MATERNITY, PATERNITY AND PARENTAL LEAVE AND THE BEST INTERESTS OF THE CHILD

MIA v State Information Technology Agency (Pty) Ltd [2015] JOL 33060 (LC)

1 Introduction

Since the enactment of Chapter 19 of the Children's Act 38 of 2005 (hereinafter "Children's Act") and the decision in *Ex parte WH* (2011 (6) SA 514 (GNP)) it has become possible for homosexual partners, or spouses in terms of a civil union (as regulated by the Civil Union Act 17 of 2006 (hereinafter "Civil Union Act")) to enter into surrogate-motherhood agreements. The effect of such an agreement would be that the spouses/partners become the biological parents of the child born of surrogacy. All children, regardless of their parentage or manner of conception, have the constitutionally enshrined right to "family care or parental care" (s 28(1)(b) of the Constitution of the Republic of South Africa, 1996 (hereinafter "Constitution")) and the best interests of the child should always be regarded as "of paramount importance in every matter concerning the child" (s 28(2)). It is in light of the acknowledgment of these rights of both homosexual parents, and children begotten from surrogacy, that the case of *MIA v State Information Technology Agency (Pty) Ltd* ([2015] JOL 33060 (LC) (hereinafter "*MIA*")) came before the Labour Court.

In *MIA* a male commissioning parent successfully claimed maternity leave in terms of a surrogate-motherhood agreement. The judgment effectively illustrates the superiority of the Constitution and the prominence of the best interests of the child in all matters relating to children. Determining the best interests of the child requires a process of balancing the rights, duties and interests of the parties to the surrogate-motherhood agreement, as well as that of the greater society (Nöthling-Slabbert "Legal Issues Relating to the Use of Surrogate Mothers in the Practice of Assisted Conception" 2012 5(1) *SAJBL* 27 28). Surrogate-motherhood agreements affect various areas of the law relating to children and families. The problem, however, lies therein that law is often seen as compartmentalised and unrelated to, or unaffected by the Bill of Rights and the Constitution (in this regard see Klare "Legal Culture and Transformative Constitutionalism" 1998 14(1) *SAJHR* 146). In *MIA*, the Court based its decision on the constitutionally protected rights of both parent and child and highlighted the intertwined nature of these rights.

In this case the author will address the facts and decision in *MIA*, as well as progressive and problematic matters arising from the judgment. Thereafter, I shall evaluate the White Paper on Families (approved by

Cabinet on 26 June 2013 (hereinafter "White Paper on Families")) and how it relates to the importance of the family as a social institution. I shall also discuss the potential implications of the judgment and the White Paper on Families for maternity, paternity and parental leave in South Africa.

2 Facts and judgment

The applicant in *MIA* is a senior specialist in business architecture, employed by the respondent. The applicant, his spouse (in terms of a civil union) and a surrogate mother concluded a surrogate-motherhood agreement, which was made an order of the High Court (*MIA* par 5). The commissioning parents agreed that the applicant would be the child's primary caregiver from the moment of birth (*MIA* par 16). The applicant subsequently applied for four months' paid maternity leave, as provided for by the respondent's policy on leave. The respondent contended that, since the applicant is not the "biological mother" (*MIA* par 1) of the child, no "maternity" leave could be granted. The respondent granted the applicant two months' paid adoption leave and two months' unpaid leave (*MIA* par 2).

The applicant approached the Commission for Conciliation, Mediation and Arbitration (CCMA) for conciliation, which was unsuccessful, and subsequently approached the Labour Court. The applicant claimed that the respondent's refusal to approve his application for four months' paid leave constituted unfair discrimination based on gender, sex, family responsibility and sexual orientation. The resulting claim was for the two months' salary which the applicant did not receive, as well as R400 000 in damages.

The respondent based its argument against approving the leave on the fact that its policy on maternity leave is in line with the the Basic Conditions of Employment Act 75 of 1997 (hereinafter "BCEA"), which makes no reference to surrogate parents (*MIA* par 10). The BCEA provides that female employees (indicated by the use of "her") are entitled to maternity leave, because of the physiological demands that pregnancy and birth place on the body of the birth mother, resulting in "physical incapacity to work immediately before and after childbirth" (*MIA* par 12).

