

**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 16402/17

In the matter between:

THE VOICE OF THE UNBORN BABY NPC

1st Applicant

CATHOLIC ARCHDIOCESE OF DURBAN

2nd Applicant

and

MINISTER OF HOME AFFAIRS

First respondent

MINISTER OF HEALTH

Second respondent

FILING NOTICE

DOCUMENTS: 1ST APPLICANT'S HEAD OF ARGUMENT

ON ROLL : NO DATE ALLOCATED YET

FILED BY


1ST APPLICANT'S ATTORNEYS

Ms Renaldi Ingram

Ingram Attorneys
Boardwalk Lakside Office Park
Corner of Solomon Mahlangu and
Haymeadow Crescent
Block C, First Floor
Faerie Glen, Pretoria
C/O PAUL DU PLESSIS ATTORNEYS
568 NORVAL STREET
MORELETA PARK, PRETORIA
Email: ingramlaw@securitas.co.za
Tel: 012 990 5144
REF: R INGRAM/RV0007

TO: THE REGISTRAR
High Court of South Africa
Gauteng Division, Pretoria

AND TO: THE MINISTER OF HOME AFFAIRS
Care of the State Attorney
8th Floor Bothongo Heights
167 Andries Street
Pretoria
REF: 2143/2017/Z74



AND TO: THE MINISTER OF HEALTH

Care of the State Attorney
8th Floor Bothongo Heights
167 Andries Street
Pretoria
REF: 2143/2017/Z7



AND TO: BRUCE BURT ATTORNEY
Attorney for the 2nd Applicant
c/o CB center west building
75 Durham Road, Clubview
Centurion, Pretoria

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no: 16402/17

In the matter between:

THE VOICE OF THE UNBORN BABY NPC

First applicant

CATHOLIC ARCHDIOCESE OF DURBAN

Second applicant

and

MINISTER OF HOME AFFAIRS

First respondent

MINISTER OF HEALTH

Second respondent

and

CAUSE FOR JUSTICE

First amicus curiae

WOMEN'S LEGAL CENTRE TRUST

Second amicus curiae

WISH ASSOCIATES

Third amicus curiae

FIRST APPLICANT'S HEADS OF ARGUMENT

TABLE OF CONTENTS

A	Introduction	3
B	Summary of extant legislation.....	5
	Births and Deaths Registration Act.....	6
	Regulations Relating to the Management of Human Remains	8
	National Standard: Management of Healthcare Risk Waste	9
C	The evidence before the court	11
D	Human rights analysis.....	15
	Interpretation stage	16
	Limitation stage	21
	Conclusion on the human rights analysis.....	21
E	Remedy.....	21
F	Comparative analysis.....	23
G	Cost order.....	26
H	Conclusion.....	27
	Table of authorities.....	30
	Extracts from relevant United States legislation	33

A INTRODUCTION

1 This application deals with pregnancy loss, the emotional consequences of such loss to the bereaved parents, and how the state should deal with such bereaved parents in our constitutional dispensation.

2 In particular, this application challenges the constitutionality of extant legislation that relates to how dead fetuses must be dealt with.

3 It should be noted, with respect, that the first applicant does not seek to create any rights or legal subjectivity for the fetus, but builds its case exclusively on the *constitutional rights of bereaved parents*.

4 Both the respondents on the one hand, and the first amicus curiae on the other – although they take opposing positions – fixate on the innate biological and moral properties of the fetus or ‘unborn child’, such as its biological viability and whether it constitutes a ‘living human being’. It is settled law that the unborn child is not a legal subject and does not have any legal interests or rights.¹ Accordingly, the debate between the respondents and the amicus curiae about the innate properties of the

¹ *Christian Lawyers Association of South Africa v Minister of Health* 1998 (4) SA 1113 (T).

unborn child is simply not relevant and only serves to detract from the actual legal issue before the court.

5 The only relevant legal paradigm in the present case is the constitutional rights of actual legal subjects, namely parents who experience pregnancy loss. It is *uncontested* that expecting parents who experience pregnancy loss may suffer emotional and psychological trauma as a result.² It stands *uncontroverted* that many of these bereaved parents *want* to bury the fetal remains. It also stands *uncontroverted* that such burial of the fetal remains can *assist* bereaved parents to deal with their grief. These are the *facts* that form the foundation of this human rights case.

6 The core question that the respondents failed to recognise or address in their papers is the following: *If we are a caring, compassionate society, why do we prohibit parents who suffer pregnancy loss from burying the remains of their unborn child if such burial is their wish, and such burial can bring them psychological healing?*

7 The answer is that *there is simply is no reason for this prohibition*. Accordingly, the prohibition is unconstitutional.

² Respondents' answering affidavit to the first applicant, para 24, p521.

8 For the benefit of the court, I attach hereto an article on the subject of this lawsuit that was published in the *South African Medical Journal* by DuToit-Prinsloo et al in 2016.

Structure of these heads of argument

9 In Part B, I provide the court with a summary of the relevant legislation, and in Part C, with a summary of the facts. I then provide the court with a brief comparative legal analysis in Part D. Part E is a human rights analysis of the relevant legislation. This analysis concludes that specific parts of our extant legislation is unconstitutional. In Part F, I make submissions regarding appropriate remedies. Lastly, in Part G, I request the court to make a cost order in favour of the first applicant.

