REPUBLIC OF SOUTH AFRICA

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case no: 16402/17

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

.

SIGNATURE **26/03/2021**

In the matter between:

THE VOICE OF THE UNBORN BABY NPC	1st Applicant
CATHOLIC ARCHDIOCESE OF DURBAN	2nd Applicant
and	
MINISTER OF HOME AFFAIRS	1st Respondent
MINISTER OF HEALTH	2nd Respondent
and	
CAUSE FOR JUSTICE	1st amicus curiae
WOMEN'S LEGAL CENTRE TRUST	2nd amicus curiae
WISH ASSOCIATES	3rd amicus curiae

JUDGMENT

MNGQIBISA-THUSI, J

[1] In its amended notice of motion, the applicant is seeking the following relief:

"1.1 That for purpose of this Court Order, the following words shall have the following matters:

a. 'bereaved parent or parents' shall mean, in the context of pregnancy loss, a person or persons who would have been a parent or parents as

b. defined in the Children's Act, Act 38 of 2005, of such child that would have been born had the pregnancy resulted in a live birth.

c. 'burial' shall have the meaning as defined in the Births and Deaths Registration Act, Act 51 of 1992 ('BADRA'), but shall be expanded to include dead fetuses; 'bury' shall have a corresponding meaning;

d. 'loss of pregnancy' or 'pregnancy loss' shall mean the death of a fetus prior to or during separation from the pregnant woman's body, irrespective of whether through natural causes or human intervention;

e. 'stillbirth' shall mean a species of pregnancy loss where the fetus at the time of separation is viable, and where the fetal death is not caused by human intervention;

f. 'viable' with relation to a fetus, shall mean the gestational age (or other criteria) at which a fetus is considered able to survive outside the womb by legislation that provides what entities qualify to be buried. For clarity, BADRA currently sets the gestational age of viability at 26 weeks.

2. THAT it is declared that in the event of a loss of pregnancy other than stillbirth, the bereaved parent or parents have the right to bury the dead fetus, if such bereaved parent or parents so elect.

3. THAT section 20(1) of BADRA, read with section 1 (definition of 'stillbirth) and subsections 18(1)-18(3) of BADRA, is declared inconsistent with the Constitution and invalid insofar as it does not make provision for the right declared in paragraph 2 supra.

4. THAT the declaration of invalidity in paragraph 3 supra is suspended to allow Parliament the opportunity to amend BADRA to provide for the right declared in paragraph 2 supra.

5. THAT pending the amendment by Parliament of BADRA to provide for the right stated in paragraph 2 supra:

a. a medical practitioner shall act lawful if he or she issues a stillbirth certificate in terms of section 18(1) of BADRA, upon request by a bereaved parent or bereaved parents following loss of pregnancy other than stillbirth.

b. if no medical practitioner was present at a loss of pregnancy other than stillbirth, or if no medical practitioner examined the remains of the dead fetus following said loss of pregnancy, any person who was present at the loss of pregnancy shall act lawful if he or she makes a prescribed declaration of stillbirth to any person contemplated in section 4 in terms of section 18(2) of BADRA, upon request by a bereaved parent or parents following a loss of pregnancy other than stillbirth.

c. a person contemplated in section 4 of BADRA shall not refuse a burial order in terms of section 18(3) of BADRA because the stillbirth certificate or declaration of stillbirth relates to the loss of pregnancy other than stillbirth.

6. THAT the first respondent is ordered and directed to:

a. take all reasonable steps to communicate the content of the right declared in paragraph 2 supra and the content of paragraph 5 supra to all persons contemplated in section 4 of BADRA; and

b. serve on all the other parties to this application and file with the Registrar of this Court an affidavit, within 20 days of this judgment, detailing the steps that he has taken to give effect to subparagraph 6a supra.

7. THAT should Parliament fail to amend BADRA to provide for the right stated in paragraph 2 supra within 12 months of the date of this order, any interested person may apply to this Court or any other division of the High Court for any appropriate further relief.

