the decision in the *Gaqa* case, considering that it takes into account that none of the rights in the Bill of Rights are sovereign, but that they are all limitable.[13] In the *Gaqa* case the court applied section 36 of the Constitution in order to limit the respondent's rights. The court decided that granting orders for forced surgical intrusions by a limitation of the section 12(2) rights in terms of section 36 calls for the balancing of different interests which must be done on a case-by-case basis with reference to the facts and circumstances of the particular case. Therefore, the individual's interests in bodily and psychological integrity must be weighed up against the community's interest in conducting the operation for the court to grant the order.

Coming back to an order for forced *in utero* surgery, we find that if a situation would arise such as in the above-mentioned facts, that *in utero* surgery becomes necessary to save the life of the child, certain rights become relevant. Firstly, the surrogate mother's right to bodily and psychological integrity reigns supreme. This right grants her full autonomy over her body and it is therefore obvious that it is this right that has to be limited in order to compel her to undergo surgery. Section 36 states that the limitation of a right can only be done if it is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including:

- *the nature of the right*. The right to bodily and psychological integrity is of a limitable nature as has been shown in *Minister of Safety and Security v Gaqa*.[14]
- *the importance of the purpose of the limitation*. The fact that the foetus' only chance of survival depends on the *in utero* surgery and the parent's ability to exercise their right to reproduction make this limitation important.
- *the nature and extent of the limitation*. Here one would look at the medical risks for the surrogate mother during the *in utero* surgery.
- *the relation between the limitation and its purpose*. In the case of *in utero* surgery, the limitation is usually directly related to the

12 2003 7 BCLR 754 (D).
13 Carstens & Pearmain (n 5 above) 924.
14 n 11 above, 659.

purpose, which is to grant the parents a child of their own and to grant the foetus a healthy life.

- *less restrictive means to achieve the purpose*. In the case of *in utero* surgery, there are no less restrictive means to achieve the purpose. Considering that the operation is usually only effective during a short window period, any other means would merely defeat the purpose and result in the foetus being born ill and possibly dying prematurely.

We have therefore shown that the surrogate mother's right to bodily and psychological integrity can be limited. However, one still has to force the surrogate mother to undergo the surgery. Referring back to the *Gaqa* case, one realises that, in order to grant an order for forced surgery, the court has to weigh the surrogate mother's right to bodily and psychological integrity against the community's as well as the parents' interests in the surgery.

The parents' interests in the surgery obviously involve their section 12(2) right to reproduction. The most important question, however, is whether the community has an interest in the forced surgery to save the life of a foetus. *Prima facie* one would assume that the community has no interest in the protection of the foetus, for the case of *Christian Lawyers Association v Minister of Health*[15] has made it very clear that a foetus is not a legal person until birth and that no rights can be allocated to it. However, we are not aiming at allocating any rights to the foetus. We are merely looking at whether the community has an interest in protecting a foetus after the 25th week of gestation.

For this, we refer to the unreported case of *S v Mashumpa and Another*.[16] In this case, medical evidence was given that in the eyes of the medical community, a foetus after 25 weeks of gestation is viable, ie in lay terms a baby. Judge Froneman in this case stated that if the community convictions were to be tested as to whether the killing of an unborn foetus would amount to murder, that it would be in the affirmative. The notion that the community wants to protect viable foetuses is also reflected in the Choice of Termination of Pregnancy Act[17] where, after the 20th week of gestation, the measures for having a legal abortion become very stringent. Therefore, a foetus after the 25th week of gestation is viable and the community has an interest in protecting it.

Section 11 of the Constitution, read in terms of section 7, states that the state has a duty to keep a high regard and respect for human life that has been born. Surely, if the state has a duty to have a high regard and respect for human life that has been born, the state must

15 1998 4 SA 113 (T) 1122 (F-I).
16 n 9 above.
17 Sec 2(c) of Act 92 of 1996.

also have a duty to have a high regard and respect for developing human life. And even more so if the developing human life is already viable, for as I have shown, the community now views a foetus after 25 weeks of gestation as viable. How can the state have a high regard and respect for developing human life? The state can have such high regard and respect for developing human life by offering the foetus the best medical attention available, which in the particular circumstances would be *in utero* surgery.

One therefore finds that the law at present does not reflect the community convictions and medical realities of our time. In the case of *Carmichele v Minister of Safety and Security and Another,*[18] it was decided that the courts have a duty to develop the common law so as to reflect the *boni mores* of the community. We have already shown that the *boni mores* of the community are moving in a direction that protects foetuses after 25 weeks of gestation. Therefore we argue that the common law be extended to protect viable life after the 25th week of gestation.

Therefore, it has been shown that the legal position regarding a viable foetus after 25 weeks of gestation is rather murky. One finds that with the current medical technology it may be possible that, if a situation as mentioned above does occur, one could compel a surrogate mother to undergo a surgical procedure such as *in utero* surgery. This surgery would, however, have to pose very little or no risk to the surrogate mother and its rationale must be purposive, necessary and important.

[18] 2003 2 SA 656 (C) 33-35.