B SUMMARY OF EXTANT LEGISLATION

10 First, a note regarding terminology: Pregnancy loss can either be due to natural causes (spontaneous pregnancy loss) or due to conscious human decision (induced pregnancy loss; termination of pregnancy). In the case of natural causes, pregnancy loss can occur either before the fetus is viable (miscarriage) or after viability (stillbirth).

Births and Deaths Registration Act

11 The Births and Deaths Registration Act 51 of 1992 ('BADRA') is the statute that governs burials, and in particular governs which entities qualify to be buried.

12 The relevant definitions of BADRA read as follows:

1. Definitions

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;

13 Section 18 of BADRA provides for the issuance of still-born certificates or still-born declarations, and consequent to such certificates or declarations, burial orders. The relevant subsections read as follows:

18. Still-birth

(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 authorizing burial.

14 Subsection 20(1) of BADRA makes it clear that no burials may take place in the absence of a burial order. The subsection reads as follows:

20. Burial order

(1) No burial shall take place unless 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.

15 Accordingly, subsection 20(1), read with section 1 (the definition of 'still-birth') and subsections 18(1)–18(3) has the effect that no still-birth certificate or declaration can be issued in the event of either miscarriage or termination of pregnancy; this in turn has the effect that no burial order can be issued, thus *effectively legally banning the burial of dead fetuses in the event of pregnancy loss due to miscarriage or termination of pregnancy.*

Regulations Relating to the Management of Human Remains

16 The Regulations Relating to the Management of Human Remains made in terms of the National Health Act 61 of 2003 ('the Regulations') govern certain aspects regarding funeral undertakers and burials. The Regulations only make provision for the burial of 'corpses' and 'human remains', not for anything else. The Regulations define 'corpse' and 'human remains' in regulation 1 as follows:

“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;

- 17 Given that legal personhood only starts with *live birth*, the most apparent interpretation of ‘dead human body’ is the dead body of a person who actually lived, or, if interpreted aligned with BADRA, also including a still-born fetus (referred to in BADRA as a still-born ‘child’). In either interpretation, ‘dead human body’ is unlikely to mean ‘fetal remains following a miscarriage’, or ‘fetal remains following a termination of pregnancy’.
- 18 Accordingly, the Regulations do not make provision for the burial of dead fetuses in the event of pregnancy loss due to miscarriage or termination of pregnancy.

National Standard: Management of Healthcare Risk Waste

- 19 The handling of dead fetuses is guided by, inter alia, the South African National Standard 10248, entitled ‘Management of Healthcare Risk Waste’, issued in terms of section 24 of the Standards Act, Act 8 of 2008, by the South African Bureau of Standards (‘the National Standard’).

20 The National Standard contains three parts. Each of these parts contains the same definition of 'pathological waste' or 'anatomical waste', which reads as follows:

waste that contains tissues, organs, body parts, blood and body fluids from patients, foetuses and animal carcasses, but excludes teeth and hair [my emphases]

21 The National Standard groups anatomical or pathological waste as part of 'healthcare risk waste' and requires *incineration* as the main 'treatment' method of healthcare risk waste.

22 However, only dead fetuses that are 'discarded' in the first place are considered 'waste'. 'Waste' is defined as follows:

undesirable or superfluous by-product, emission, residue or remainder of any process or activity, any matter, gaseous, liquid or solid or any combination thereof, which

- a) is discarded by any person;
- b) is 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

23 Accordingly – different from BADRA and the Regulations – the National Standard does not necessarily exclude the possibility that fetuses can be buried (rather than being discarded as healthcare risk waste).

C THE EVIDENCE BEFORE THE COURT

24 In the first applicant's founding affidavit, the first applicant shows, with reference to expert opinions, that many expecting parents make significant emotional investment in their prospective child before birth, and that pregnancy loss can cause such parents intense grief – irrespective of gestational age or whether the pregnancy loss was due to natural causes or due to conscious human decision.

25 This was conceded by the respondents. The respondents state as follows:³

It cannot be gainsaid that pregnancy loss irrespective of when it happens unabatedly results in emotional and psychological trauma to the bereaved parents. It is also correct that different parents would react differently to the pregnancy loss depending on how much they have emotionally invested on [sic] the pregnancy which subsequently terminated.

³ Respondents' answering affidavit to the first applicant, para 24, p521.

- 26 Furthermore, the first applicant shows – relying on expert opinions in the fields of psychology and grief counselling – that bereaved parents often have a desire to bury the fetal remains of their prospective child, and that the ceremony or ritual of a burial has a decidedly positive and healing effect on such bereaved parents.
- 27 It is important to note, with respect, that the respondents failed to submit any expert opinions. Accordingly, the expert opinions filed by the first applicant stand uncontroverted.
- 28 It is insightful to read the expert opinions filed by the first applicant in detail. I respectfully refer the court to these expert opinions. In the following paragraphs, I highlight just some of the most salient aspects that form the foundation of the first applicant’s case.
- 29 Reverend Braam Klopper, a pastoral therapist who specialises in bereavement counselling, states as follows in his expert opinion:⁴

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.