8. THAT the definitions of ‘corpse’ and ‘human remains’ in regulation 1 of the Regulations Relating to the Management of Human Remains, published by the second respondent in the Gazette of 22 May 2013, in terms of NHA, are declared inconsistent with the Constitution and invalid insofar as these definitions do not make provision for the right declared in paragraph 2 supra.

9. THAT the declarations of invalidity in paragraph 8 supra are suspended to allow the second respondent the opportunity to amend the Regulations referred to in paragraph 8 supra to provide for the right declared in paragraph 2 supra.

10. THAT pending the amendment by the second respondent of the Regulations referred to in paragraph 8 supra to provide for the right declared in paragraph 2 supra, the definitions of ‘corpse’ and ‘human remains’ in the Regulations referred to in paragraph 8 supra shall forthwith be read as including a dead fetus, if burial order was issued in respect of such a fetus in terms of section 18(3) of BADRA.

11. THAT should the second respondent fail to amend the Regulations referred to in paragraph 8 supra to provide for the right stated in paragraph 2 supra within 12 months of the date of this order, any interested person may apply to this Court or any other division of the High Court for any appropriate further relief.

12. THAT the second respondent is ordered and directed to:

a. take all reasonable steps to communicate the content of the right declared in paragraph 2 supra and the content of paragraph 5 supra to all public hospitals and clinics in South Africa that provide pre-natal care; and

b. serve on all the parties to this application and file with the Registrar of this Court an affidavit, within 20 days of this judgment, detailing the steps that he has taken to give effect to subparagraph 12a supra.

13. THAT, in the event that this application is opposed, the costs of the application, including the costs incumbent upon the employment of two counsel, and including the qualifying costs of the experts, be paid by such respondent that is opposing, or if both respondents oppose this application, by the respondents jointly and severally, the one to pay the other/s to be absolved.
14. THAT the applicant be granted such further and/or alternative relief as the Court deems meet".

[2] The first applicant, Voice of the Unborn Baby NPC, is a non- profit organisation. The deponent to the first applicant's founding affidavit is a co-founder and executive director of the first applicant. The second applicant, the Catholic Archdiocese of Durban, is a voluntary organisation which was granted leave to intervene.

[3] The first applicant brings this application in its own interest and in the public interest as contemplated in s 38 of the Constitution. The second applicant is bringing this application in its own interest and on behalf of members of the Catholic Church in Durban and its surrounds. The first and second respondents are the political heads of the departments of Home Affairs and Health, responsible for the administration of the BADRA and the Regulations, respectively.

[4] The first amicus curiae, Cause for Justice ("CFJ"). The second amicus curiae, Women's Legal Centre Trust ("WLC Trust"), a non-profit organisation whose object is to advance and protect the human rights of women and girls who suffer systematic discrimination and disadvantage. The third amicus curiae, WISH Associates, ("WISH"), is an organisation aimed at providing sexual and reproduction health services to women. As WLC Trust and WISH have a common interest in the outcome of these proceedings, hereinafter and for

convenience they will be referred to as WLC Trust. All three amicus curiae were admitted in order to assist the court.

[5] In brief the first and second applicants seek in their respective applications under the same case number, a declaratory order declaring section 20(1) read with section 18 (1) to (3) of BADRA and Regulation 1 invalid for being inconsistent with the provisions of the Constitution. It is the applicants' contention that the impugned provisions of the relevant sections and the regulation infringes on the constitutional rights, in particular, the rights to dignity[1], privacy, religion and equality[2], of the prospective parent(s) of a pregnancy loss through a miscarriage and an induced pregnancy loss by denying such parent(s) the right to bury the remains of the pregnancy loss.

[6] The loss of pregnancy can either be a spontaneous pregnancy loss, due to natural causes (a miscarriage or still-birth), or an induced pregnancy loss, due to conscious human intervention.

[1] Section 10 of the Constitution provides that: "Everyone has inherent dignity and the right to have their dignity respected and protected".