When applying its policies the respondent followed the letter of the law and not the spirit thereof. The Court condemned this by stating that:

> "[t]his approach ignores the fact that 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 must of necessity be interpreted to … take into account the best interests of the child. Not to do so would be to ignore the Bill of Rights in the Constitution of the Republic of South Africa and the Children's Act" (*MIA* par 13).

The Court described the Civil Union Act and the Children's Act as constitutionally mandated legislation and explained:

> "*[t]hat* our law recognises same-sex marriages and regulates the rights of parents who have entered into surrogacy agreements, suggests that any policy adopted by an employer likewise should recognise or be interpreted or amended to adequately protect the rights that flow from the Civil Union Act and the Children's Act" (*MIA* par 18; and author's own emphasis).

The argument that the employer's policies were enforceable, because they were in line with labour legislation, was rejected. Hiding behind either company policy or legislation inconsistent with the spirit and purport of the Bill of Rights, was deemed inexcusable. The argument that the BCEA does not directly address the matter of surrogacy and therefore cannot apply in the present situation was also rejected. Any action taken by an employer, which results in the shirking of responsibilities created by the Constitution, cannot be legal and may not be condoned by South African courts entrusted with the duty to uphold the Constitution as the supreme law of South Africa (s 2 of the Constitution).

The Court ruled the respondent's denial of the applicant's four months' paid maternity leave constituted unfair discrimination in terms of section 61 of the Employment Equity Act 55 of 1998. The respondent had to reimburse the applicant for the two months' salary he was denied when forced to take unpaid leave. No case was, however, made for awarding the damages sought and as a result no order for damages was made. Costs were to be paid by the respondent (*MIA* par 22–24).

3 Matters arising from the judgment

The *MIA* judgment is progressive and commendable, but the Court could only rule on the facts before it. Both favourable and problematic matters arise from Gush J's judgment.

3 1 Implications for the confirmation of surrogate-motherhood agreements

Section 295(d) of the Children's Act requires that the surrogate-motherhood agreement must specifically include "adequate provisions for the contact, care, upbringing and general welfare of the child that is to be born in a stable home environment". Of importance for this discussion is the legislature's specific reference to the *care* of the child (for a discussion on the care requirement see Nicholson and Bauling "Surrogate Motherhood Agreements and their Confirmation: A New Challenge for Practitioners?" 2013 46(2) *De Jure* 510, 516 and 520; and Louw "Surrogate Motherhood" in Davel and Skelton (eds) *Commentary on the Children's Act* (2007) 19–18).

In *Ex parte WH* (2011 6 SA (GNP) 530B–C) the Court prescribed an objective test that analyses the commissioning parents' capacity to provide a child with the safe living environment, which is imperative for its growth and development. As much relevant information as possible should be provided to the Court when an application for the confirmation of a surrogate-motherhood agreement is compiled. Naturally, the description of the role of the primary caregiver and his/her leave arrangement will be of the utmost importance to the Court, as this relates directly to the quality of care the child will receive.

The effect of the requirement of comprehensive documentary proof of the capacity of the commissioning parents to act as such, is that they are "held to much more demanding standards of care than the fertile" (Meyerson "Surrogacy Agreements" 1994 *Acta Juridica* 121 128). The emphasis on the

best interests of the child does, however, justify these strict measures. Providing the Court with a leave schedule of each parent could help prove their commitment to provide the care initially required by the child after birth. The *MIA* judgment will thus assist individuals and couples with the confirmation of their surrogate-motherhood agreements.

3 2 The paramountcy of the amendment of labour legislation

I applaud the Court's call for the relevant legislation to be amended, as it reiterates the importance of the status of the Constitution in all legal matters. The Court stated that the BCEA should be amended to protect the rights of spouses in civil unions, as well as parents of children born of surrogacy (*MIA* par 19). This was, however, not made an order of court, since the applicant based his claim on the respondent's discriminatory policies, and not the unconstitutionality of the BCEA itself (Naidoo "Employment Law Update" June 2015 *De Rebus* 42).

