

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

8/4/2016.

CASE NO: 82891/15

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
08/4/16 DATE
 SIGNATURE

In the matter between:-

NURTURE EGG DONORS CC

Applicant

and

MINISTER OF HEALTH

1st Respondent

DIRECTOR – GENERAL OF THE NATIONAL

DEPARTMENT OF HEALTH

2nd Respondent

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

3rd Respondent

JUDGMENT

MADIBA (A J)

INTRODUCTION

1.

This is an application in which the Applicant seeks a declaratory order that, it is lawful to operate an egg bank business on a for-profit basis by trading in Additional information / soft type information.

The 1st, 2nd and 3rd Respondents have not filed notices to oppose.

2.

BACKGROUND

The facts are briefly as follows:-

Ms Tertia Albertyn established the Applicant, Nurture Egg Donors CC, an online egg donation agency in 2008. She possesses an MBA degree and she is involved in the fertility industry and has written extensively on the topic of fertility.

The person or couples interested in Applicant's business, search on line for potential egg donors free of charge. Once they found a matching donor they pay a matching donor fee to the Applicant. The Applicant will then arrange and coordinate the donation on behalf of the clinic and the recipient.

3.

The Applicant intends to establish an egg bank which will be the first egg bank in South Africa that is independent from any fertility clinic. It will not be owned or be part of any existing clinic. As stated above, Ms Tertia Albertyn, owner of the Applicant is not a medical practitioner but possesses extensive knowledge in the field of fertility.

The intended egg bank which the Applicant wants to operate will recruit egg and sperm cells (collectively known as gametes) from donors, store and make available certain information about their donors on line and supply gametes to the interested parents on a fee.

4.

The egg bank that the Applicant intends operating, targets person or couple with fertility problems who needs services of fertility healthcare professionals to conceive.

Only private fertility clinics and some public hospitals offer the fertility health care service in South Africa.

Trading in gametes is not permitted in South Africa.

The donor profiles can be obtained on line free of charge. Any person or couple who wants to source more information about the donor other than the required information in such cases, has to pay for the required information.

5.

ISSUE TO BE DETERMINED

The issue in this matter is whether a gamete bank can provide more additional information than what is required about the gamete donor on a profit basis in South Africa.

6.

THE CURRENT POSITION OF OUR LAW

In terms of Section 60 (1) (a) and (b) of the National Health Act no 61 of 2003 the gamete bank may receive payment for supplying gametes in order to retrieve reasonable costs incurred in the donation. It is an offence for a person who has donated gametes to receive any form of financial or other reward for such donation other than reasonable costs incurred.

7.

Section 60 (1) (a) of the National Health Act provides that only authorized institutions may receive payment for supplying gametes to intended person or couple. Any egg bank must be an authorized institution before it can operate its business. See Section 54 (1) of the National Health Act.

8.

No provision has been made in National Health Act in an instance whereby the object of the transaction is not gametes but information about the gametes donors.

It is required by law that gamete donation should provide specific information / hard type information by the gamete donor. The specific information required include:-

The particulars and identification of the donor, informed consent from the donor relating to the physical examination, the age of the donor, eye colour, hair colour, family history population group, qualification and field of interest. See Regulation, in terms of the National Health Act specifically sub regulation 8 (2) b – c.

9.

The following are examples of additional information not regulated in terms of the Regulation:-

- Early childhood photos;
- Personal essays
- Handwriting samples
- Voice samples

The above information is classified as Additional information or soft type information.

Generally speaking, the additional information does not disclose the identity of the donor.

10.

Therefore the additional information or soft type information is not a legal requirement for the donor and is not provided for in regulation 4 of the Regulations and the National Health Act.

11.

The Applicant submits that a gamete donor is entitled to trade on a for-profit basis regarding the additional information.

Consequently the Applicant seeks a declaratory order that free trade in additional information is lawful.

12.

In the circumstances the Applicant further submits that since additional information is not prohibited by any law, the egg bank can provide additional information as an extra option to the recipient on a profit basis.

13.

The 1st, 2nd and 3rd Respondents were approached and engaged by the Applicant seeking their confirmation that Applicant is entitled to trade in additional

information for a profit. The Respondents in this matter did not corporate as seen from numerous letters addressed to them. (As per annextures "TA3" to "TA12 of the notice motion)

14.

The Southern African Society of Reproductive Medicine and Gynaecological Endoscopy (SAREG) which regulate the profession in the fertility industry was also contacted. (See annexture "TA11" of the notice of motion)

SASREG is of the view that authorized institutions applying to operate egg banks should be Reproductive medicine specialists and not people who do not have medical qualifications like Applicant.

It should be noted that SASREG's guidelines are not legally binding but influential in the fertility industry.

15.

For the Applicant to proceed with its intended egg bank, it needs legal certainty whether it will be entitled to operate an egg bank trading in additional information for profit.

16.

The test case is therefore whether the Applicant should proceed with its plans to establish an egg bank and operate it on a profit basis by trading in additional information.

17.

The declaratory order sought is informed by the fact that there is no authority in our law authorizing the gamete donor to trade in Additional Information soft type information.

The Applicant deems it necessary to first obtain legal certainty on the subject matter before proceeding with the establishment of an egg bank.

In a nutshell the Applicant's matter raises a res nova.

18.

Having considered the application and the declaratory order sought, I am of the view that it is in the interest of justice to call upon the Respondents to show cause why the declaratory order should not be granted.

Consequently the following order is made:-


19.

ORDER

- a) The Respondents in this matter should show cause why the declaratory order should not be granted.
- b) The Respondents should serve and file their papers within thirty (30) days from the date of this order.

c) The Sheriff of the Court Pretoria or his Deputy must serve this order personally on the 1st, 2nd and 3rd Respondents.

d) No order as to costs is made.



S S MADIBA

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

HEARD ON THE

26 NOVEMBER 2015

DATE OF JUDGMENT

08 APRIL 2016

APPLICANT'S COUNSEL

ADV. JORDAAN

APPLICANT'S ATTORNEY

C.R BOTHA

1ST, 2ND & 3RD RESPONDENTS

NO APPEARANCES