[2] Section 9 of the Constitution provides that: "(1) Everyone is equal before the law and has the right to equal protection and benefits of the law; (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advanced persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair".

[7] It is apposite at this stage to set out the statutory provisions in BADRA applicable to the disposal of the remains resulting from loss of pregnancies and the relevant regulation thereto.

[8] Section1 of the BADRA, *inter alia,* provides that:

> "In this Act, unless the context otherwise indicates-
>
> "Birth", in relation to a child, means the birth of a child born alive
>
> "Burial" means burial in earth or the cremation or any other mode of disposal of a corpse
>
> "Corpse" means any dead human body, including the body of any still-born child
>
> "Still-born", in relation to a child, means that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth, and "still-birth", in relation to a child, has a corresponding meaning.

[9] Section 18(1) to 18(3) of BADRA reads as follows:

> (1) A medical practitioner who was present at a still-birth, or who examined the corpse of a child and is satisfied that the child was still-born, shall issue a prescribed certificate to that effect.
>
> (2) If no medical practitioner was present at the still-birth, or if no medical practitioner examined the corpse of a still-born child, any person who was present at the still-birth shall make a prescribed declaration thereanent to any person contemplated in section 4.
>
> (3) The certificate mentioned in subsection (1) or the declaration mentioned in subsection (2) shall be deemed to be the notice of the still-birth, and a person contemplated in section 4 shall, on the basis of such notice and if he or she is satisfied that the child was still-born, issue under the surname of any parent concerned a prescribed burial order authorising burial".

[10] In turn Regulation 1 defines the following terms:

> "Corpse" means a dead human body.
>
> "Human remains" means a dead human body, or the remains of a dead human body whether decomposed or otherwise.

[11] In terms of s 20(1)[3] of BADRA no burial may take place in the absence of a burial order.

[12] The effect of section 20(1) read with the provisions of section 18 (1)-18 (3) and the definition of 'burial' and 'corpse' in BADRA is that a still-birth certificate or declaration and a burial order in the event of a still-birth, to the exclusion either an early loss of pregnancy due to natural causes (a miscarriage) or loss of pregnancy caused by human intervention.

[13] In South Africa a foetus is taken to have reached the stage of viability when the pregnancy is 26 weeks old. The relevance of this threshold will become relevant below. The impugned provisions posit viability as a criterion for determining whether or not the remains of a pregnancy loss can be buried. As BADRA provides for the burial of the remains of a still-birth, the remains of a miscarriage and an induced pregnancy are treated as pathological or anatomical waste[4] and are disposed of through incineration with other medical waste.

---

[3] Section 20(1) of BADRA reads as follows: "(1) No burial shall take place unless a notice of the death or still-birth has been given to a person contemplated in section 4 and he or she has issued a prescribed burial order.

[4] The South African National Standards ("SANS") 10248, titled 'Management of Healthcare Risk Waste'[4], defines 'pathological waste or anatomical waste' as follows: "Waste that contains tissues, organs, body parts, blood and body fluids from patients, fetuses and animal carcasses, but excludes

[14] The applicants challenge the constitutionality of BADRA and the regulation as it relates to how the remains of a spontaneous pregnancy loss which is less than 26 weeks and the remains of an induced loss of pregnancy, should be disposed.

[15] At the outset it should be stated that the first applicant is not challenging the concept of 'viability' as used in BADRA.

[16] On behalf of the first applicant counsel submitted that ordinarily many expectant mothers and fathers make significant emotional investment in the prospective child and that through advanced technology through which they are able to observe the fetus whilst still in the womb, these prospective parents develop a bond with the fetus. That the loss of the pregnancy, irrespective of whether it was due to natural causes or was induced, causes immense grief to the prospective parents.