An issue which has, to date, not been addressed by the legislature or the judiciary, is the matter of the surrogate mother's entitlement to maternity leave. Section 25(1) of the BCEA indicates that an employee is entitled to "at least four consecutive months' maternity leave". If the BCEA is interpreted strictly, this would mean that the surrogate mother is entitled to maternity leave for this period, regardless of whether she keeps the child or is required to care for it after birth. It is, however, possible that an employer may argue that a surrogate mother requires less maternity leave, since she only needs to recover from the physiological effects of the pregnancy and birth and is not burdened with the responsibility of caring for a new-born.

Section 25(2)(a) of the BCEA states that an employee is entitled to maternity leave four weeks before the expected birth of the child. Section 25(3) indicates that "no employee may work for six weeks after the birth of her child, unless a medical practitioner or midwife certifies that she is fit to do so". It may thus be deduced that a surrogate mother is entitled to a minimum of 10 weeks' maternity leave (four weeks before the birth and six weeks after the birth), but a strong argument could be made for the full four months' maternity leave other employees are entitled to. Any amendment to the BCEA should address the position of the surrogate mother in order to clarify this matter.

3 3 Terminology

The nature of the matter in *MIA* required of the Court to refer to "'maternity' leave" (*MIA* par 1 and 21), but a continuation of this practice might result in further discrimination against parents. Referring instead to "parental" leave might result in a more equitable situation (Timothy and Motsiri "Sir, Your Maternity Leave has been Granted …" 2 June 2015 *Legal Brief* http://www.werksmans.com/legal-briefs-view/sir-your-maternity-leave-has-been-granted/ (accessed 2015-07-01)). If the legislature wishes to retain references to "maternity leave", clear guidelines should be provided to indicate who would be eligible for such leave. In order to address the

potential discrimination this could cause, the BCEA should also cater for paternity and parental leave. Guidelines on eligibility, circumstances and duration would also have to be furnished by the amended BCEA.

3 4 Uncertainty regarding the implications of the judgment

The judgment appears to be only applicable to spouses in terms of a civil union, who become parents by means of a confirmed surrogate-motherhood agreement ("employees in the applicant's position" *MIA* par 17 and 21). Several questions thus remain unanswered.

The BCEA makes no mention of leave for the parent of an adopted child, other than family-responsibility leave available upon the death of an adopted child (s 27(2)(c)(ii)). Family-responsibility leave is granted to a parent when a child is born (s 27(2)(a)), but not when a child joins the nuclear-family unit, regardless of the reason therefore. Manganbhai-Mooloo argues that legislation should be amended to provide for adoption leave, which should encapsulate surrogacy leave ("The Rights of Children to Maternal Care" 3 June 2015 http://www.adamsadams.com/index.php/media_centre/news/the_rights_of_children_to_maternal_care/ (accessed 2015-06-12)).

As a result of the *MIA* judgment, parents of an adopted child may be entitled to maternity/parental leave, since the Court highlighted that maternity leave is granted based on both physiological and psychological reasons, and that the best interest of the child should always be a court's greatest concern (*MIA* par 13). This judgment also strengthens the arguments put forward by heterosexual men who wish to take on the responsibilities of primary caregiver or spend more time at home after the birth of their children (Grobler "A Dad Can Mother Too!" 12 April 2015 http://www.parent24.com/Pregnant/think_about/A-dad-can-mother-too20150409 (accessed 2015-06-12)).

Eleven African countries have labour legislation which specifically caters for paid paternity leave, with Kenya being the most progressive by providing for two weeks' paid paternity leave (Addati, Cassirer and Gilchrist *Maternity and Paternity at Work: Law and Practice Across the World* (2014) 54). Other paternity-leave models which are of interest include those of Slovenia (90 days' paid paternity leave, of which fifteen are to be taken before the child is six months old, and the remainder to be taken before the child is three years old); Iceland (three months' paid paternity leave); Finland (54 working days' paid paternity leave, eighteen of which may be taken when the mother is on maternity leave); and Portugal (twenty days' paid paternity leave, of which ten are compulsory) (Addati *et al Maternity and Paternity at Work* 54–55).