⁴ Klopper expert opinion (attached to the first applicant’s founding affidavit as ‘Smith4’) para 36, p408.

- 30 This sentiment is echoed by Dr Louise Olivier, a clinical and counselling psychologist, who states as follows:⁵

From the clinical experience of the undersigned psychologist as well as the literature it is clear that an abortion, miscarriage or still birth of a foetus/baby can be extremely traumatic for not only the mother but also the father of the deceased foetus/baby. The management of the mother and the father after such an event is important for their mental health. One of the important management strategies would be to give the parents the choice if they want to bury the foetus or have the hospital discard it as medical waste.

- 31 Importantly, Dr Olivier also provides an overview of African culture, and concludes as follows:⁶

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.

⁵ Olivier expert opinion (attached to the first applicant's founding affidavit as 'Smith3') para 6, p127.

⁶ Ibid.

- 32 The positive value of burial must be seen in the following important context given by Rev Klopper:⁷

In contrast with incineration, a burial or cremation provides the opportunity for and typically entail ritual and ceremony (whether religious or secular). For such a ceremony to have the maximum effect the following would be of the utmost importance: the physical presence of the body or ashes of the deceased, the physical presence of the bereaved parents, and the physical presence and emotional support of their loved ones. [My emphasis]

- 33 The physical presence of the body of the dead fetus is also highlighted by Dr Olivier in the context of traditional Black South African culture:⁸

. . . the ritual whilst the foetus is lying in the coffin allows the family members to help the spirit to resume his or her rightful role in the spirit world.

⁷ Klopper expert opinion (attached to the first applicant's founding affidavit as 'Smith4') para 25, p404.

⁸ Olivier expert opinion (attached to the first applicant's founding affidavit as 'Smith3') para 3.1, p119 (at the very bottom of the page).

- 34 The problematic nature of the current legal position is summed up as follows by Rev Klopper:⁹

During my fifteen years of grief counselling, some of the parents who experienced miscarriage expressed their anger and feeling of disempowerment at the fact that their 'baby' was taken from them and in their absence unceremoniously incinerated; for these parents, the fact that their 'baby' was simply perceived and treated as 'waste' is experienced as a deep insult. These negative emotions caused by the current rigid system are acutely counter-productive in a grief counselling therapeutic setting.

- 35 Accordingly, bereaved parents have a clear interest in electing whether to bury the fetal remains of their prospective child following pregnancy loss.

D HUMAN RIGHTS ANALYSIS

- 36 In this section of my heads of argument, I submit that BADRA subsection 20(1) and the Regulations' definitions of 'corpse' and 'human remains' (the impugned provisions) infringe on the constitutionally protected rights of bereaved parents in the event of miscarriage or termination of pregnancy,

⁹ Klopper expert opinion (attached to the first applicant's founding affidavit as 'Smith4') para 44, p410.

by not allowing such parents the choice whether to bury the fetal remains following pregnancy loss.

- 37 The human rights analysis has two stages: (1) The interpretation stage, in which it is investigated whether the relevant interest falls within the ambit of any constitutional rights, and if so, (2) the limitation stage, in which it is investigated whether the relevant constitutional rights can be limited by a legitimate government purpose.

Interpretation stage

- 38 Given the evidence before the court, it is clear that bereaved parents have a clear *interest* in electing whether to bury the remains of their late prospective child following pregnancy loss.

- 39 In the following paragraphs, I argue that this interest falls within the protective ambits of the constitutional rights to dignity, privacy, and equality.

Human dignity

- 40 Constitutional scholar Woolman identifies five closely related conceptions of human dignity that have crystallised in the Constitutional Court's

jurisprudence:¹⁰ (1) an individual is an end-in-himself or -herself; (2) all individuals are entitled to equal concern; (3) an individual is entitled to a space for self-actualisation; (4) an individual is entitled to self-governance; and (5) individuals are collectively responsible for the material conditions for individual agency. Especially conceptions (1) and (3) are applicable in *casu*.

41 Burial entails a ceremony where the bereaved parents and their loved ones can be present. This ceremony serves as an acknowledgement that the prospective child had meaning for the bereaved parents. On a deeper level, it acknowledges the bereaved parents as *creators of meaning in their own lives* – as self-actualising individuals who are ends-in-themselves (conceptions (1) and (3) above).

42 Stated in less philosophical language: For many expecting parents their unborn child is something very important and meaningful. The law currently disrespects the parents' feelings, and quite literally treats the body of the dead unborn child as waste. This is a slap in the face of bereaved parents – a violation of their dignity.

¹⁰ S Woolman, 'Dignity' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn 2005) 36-6–36-19.

43 Accordingly, the interest of the bereaved parents to be allowed the choice whether to have a burial for the fetal remains following pregnancy loss due to miscarriage or termination of pregnancy is protected within the ambit of the right to dignity.