[17] Counsel for the first applicant further submitted that despite emotional trauma as a result of the pregnancy loss, which is acknowledged by the respondents, BADRA unfairly discriminates against the parent(s) of a pregnancy loss other than a still-birth by not allowing them to bury the remains of the loss. It is the first applicant's contention that the giving of burial rights to the parent(s) of a still-born and denying same to parents who have suffered a pregnancy loss

---

teeth and hair". Further, Part 1 of the SANS describes 'waste' as: "Undesirable or superfluous by-products, emission, residue or remainder of any process or activity, any matter, gaseous, liquid or solid or any combination thereof, which is: (a) discarded by any person; (b) accumulated and stored by any person with the purpose of eventually discarding it with or without prior treatment connected with the discarding thereof; or (c) is stored by any person with the purpose of recycling, reusing or extracting a usable product from such matter".

other than a still-birth, amounted to an unfair differentiation between parents in the same situation. Further, it is the first applicant's contention that the manner in which the remains of the pregnancy loss other than a still-birth are dealt with through incineration is insensitive, hurtful and disrespectful to the feelings and dignity of the 'bereaved parents'.

[18] Counsel for the first applicant further submitted that in order for the parents of a pregnancy loss who are denied a burial to deal with their grief, they wish to bury the remains of the pregnancy loss which would contribute to their healing emotionally. It was submitted that the burying of the remains of such pregnancy loss, accompanied by the performance of the necessary rituals would go a long way to dealing with their loss.

[19] It was further submitted on behalf of the first applicant that there is no legitimate government purpose suggested by the respondents for depriving parents who have suffered pregnancy loss due to miscarriage or induced termination of pregnancy of choosing whether or not to bury the fetal remains.

[20] In support of its assertion of the impact of a pregnancy loss and the emotional consequences on the parent(s), the applicant has attached, amongst others, the affidavits of Dr Botha, a gynaecologist and obstetrician, Dr Louise Olivier, a clinical and counselling psychologist and Reverend Braam Klopper, a pastoral therapist and counsellor.

[21] Dr Daniel Johannes Botha is of the opinion on the psychological effects of a miscarriage are based on his observation of patients he consulted with.

[22]

[23] Rev Klopper is of the opinion that:

> "It should be clear … that burial or cremation would impact positively on the process of grief of expecting parents who have experienced miscarriage or termination of pregnancy".

[24] Dr Olivier expressed the following view:

> > "Most of the cultures in Africa recognise the belief of the spirit of each human being (even the unborn) and the importance of rituals to take leave of such a spirit in time of death and if it is not done appropriately that it has consequences for the community and the individual".

[25] Moving from a premise that life begins at conception and it was submitted on behalf of the second applicant that unborn children are human beings with dignity and entitled to respect. The second applicant contends that the impugned legislation infringes its members' constitutional rights to equality and to freedom of religion. Counsel for the second applicant submitted that s 15 of the Constitution guarantees everyone the right to freedom of conscience, religion, thoughts, beliefs and opinion, which according to the Constitutional Court includes: the right to entertain such religious beliefs as a person chooses; the right to declare religious beliefs openly and without fear or hindrance or reprisal and the right to manifest religious beliefs by worship and practice, which practice involves giving the unborn child dignity and respect as given to persons that die after being born, including, amongst others, such practises as 'prayer,

blessings, and the invocation of secret rites. Furthermore, it was submitted on behalf of the second applicant that the right to freedom of religion contains the element of the absence of coercion or restraint. Reference was made to *S v Lawrence*; S v Senegal; S v*Solberg*[5] at where the court held that

> "[92] … I cannot offer a better definition than this of the main attributes of freedom of religion. But, as Dickson CJC went to say, freedom of religion may mean more than this. In particular he stressed that freedom implies an absence of coercion or constraint and that freedom of religion may be impaired by measures that force people to act or refrain from acting in a manner contrary to their religious beliefs".

[26] It was further submitted on behalf of the second applicant that the respondents did not proffer any justification for the distinction in the treatment of the remains of a stillbirth and those of a loss of pregnancy other than stillbirth except to say that the legislation protects the health and welfare of human beings without providing any evidence in support of that assertion. Furthermore, that there was no justification for the limitation of the bereaved parents' right to bury the remains of the pregnancy loss other than a still-birth and therefore that the impugned legislation should be declared inconsistent with the Constitution and invalid to the extent of that inconsistency.