A trend is developing in Europe in terms of which 156 weeks of parental leave is available to either parent, to care for the child until its third birthday (in this regard see Schulze and Geroric *Maternity, Paternity and Parental Leave: Data Related to Duration and Compensation Rates in the European Union* (2015) http://www.europarl.europa.eu/RegData/etudes/STUD/2015/509999/IPOL_STU(2015)509999_EN.pdf (accessed 2015-07-13)). Not all European countries provide for such extensive periods of parental leave, but the majority of European countries cater for varying combinations of maternity, paternity and parental leave. The three days' family-responsibility

leave awarded to a South African father under the BCEA is clearly insufficient when compared to international trends.

3 5 The family unit

The child's right to the care provided by a primary caregiver should guide any interpretation of "'maternity' benefits" (Maganbhai-Mooloo http://www.adamsadams.com/index.php/media_centre/news/the_rights_of_children_to_maternal_care/ (accessed: 2015-06-12)). The fact that the South African family's composition is changing should not be to the detriment of the child. This is the case when discriminatory legislation or policies guide matters related to parents in their capacity as such. The *MIA* judgment has illustrated the importance of aligning existing labour law with the Constitution in order to protect the rights of both parent and child. Bringing discriminatory legislation in line with the spirit of the Constitution will create a safe space for the family unit, a cornerstone of the South African society (s 1.1 of the White Paper on Families 5). The White Paper on Families highlights the importance of the family and understanding it as a continuously evolving concept:

> "There are different types of families in South Africa which are products of various cultures and social contexts. Therefore, the need exists to recognise the diverse nature of South Africa's families in all initiatives that address their plight" (s 1.5 of the White Paper on Families 9).

The *MIA* judgment does not specifically mention the importance of the family, but matters which arise from the judgment relate to the White Paper on Families, and both address the importance of the relationship between parents and children.

4 The White Paper on Families, June 2013

The White Paper on Families defines a family as

> "a societal group that is related by blood (kinship), adoption, foster care or the ties of marriage (civil, customary or religious), civil union or cohabitation, and go beyond a particular physical residence" (s 2.1 of the White Paper on Families 11).

It is, however, also mentioned that there is no standard definition of "family" comprehensive enough to cover the various kinds of families, due to the multicultural nature of the South African community (s 2.3.2 of the White Paper on Families 16). A nuclear family is defined as "a family group consisting of parents with their biological or adoptive children only" (Glossary, 3). It is assumed that the nuclear family also refers to children born of surrogacy.

The South African society's perception of the nuclear family is changing along with its understanding of the financial demands on families (Grobler http://www.parent24.com/Pregnant/think_about/A-dad-can-mother-too-20150409 (accessed 2015-06-12)). In many family units women are no longer the sole or primary caregivers of the children living in the nuclear family. Various social and financial factors influence a family's decision on the role of

primary caregiver. The biological mother of the child is not necessarily the one who can afford (or wishes) to take maternity leave, care for a child or manage the household on a full-time basis (Grobler http://www.parent24.com/Pregnant/think\about/A-dad-can-mother-too-20150409 (accessed 2015-06-12)).

The White Paper on Families acknowledges the importance of these changes of perception on the changing roles of family members. The parents of a (new-born) child are the best equipped to decide who the child's primary caregiver should be (Grobler http://www.parent24.com/Pregnant/think_about/A-dad-can-mother-too-20150409 (accessed 2015-06-12)). It is thus in the best interests of the child to allow the parents to make this decision without being influenced by the parental leave policies of their employers.

The family, as an institution worth protecting and nurturing, has not enjoyed sufficient political favour in South Africa (s 2.3 of the White Paper on Families Section 11). The chief objective of the White Paper on Families is "to foster positive family well-being and overall socio-economic development in the country" (s 1.3 of the White Paper on Families 8). Several goals are listed as part of the strategic priority of promoting healthy family life, and respecting the diversity of family types and values in South Africa is one of these goals. Here specific mention is made of attempting to eliminate discriminations based on, among others, gender, sexual orientation, marital status, family composition and blood relations (s 4.3 of the White Paper on Families 39). Promoting gender equality is also cited as a specific goal, and here the promotion of the concept of sharing domestic and caregiving duties by all family members, regardless of gender, is highlighted. Encouraging responsible (co-)parenting is also viewed as crucial.