44 The impugned provisions prohibit and/or fail to provide for such choice, and therefore infringe the right to dignity.

Privacy

45 In *Bernstein v Bester*, the Constitutional Court held that privacy is acknowledged in the truly personal realm.¹¹ In *NM v Smith*, the Constitutional Court held that the right to privacy encompasses the right of a person to – within this truly personal realm – live his or her life as he or she pleases,¹² and not to be interfered with.¹³

46 I submit that pregnancy loss due to miscarriage or termination of pregnancy, and the subsequent decision whether to bury the fetal remains

¹¹ *Bernstein v Bester* [1996] ZACC 2, 1996 (2) SA 751 (CC) [67].

¹² *NM v Smith* [2007] ZACC 6, 2007 (5) SA 250 (CC) [33].

¹³ *Ibid* [45].

or not, are life events that are within the truly personal realm contemplated in *Bernstein v Bester*.

47 Accordingly, the interest of the bereaved parents to be allowed to choose whether to have a burial for the fetus following pregnancy loss due to miscarriage or termination of pregnancy is protected within the ambit of the right to privacy.

48 The impugned provisions prohibit and/or fail to provide for such choice, and therefore infringe the right to privacy.

Equality

49 In *Harksen v Lane* the Constitutional Court established the steps to be followed to determine whether the right to equality in section 9(1) of the Constitution has been violated:¹⁴ The first step is to ascertain whether the impugned provisions differentiate between people; if so, the second step is to ascertain whether there is a rational connection between the differentiation in question and the legitimate governmental purpose it is designed to further or achieve.

¹⁴ *Harksen v Lane* [1997] ZACC 12, 1998 (1) SA 300 (CC) [42].

50 The current legislative regime effectively creates two categories of bereaved parents:

50.1 *Category A:* Bereaved parents who suffered stillbirth – one kind of pregnancy loss.

50.2 *Category B:* Bereaved parents who suffered pregnancy loss other than stillbirth – bereaved parents who suffered pregnancy loss due to miscarriage or termination of pregnancy.

51 While bereaved parents in Category A have a duty to bury the remains of their prospective child, bereaved parents in Category B are legally banned from burying the remains of their prospective child.

52 There is no legitimate government purpose for this differentiation.

53 Accordingly, the impugned provisions infringe the right to equality as protected in section 9(1) of the Constitution.

Conclusion on the interpretation stage

54 The impugned provisions infringe on the rights to dignity, privacy, and equality.

Limitation stage

- 55 No legitimate government purpose has been suggested by the respondents.
- 56 There is no conceivable legitimate government purpose for banning bereaved parents who have suffered pregnancy loss due to miscarriage or termination of pregnancy from choosing to bury the fetal remains.

Conclusion on the human rights analysis

- 57 The impugned provisions are unconstitutional to the extent that they ban bereaved parents who have suffered pregnancy loss due to miscarriage or termination of pregnancy from choosing to bury the fetal remains.

E REMEDY

- 58 The remedy includes three main components: (a) The guiding principle, (b) the permanent solution, and (c) the interim solution:

58.1 *The guiding principle.* The first applicant respectfully requests the Court to grant a declaration in terms of section 38 of the Constitution that, in the case of pregnancy loss due to miscarriage or termination

of pregnancy, the bereaved parent or parents have the right, based on the constitutional rights to human dignity, privacy, and equality, to elect to bury the dead fetus. I refer to this right as the 'Burial Right'.

58.2 *The permanent solution.* The offending section of BADRA will be referred back to parliament to review, and the offending parts of the Regulations will be referred back to the second respondent to review. The Burial Right will be the guiding principle for these reviews.

58.3 *The interim solution.* Given that the reviews will take time, and that the constitutional rights of bereaved parents must be vindicated, the first applicant requests that the Court, as an interim measure, authorises the use of still-birth certificates in cases of pregnancy loss due to miscarriage or termination of pregnancy, where the bereaved parent or parents indicate to their attending physician that they wish to bury the fetal remains. In order for this interim solution be effective, it needs to be communicated by the respondents within their respective spheres of authority. The first applicant respectfully requests the Court to exercise supervisory jurisdiction in this regard.

F COMPARATIVE ANALYSIS

59 In this part of my heads of argument, I provide the court with an non-exhaustive, broad overview of the legal position in comparative jurisdictions concerning the disposal of fetal remains. I limit this overview to jurisdictions that I could find where there exist legislation, rules or guidelines explicitly dealing with the disposal of fetal remains in the case of pregnancy loss because of miscarriage and/or termination of pregnancy. These jurisdictions are the United Kingdom, and 18 states of the United States of America.

United Kingdom

60 In the United Kingdom, the Human Tissue Authority, a statutory body, issued a guidance document on the disposal of pregnancy remains following pregnancy loss or termination.¹⁵ For the court's convenience, I attach a copy of this guidance document to these heads of argument. In essence this guidance document provides that a woman who suffers pregnancy loss in the form of miscarriage or termination of pregnancy has

¹⁵ Human Tissue Authority. *Guidance on the disposal of pregnancy remains following pregnancy loss or termination*. (2015).

the *right to choose* the way in which the pregnancy remains will be disposed of. The guidance document provides that:

21. Cremation and burial should always be available options for the disposal of pregnancy remains, *regardless of whether or not there is discernible fetal tissue*. [Original emphasis.] Sensitive incineration, separate from clinical waste, may be used where the woman makes this choice or does not want to be involved in the decision and the establishment considers this the most appropriate method of disposal.