[27] The respondents raised the issue of the first applicant's locus standi. On behalf of the respondents it was submitted that the deponent to the first applicant's founding affidavit is not genuinely acting in the interest of the first applicant but that her interest was self-serving as she has a strong financial interest in the current application and is driven by financial self-interest. Further, the

[5] 1997 (4) SA 1176 (CC).

respondents question whether the deponent to the first applicant's founding affidavit is acting in the public's interest.

[28] In the founding affidavit the deponent to the first applicant's founding affidavit asserts that the application is brought in her own right and in the public interest in terms of s 38(a)[6] and (d). Further, the deponent to the first applicant's founding affidavit, has disclosed her personal experience when her daughter suffered a pregnancy loss and was not able to bury the fetal remains and its emotional consequences on her daughter.

[29] I am satisfied that the respondents' complainant about the first applicant's locus standi has no merit.

[30] On the merits counsel for the respondents submitted that since the main complaint of the applicants is that pregnancy loss often causes grief to expecting parents, the applicants have not laid a basis to seek to impugn the provisions of BADRA since they have not challenged the fundamental principle and legal concept underlying the burial of foetus, namely, the concept of viability. Counsel submitted that in the absence of viability there is no life therefore there is no basis to render section 20(1) and the regulations unconstitutional. It was further submitted that the concept of viability was introduced to serve a legitimate purpose.

[6] Section 38 of the Constitution provides that: "Anyone listed in this section has the 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. The persons who may approach the court are–(a) anyone acting in their own interest; (b) anyone acting on behalf of another person who cannot act in their own name; (c) anyone acting as a member of, or in the interest of a group or class of persons; (d) anyone acting in the public interest; and (e) an association acting in the interest of its members."

[31] It was submitted that where no child is born alive or where no viability is realised in terms of BADRA one cannot talk about bereaved parents, they are merely prospective parents. According to the respondents there is no legal and or scientific justification as to why the law should recognise the burial of a foetus of less than 26 weeks upon termination of pregnancy or induced pregnancy loss. It was further submitted that the mere fact that a prospective mother feels emotionally attached to the pregnancy even if it is still at conception or is merely two weeks' old does not mean that a legal right exists for the prospective mother to bury the foetus even if it is an embryo.

[32] It was further submitted that the fact that prospective parents suffer emotionally and psychologically after the loss of a prospective child does not give rise to the infringement of the constitutional rights of such prospective parents. Further it was submitted that there is a legitimate government purpose for regulating aspects relating to the burial of a dead foetus with regards to the aspect of human conduct that has an impact on society.

[33] With regard to the right to privacy it was submitted that such right is not absolute and is subject to limitations by the legitimate interest of others in the public interest. It is the respondents' view that the right to privacy is limited by the law of general application in that the government is in no way able to ascertain in each case as to whether the disposal was done in accordance with the law. Therefore, the limitation is about the health and safety in relation to the handling of healthcare risk waste. was legitimate.

[34] In *NM v Smith*[7] the Constitutional Court held that:

> "Privacy encompasses the right of a person to live his or her life as he or she pleases. In *Bernstein and Others v Bester NNO and Others* this Court stated:
>
> > 'A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, no justifiable limitation thereof can take place. But this most intimate core is narrowly construed. This inviolable core is left behind once an individual enters into relationships with persons outside this closest intimate sphere; the individual's activities then acquire a social dimension and the right of privacy in this context becomes subject to limitation'."

[35] The first applicant submits that pregnancy loss due to miscarriage or termination of pregnancy and the subsequent decision whether to bury the foetal remains or not falls within the personal realm, as contemplated in *Bernstein v Bester.*

[36] It was submitted that the decision to grant prospective parents an election to bury a dead foetus would not resolve the emotional and psychological attachment every prospective parent is likely to have. Further, that burial of the

[7] 2007 (5) SA 250 (CC) at para [33].

dead foetus could be assisted by psychological and counselling support that government makes available to the bereaved parents.