Another goal of the strategic priority of promoting healthy family life which directly relates to this discussion is the aim of encouraging fathers' involvement in the upbringing of their children. The goal is to

> "revise current laws and social policies that restrict fathers from being involved in their children's lives and replace them with those that create an environment where fathers have the opportunity to care for, engage with, and support their children" (s 4.3 of the White Paper on Families 40).

Of extreme importance is the fact that the White Paper on Families specifically refers to the fact that the introduction of paternity leave is a serious consideration in this regard. The strategic priority of strengthening the family (s 4.3 of the White Paper on Families 41) mentions that supporting the family in its general caregiving functions could include introducing "mechanisms and policies, including paternity and parental leave, to facilitate the balancing of work and family responsibilities and to promote equal parenting care and responsibility between fathers and mothers, and encourage gender equality in parenting". The importance of the community supporting the family is affirmed and communities should be encouraged to embrace the value and spirit of "Ubuntu" (s 4.3 of the White Paper on Families 42).

The implementation of the Integrated White Paper Plan is discussed in section 5 and the drastic and diverse implementation strategies mentioned

creates the hope that the implementation thereof might, in time, prove successful. Government departments are listed by name and the Department of Labour is tasked with "[r]ecommend[ing] the development and implementation of paternity leave" (s 5.2.1 of the White Paper on Families 50). The Department of Women, Children and People with Disabilities should recommend "the extension of maternity leave and the creation of paternity leave" (s 5.2.1 of the White Paper on Families 51). The private sector is specifically mentioned (s 5.2.3 of the White Paper on Families 53) and its importance in achieving the goals set out in the White Paper on Families is highlighted. Aiding employees in finding a healthy balance between work and family responsibilities and "affording employees their full family-related entitlements and benefits such as maternity leave and family responsibility leave" (s 5.2.3 of the White Paper on Families 54) are mentioned as ways in which the private sector could protect the family as an institution, as well as individual families and family members.

The White Paper on Families provides a multitude of goals and initiatives by which to achieve the desired result of strengthening individual South African families, in order to ultimately benefit the greater South African society through socio-economic upliftment and development. Focusing attention on the leave available to parents is a welcome initiative.

5 Conclusion

When drafting and applying policies on leave employers should, first and foremost, consider the Constitution and subsequently the rights created by legislation such as the Civil Union Act and the Children's Act. The importance of the best interests of the child in all matters concerning parents and children was reiterated by the Labour Court. The effect of *MIA* is that commissioning parents in terms of surrogate-motherhood agreements may qualify for maternity/paternity/parental leave, regardless of their sex, gender or marital status. The fact that one or both of the commissioning parents qualify for such leave will strengthen an application for the confirmation of a surrogate-motherhood agreement. Another positive outcome of the judgment is that the dire need for legislative reform of maternity-leave provisions has been highlighted.

Gush J does not specifically refer to the family unit or its role in society, but the result of the judgment is similar to certain aspects of that aimed for by the White Paper on Families. These include the protection of the best interest of every child and the child's right to family care. The judgment lacks information on the rights of adoptive parents or heterosexual men who wish to apply for maternity/parental leave, but the hope is that the new or amended legislation and policies emanating from the White Paper on Families will provide the answers.

- I contend that amendments to current labour legislation and policies should provide for maternity leave which is specifically related to the pregnancy of the gestational or biological mother;
- leave for the new primary caregiver of a child (regardless of whether the child is related to the parent by birth, surrogacy, adoption or marriage, and regardless of the parent's sex or gender);

- paternity leave for new fathers (regardless of whether the child is his biological or adopted child); and
- additional parental leave for either or both parents which may be taken during the early years of the child's life.

The ultimate goal of such amendments should be to eliminate any and all discrimination against natural, adoptive or commissioning parents. Specific provision should also be made for the right of the surrogate mother to maternity leave.

Both *MIA* and the White Paper on Families imply that employers should accept their responsibility towards parents, children and families due to the horizontal application of the Bill of Rights (s 8(2) of the Constitution). The hope is that, in future, the family as an institution will play a larger role in society. The aim of this laudable goal to protect the family is to drive socio-economic development and subsequently contribute to the development of the greater South African community. Granting fathers leave to assist with the care of their children certainly constitutes a step in this direction.

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