61 Furthermore, the guidance document highlights the importance of informing the woman who suffered pregnancy loss of her choices concerning the disposal of pregnancy remains.

18 American states

62 I attach hereto extracts from the relevant statutes and rules of the 18 American states with laws or rules that explicitly deal with the disposal of fetal remains in the case of pregnancy loss because of miscarriage and/or

termination of pregnancy.¹⁶ The salient elements of these laws and rules are the following:

62.1 The right to choose the way in which the dead fetus is to be disposed of is a common element in these laws and rules.

62.2 In some instances this right belongs to the bereaved parents, in some instances to the bereaved mother.

62.3 In some instances this right only relates to miscarriage, in some instances it also includes termination of pregnancy.

62.4 The options for fetal disposition are not always defined. However, in the instances where these options are defined, they typically include 'cremation or interment' – what would be termed 'burial' in South African law.

¹⁶ Alabama Code §22-9A-16; Alaska Administrative Code 7.05.450 & 7.05.530; Colorado Revised Statutes § 25-2-110.5 (2016); Florida Statutes § 383.33625 (2016); Georgia Code § 31-10-20; Illinois: Public Act 92-0348 §11.4; Indiana Code § 16-21-11; Kansas Statutes § 65-67a10 (2014); Maine Rules for the Department of Health and Human Services § 10-146, ch 1, s 7; Michigan Compiled Laws § 333.2854 (2014); Minnesota Statutes § 145.1621-1622 (2016); Missouri Revised Statutes § 194 (2012); Nebraska Code § 71-20,121 (2014); Ohio Revised Code § 759.49 (2017); Oregon Revised Statutes § 432.143 & § 432.158 (2013); South Dakota Codified Laws § 34-25-32.3 to 34-25-32.6 (2017); Texas Statutes 241.010; West Virginia Code § 16-5-23.

62.5 The right to choose the way in which the dead fetus is to be disposed of is often buttressed by a duty on the health care provider to inform the bereaved parents/mother of their/her right.

Conclusion

63 The principle advanced by the first applicant, namely that bereaved parents in the event of miscarriage and termination of pregnancy should have the right to bury their fetal remains, is not a new idea. In fact, this right has already been recognised in numerous comparative jurisdictions.

G COST ORDER

64 The respondents have misconducted themselves as litigants by filing notices of opposition, but then failing to file answering affidavits for six months.

65 The respondents' dilatory attitude caused the first applicant to serve notices in terms of Rule 30A and to launch an application to strike out, which increased the cost of litigation.

66 Eventually the respondents only filed their answering affidavit after the Deputy Judge President, the Honourable Mr Justice Ledwaba, directed the respondents to file their answering affidavit.

67 In further careless fashion, the respondents failed to request the court to condone their late filing, and failed to provide the court with any explanation for being six months late.

68 Given the above, the first applicant respectfully requests the court to grant a special cost order in favour of the first applicant.

H CONCLUSION

69 It stands uncontroverted that parents who suffer pregnancy loss and wish to bury their fetal remains can find particular psychological healing through the process of burying the fetal remains.

70 As a country, we should aspire to be a *caring* society. In numerous cases since the inception of our constitutional dispensation, the Constitutional

Court made it clear that we have a constitutional commitment to being a caring society.¹⁷

- 71 If we are serious about this constitutional commitment, we cannot without good reason refuse to allow parents who suffer the anguish of pregnancy loss and wish to find psychological healing by burying their fetal remains the right to do so.
- 72 No good reason exists for such refusal. The narrative about the biological and moral properties of the fetus is not relevant to the issue of the emotional and psychological suffering of the bereaved parents. Where expecting parents invested emotionally into the pregnancy, they may suffer great emotional pain when losing such a pregnancy *irrespective* of whether the fetus was biologically viable, and *irrespective* of the moral status that others may or may not allocate to the fetus.

¹⁷ *S v Williams* [1995] ZACC 6, 1995 (3) SA 632 (CC) [63]: ‘our progress towards being a more humane and caring society’ (in the context of children’s rights); *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7, 2005 (1) SA 217 (CC) [37]: ‘the constitutional vision of a caring society based on good neighbourliness and shared concern’ (in the context of illegal occupation of land), which passage has been quoted and relied upon in several subsequent Constitutional Court judgments; *Khosa v Minister of Social Development*; *Mahlaule v Minister of Social Development* [2004] ZACC 11, 2004 (6) SA 505 (CC) [65]: ‘the constitutional commitment to developing a caring society’ (in the context of immigrants); *Raduwa v Minister of Safety and Security* [2016] ZACC 24, 2016 (10) BCLR 1326 (CC) [59]: ‘our solemn undertaking as a nation to create a new and caring society’ (in the context of children’s rights).

73 Therefore, given 'our solemn undertaking as a nation to create a new and caring society',¹⁸ we must allow parents who suffer the anguish of pregnancy loss and wish to bury their fetal remains the right to do so.

74 I submit that the court should, with respect, declare as unconstitutional the impugned provisions that currently prohibit bereaved parents' right to bury their fetal remains, and grant the ancillary relief.



Donrich Thaldar

Counsel for the first applicant

13 November 2018

¹⁸ *Raduha* (n 17) [59].