[37] It is the view of CFJ that the denial of the choice to bury the fetal remains of the unborn child infringes the value of human dignity.

[38] The WLC Trust and Wish Associates, the second and third amicus curiae, although abiding the decision of the court with regard to the merits of the relief sought by the applicant, they have raised concerns with regard to the effect the relief sought as currently formulated is granted on the rights of pregnant women who chose to terminate their pregnancies in terms of the provisions of the Choice of Termination of Pregnancy Act[8] ("CTOPA").

[39] The WLC Trust with the relief as currently formulated is that:

39.1 the relief sought will mean additional burdens will be placed on designated facilities;

39.2 the relief will undermine the confidentiality provisions of the CTOPA;

39.3 The right to bury may create an additional barrier to access facilities offering services under OCTOPA.

[40] It was submitted on behalf of WLC Trust that in the event of the court granting a declaratory order conferring burial rights on bereaved parent or parents, the order should expressly exclude the accrual of such rights on a person who seeks pregnancy loss under the voluntary termination of pregnancy regime under CTOPA. Further that should the declaratory order also apply to persons

[8] Act 92 of 1996.

seeking voluntary termination of pregnancy under CTOPA, the order should include a provision ensuring appropriate mechanisms are put in place to ensure the practical fulfilment of that right does not disproportionately interfere with pregnant women's right to access a termination of pregnancy procedure.

[41] Having considered the concerns raised in submissions on behalf of WLC with regard to the impact of the relief sought by the applicants is granted, I am not inclined to grant the relief sought where it would have a blanket effect on loss of pregnancy other than still-birth. Accordingly the first applicant's draft order will be amended to exclude application to people falling under the purview of CTOPA.

[42] Section 172(1) of the Constitution reads as follows:

> "When deciding a constitutional matter within its power, a court-
> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
> (b) may make any order that is just and equitable[9], including –
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect".

[43] It is trite that an unborn 'child' is not a bearer of rights. However, in certain instances the law has protected the 'rights' of an unborn child in the event that he or she is born alive.

[9] See also section 8(2) of the PAJA "The court or tribunal, in proceedings for judicial review in terms of section 6(3), may grant any order that is just and equitable."

[44] It is common cause that pregnancy loss results in emotional and psychological pain or trauma.

[45] It is further common cause that in terms of BADRA and the regulations, a notice of death or stillbirth can only be completed in the case of a human being or a still-born. Since in terms of the impugned provisions a burial order can only be issued once a notice of still-birth has been completed, the burial of the fetal remains of a pregnancy loss due to natural causes which occurs before 26 weeks of gestation or the fetal remains of a voluntary induced termination under CTOPA.

[46] It is the applicants' contention that the impugned provisions infringe on the constitutional rights of dignity, privacy, religion and equality in denying the parents of a pregnancy loss other than a still-birth the right to bury the fetal remains, particularly as these rights have been afforded to the parents of a still-birth. It was submitted on behalf of the applicants that the emotional pain and grief these parents suffer and endure, is no different from those of a parent(s) of a still-birth, taking into account the emotional investment made and the bonding between the parent(s) and the fetus which has been enabled by technological medical advancement. The emotional pain is exacerbated by the manner in which the fetal remains are dealt with after separation from the mother and the lack of sympathy received from hospital staff during the separation. Further these fetal remains are put together with other medical waste and incinerated. It cannot be disputed that to the medical staff the fetal remains may be just trash or waste but to the would be parent(s) it is not just a thing to be thrown away. To the would be parents the fetal remains represent

what could have been a child, in some instances a long-awaited child. By treating the fetal remains as waste is, to say the least, insensitive and disrespectful to the parent(s) who procreated with the hope that the fetus will result in a living being.