TABLE OF AUTHORITIES

Cases cited

Bernstein v Bester [1996] ZACC 2, 1996 (2) SA 751 (CC).

Christian Lawyers Association of South Africa v Minister of Health 1998 (4) SA 1113 (T).

Harksen v Lane [1997] ZACC 12, 1998 (1) SA 300 (CC).

Khosa v Minister of Social Development; Mahlaule v Minister of Social Development [2004] ZACC 11, 2004 (6) SA 505 (CC).

NM v Smith [2007] ZACC 6, 2007 (5) SA 250 (CC).

Port Elizabeth Municipality v Various Occupiers [2004] ZACC 7, 2005 (1) SA 217 (CC).

Raduwa v Minister of Safety and Security [2016] ZACC 24, 2016 (10) BCLR 1326 (CC).

S v Williams [1995] ZACC 6, 1995 (3) SA 632 (CC).

Thornhill v Gerhardt 1979 (2) SA 1092 (T).

South African Legislation

The Constitution of the Republic of South Africa, 1996.

Births and Deaths Registration Act 51 of 1992.

Regulations Relating to the Management of Human Remains (Gazette 36473, Notice 363), made in terms of the National Health Act 61 of 2003.

South African National Standard 10248, entitled 'Management of Healthcare Risk Waste', issued in terms of section 24 of the Standards Act 8 of 2008, by the South African Bureau of Standards.

United States

Alabama Code §22-9A-16

Alaska Administrative Code 7.05.450 & 7.05.530

Colorado Revised Statutes § 25-2-110.5 (2016)

Florida Statutes § 383.33625 (2016)

Georgia Code § 31-10-20

Illinois: Public Act 92-0348 §11.4

Indiana Code § 16-21-11

Kansas Statutes § 65-67a10 (2014)

Maine Rules for the Department of Health and Human Services § 10-146,
Chapter 1, section 7

Michigan Compiled Laws § 333.2854 (2014)

Minnesota Statutes § 145.1621 & 145.1622 (2016)

Missouri Revised Statutes § 194 (2012)

Nebraska Code § 71-20,121 (2014)

Ohio Revised Code § 759.49 (2017)

Oregon Revised Statutes § 432.143 & § 432.158 (2013)

South Dakota Codified Laws § 34-25-32.3 to 34-25-32.6 (2017)

Texas Statutes 241.010

West Virginia Code § 16-5-23

United Kingdom

Human Tissue Authority. *Guidance on the disposal of pregnancy remains following pregnancy loss or termination.* (2015).

Secondary source

S Woolman, 'Dignity' in S Woolman and others (eds), *Constitutional Law of South Africa* (2nd edn 2005) 36-6–36-19.

EXTRACTS FROM RELEVANT UNITED STATES LEGISLATION

Alabama Code §22-9A-16 (2009)

(c) Prior to final disposition of a dead fetus, the funeral director, the person in charge of the institution, or other person assuming responsibility for final disposition of the fetus shall obtain from the parents authorization for final disposition. In the event the parents are incompetent, unable, or unwilling to sign the documents authorizing final disposition, the institution where the fetal death occurred, or if the fetal death occurred outside an institution, any licensed hospital in reasonable proximity, shall establish a mechanism to determine the final disposition.

Alaska Administrative Code 7.05.450 & 7.05.530

7 AAC 05.450. Fetal deaths. Any product of gestation of less than 20 weeks duration of pregnancy, showing no evidence of life, may have a fetal death certificate prepared, filed, recorded, and registered as required above, at the option of the parents or others concerned; such certificate is not mandatory for fetal deaths with a duration of pregnancy of less than 20 weeks. However, this regulation does not release anyone from the duty of reporting any suspicion of foul play or illegal act; nor does it except such cases from any existing burial requirements or restrictions, or other health requirements, either state or local.

7 AAC 05.530. Gestation period. A burial-transit permit may be issued by a local registrar for the disposition of a fetus with a gestation period of less than 20

weeks, with or without the filing of a fetal death certificate; provided all other requirements have been met. For movement out of the state; for any shipment by common carrier; or for burial or other disposition in any public or other organized burial ground, vault, or crematory, a burial-transit permit shall be a prerequisite in cases of a fetus, irrespective of the length of gestation. All additional requirements pertaining to any dead body must also be fulfilled in such cases.

Colorado Revised Statutes § 25-2-110.5 (2016)

Fetal deaths - treatment of remains. (1) In every instance of fetal death, the pregnant woman shall have the option of treating the remains of a fetal death pursuant to article 54 of title 12, C.R.S. (2) In every instance of fetal death, the health care provider, upon request of the pregnant woman, shall release to the woman or the woman's designee the remains of a fetal death for final disposition in accordance with applicable law. Such request shall be made by the pregnant woman or her authorized representative prior to or immediately following the expulsion or extraction of the fetal remains. Unless a timely request was made, nothing in this section shall require the health care provider to maintain or preserve the fetal remains. (3)(a) Nothing in this section shall prohibit a health care provider from conducting or acquiring medical tests on the remains of a fetal death prior to release. (b) Upon a request pursuant to subsection (2), whenever a medical test is conducted pursuant to paragraph (a) of this subsection (3), the health care provider conducting the test shall, where medically permissible and otherwise permitted by law, release to the pregnant woman or the woman's designee the remains of a fetal death for final disposition. (4) Nothing in this section shall prohibit the health care provider from requiring a release of liability

for the release of the remains of a fetal death prior to such release. (5) A health care provider shall be immune from all civil or criminal liability, suit, or sanction with regard to any action taken in good faith compliance with the provisions of this section.

Florida Statutes § 383.33625 (2016)

Stephanie Saboor Grieving Parents Act; disposition of fetus; notification; forms developed.—

(1) This section shall be known by the popular name the “Stephanie Saboor Grieving Parents Act.”

(2) A health care practitioner licensed pursuant to chapter 458, chapter 459, chapter 464, or chapter 467 having custody of fetal remains following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her option to arrange for the burial or cremation of the fetal remains, as well as the procedures provided by general law. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial of the fetal remains.

(3) The Department of Health shall adopt rules to develop forms to be used for notifications and elections by the health care practitioner, and the health care practitioner shall provide the forms to the mother.

(4) A facility licensed pursuant to chapter 383 or chapter 395 having custody of fetal remains following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her option to arrange for the burial or cremation of the fetal remains, as well as the procedures provided by general law. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial of the fetal remains.

(5) If the mother chooses the option of using the procedures provided by general law, the facility or health care practitioner in custody of fetal remains shall follow the procedures set forth in general law.

(6) The Agency for Health Care Administration shall adopt rules to develop forms to be used for notifications and elections by the facility, and the hospital shall provide the forms to the mother.

Georgia Code § 31-10-20

Permits for disposition, disinterment, and reinterment

(d) Prior to final disposition of a dead fetus, irrespective of the duration of pregnancy, the funeral director or person acting as such, the person in charge of the institution, or other person assuming responsibility for final disposition of the fetus shall obtain from the parent(s) authorization for final disposition.

Illinois Public Act 92-0348

§11.4. Disposition of fetus. A hospital having custody of a fetus following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her right to arrange for the burial or cremation of the fetus. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial or cremation of fetal tissue. If, within 24 hours after being notified under this Section, the mother elects in writing to arrange for the burial or cremation of the fetus, the disposition of the fetus shall be subject to the same laws and rules that apply in the case of a fetal death that occurs in this State after a gestation period of 20 completed weeks or more. The Department of Public Health shall develop

forms to be used for notifications and elections under this Section and hospitals shall provide the forms to the mother.

Indiana Code 16-21-11

Chapter 11. Treatment of Miscarried Remains

Sec. 1. As used in this chapter, "health care facility" means any of the following:

(1) A hospital. (2) A birthing center. (3) Any other medical facility.

Sec. 2. As used in this chapter, "miscarried fetus" means an unborn child, irrespective of gestational age, who has died from a spontaneous or accidental death before expulsion or extraction from the unborn child's mother, irrespective of the duration of the pregnancy.

Sec. 3. As used in this chapter, "person in charge of interment" means a person who places or causes to be placed the body of a miscarried fetus who has a gestational age of less than twenty (20) weeks of age or the ashes, after cremation, in a grave, vault, urn, or other receptacle, or who otherwise disposes of the body or ashes.

Sec. 4. Subject to sections 5 and 6 of this chapter, the parent or parents of a miscarried fetus may determine the final disposition of the remains of the miscarried fetus.

Sec. 5. (a) Not more than twenty-four (24) hours after a woman has her miscarried fetus expelled or extracted in a health care facility, the health care facility shall: (1) disclose to the parent or parents of the miscarried fetus, both orally and in writing, the parent's right to determine the final disposition of the remains of the miscarried fetus; (2) provide the parent or parents of the miscarried fetus with written information concerning the available options for

disposition of the miscarried fetus; and (3) inform the parent or parents of the miscarried fetus of counseling that may be available concerning the death of the miscarried fetus.

(b) The parent or parents of a miscarried fetus shall inform the health care facility of the parent's decision for final disposition of the miscarried fetus after receiving the information required in subsection (a) but before the parent of the miscarried fetus is discharged from the health care facility. The health care facility shall document the parent's decision in the medical record.

Sec. 6. (a) If the parent or parents choose a means of final disposition other than the means of final disposition that is usual and customary for the health care facility, the parent or parents are responsible for the costs related to the final disposition of the fetus.

(b) If the parent or parents choose a means of final disposition that provides for the interment of a miscarried fetus who has a gestational age of at least twenty (20) weeks of age, the requirements under IC 16-37-3 apply.

(c) Notwithstanding any other law, the parent or parents whose miscarried fetus has a gestational age of less than twenty (20) weeks of age may choose a means of final disposition that provides for the cremation or the interment of the miscarried fetus. If the parent or parents choose the cremation or interment of the miscarried fetus, the local health officer shall provide the person in charge of interment with a permit for the disposition of the body. A certificate of stillbirth is not required to be issued for a final disposition under this subsection.

Disposition of fetal remains. Every maternity center and medical care facility licensed by the department of health and environment to operate in the state shall adopt written policies and inform parents regarding their options for disposition or taking of fetal remains in an event of a fetal death.