[47] It cannot be disputed that the impact of the loss of a pregnancy cannot be said to be different or of a lesser magnitude in the case of a fetus which has not reached the stage of viability when the loss occurs. The issue is not, as incorrectly assumed by counsel for the respondents' viability or non-viability of the fetus. The argument by counsel for the respondents that the use of the criterion of viability in order to accord burial rights is a necessary limitation as envisaged by s 36 of the Constitution is not convincing. It is about the emotional loss and the pain felt by the expectant parent(s). No rational reason exists why there is a differentiation in treating the consequences of a still-birth on the one hand, and on the other hand those of a pregnancy loss other than a still-birth[10]. The intensity of the pain felt by both parents who have suffered a loss must be the same. In both instances at the end of the day there is no child born alive.

[48] This court has been referred to various foreign jurisdictions where there is a recognition of the need to cater for the emotional needs of parent(s) who has lost a pregnancy in a situation other than a still-birth and no distinction is made

[10] In *Harksen v Lane* 1998 (1) SA 300 (CC) held that: "[42] Where section 8 is invoked to attack a legislative provision or executive conduct on the ground that it differentiates between people or categories of people in a manner that amounts to unequal treatment or unfair discrimination, the first enquiry must be directed to the question as to whether the impugned provision does differentiate between people or categories of people. If it does so differentiate, then in order not to fall foul of section 8(1) of the interim Constitution there must be a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve. If it is justified in that way, then it does not amount to a breach of section 8(1).

as to how the fetal remains should be disposed of in the case of a still birth and cases other than a still-birth. Policies and guidelines have been developed on how the parent(s) of a pregnancy loss should be dealt with after the loss. For instance, in Alberta, Canada in terms of Cemeteries Act[11], the definition of a 'cemetery' read with s 18(1) is all encompassing to include fetal remains whatever the cause. Regulation 65(1) of the Act reads as follows:

> "The Minister may make regulations respecting the disposal of foetuses and the bodies of newborn infants who have died, subject in each case to the parents' or guardians' request, and defining newborn infant for the purposes of the regulations".

[49] There is no reason why the impugned provisions cannot be adapted in order to cater for a loss of pregnancy other than a still-birth for those who wish to perform the last rites for the prospective baby and conduct a burial. The dignity of the parents who have suffered a loss will be restored. Further, there is no rational link between the purpose of incinerating the fetal remains of a pregnancy loss other than a still-birth and the cause of the loss. By allowing the 'bereaved parents' to bury the fetal remains under the circumstances will go a long way towards ameliorating the pain caused by the loss and will assist in the process of healing. The applicants are not calling for a blanket burial right but are suggesting that such right be given to those who request a burial.

[50] I am therefore of the view that the impugn provisions of BADRA and the regulation are inconsistent with the Constitution and are invalid to the extent of

[11] Alberta, Canada, Alberta Cemeteries Act RSA 2000-cC-3.

excluding the issuance of a still-birth notice in the case of a pregnancy loss other than a still-birth. The declaration of invalidity does not however apply in the case of a pregnancy loss due to an inducement.

[51] As this case involves a constitutional issue, the *Biowatch Trust v Registrar, Genetic Resources and Others*[12] principle applies with regard to costs. In as much as costs were argued, I am of the view that no order as to costs should be made.

[52] In the result, an order is granted in terms of the amended draft order marked "X".

_____

MNGQIBISA-THUSI J

Appearances:

For 1st Applicant: Adv D Thaldar (instructed by Ingram Attorneys)

For 2nd Applicant: Adv AJ D'Oliveira (instructed by Bruce Burt Attorney)

For 1st and 2nd Respondents: Adv WR Mokhare SC assited by Adv V Magagane and Adv C Lithole (instructed by State Attorney)

For 1st Amicus Curiae: Adv D Cooke (instructed by Craig Snyders & Associates)

For 2nd Amicus Curiae: Adv F Hobden assisted Adv P Mdakane (instructed by Woman's Legal Centre)

[12] 2009 (6) SA 232 (CC).

For 3rd Amicus Curiae: Adv F Hobden assisted Adv P Mdakane (instructed by Legal Resources Center)