*Maine Rules for the Department of Health and Human Services, 10-146,
Chapter 1*

7. Disposition of Fetuses. Transportation and final disposition of fetal remains, regardless of the length of gestation, are subject to the same regulations as dead bodies except as specified in this section.

A. A facility may dispose of fetal remains directly without obtaining a burial-transit permit.

B. A burial-transit permit is required if the fetal remains are to be buried in a cemetery, disposed of in a crematorium, buried at sea, used by medical science, or removed from the state.

C. Notwithstanding section 2(S)(3)(h) of this chapter, a burial-transit permit for disposition of the remains of a fetus of less than 20 weeks gestation, or the product of an induced abortion of any gestation, shall be issued upon presentation of a statement from the facility that the parents have chosen to dispose of the remains outside the facility and that the required miscarriage or induced abortion report has been filed. The letter shall name the person who will be responsible for the disposition and shall contain that person's signature.

Authorization for final disposition of dead body or fetus; time; form; retention of permit; religious service or ceremony not required; cremation; moving body; permit issued by other state. (2) Except as otherwise provided in section 2836, or unless the mother has provided written consent for research on the dead fetus under section 2688, before final disposition of a dead fetus, irrespective of the duration of pregnancy, the funeral director or person assuming responsibility for the final disposition of the fetus or fetal remains shall obtain from the parents, or parent if the mother is unmarried, an authorization for final disposition on a form prescribed and furnished or approved by the state registrar. The authorization may allow final disposition to be by a funeral director, the individual in charge of the institution where the fetus was delivered or miscarried, or an institution or agency authorized to accept donated bodies, fetuses, or fetal remains under this act. The parents, or parent if the mother is unmarried, may direct the final disposition to be interment or cremation as those terms are defined in section 2 of the cemetery regulation act, 1968 PA 251, MCL 456.522, or incineration. After final disposition, the funeral director, the individual in charge of the institution, or other person making the final disposition shall retain the permit for not less than 7 years. This section as amended by the amendatory act that added this sentence does not require a religious service or ceremony as part of the final disposition of fetal remains.

Minnesota Statutes § 145.1621 & 145.1622 (2016)

145.1621 DISPOSITION OF ABORTED OR MISCARRIED FETUSES.

Subdivision 1. Purpose. The purpose of this section is to protect the public health and welfare by providing for the dignified and sanitary disposition of the remains of aborted or miscarried human fetuses in a uniform manner and to declare violations of this section to be a public nuisance.

Subd. 2. Definition; remains of a human fetus. For the purposes of this section, the term "remains of a human fetus" means the remains of the dead offspring of a human being that has reached a stage of development so that there are cartilaginous structures, fetal or skeletal parts after an abortion or miscarriage, whether or not the remains have been obtained by induced, spontaneous, or accidental means.

Subd. 3. Regulation of disposal. Remains of a human fetus resulting from an abortion or miscarriage, induced or occurring accidentally or spontaneously at a hospital, clinic, or medical facility must be deposited or disposed of in this state only at the place and in the manner provided by this section or, if not possible, as directed by the commissioner of health.

Subd. 4. Disposition; tests. Hospitals, clinics, and medical facilities in which abortions are induced or occur spontaneously or accidentally and laboratories to which the remains of human fetuses are delivered must provide for the disposal of the remains by cremation, interment by burial, or in a manner directed by the commissioner of health. The hospital, clinic, medical facility, or laboratory may complete laboratory tests necessary for the health of the woman or her future offspring or for purposes of a criminal investigation or determination of parentage prior to disposing of the remains.

Subd. 5. Violation; penalty. Failure to comply with this section constitutes a public nuisance. A person, firm, or corporation failing to comply with this section is guilty of a misdemeanor.

Subd. 6. Exclusions. To comply with this section, a religious service or ceremony is not required as part of the disposition of the remains of a human fetus, and no discussion of the method of disposition is required with the woman obtaining an induced abortion.

145.1622 POLICY FOR NOTIFICATION OF DISPOSITION OPTIONS.

Hospitals, clinics, and medical facilities must have in place by January 15, 2009, a policy for informing a woman of available options for fetal disposition when the woman experiences a miscarriage or is expected to experience a miscarriage.

Missouri Revised Statutes § 194 (2012)

194.378. Final disposition of fetal remains, mother has right to determine. — In every instance of fetal death, the mother has the right to determine the final disposition of the remains of the fetus, regardless of the duration of the pregnancy. The mother may choose any means of final disposition authorized by law or by the director of the department of health and senior services.

194.381. Means of disposition. — 1. The final disposition of the remains of a human fetus may be by cremation, interment by burial, incineration in an approved medical waste incinerator, or other means authorized by the director of the department of health and senior services. The disposition shall be in accordance with state law or administrative rules providing for the disposition. If the remains are disposed of by incineration, the remains shall be

incinerated separately from other medical waste. 2. No religious service or ceremony is required as part of the final disposition of the remains of a human fetus.

194.384. Written standards required for protection of mother's right to determine final disposition. — Every hospital, outpatient birthing clinic, and any other health care facility licensed to operate in this state shall adopt written standards for the final disposition of the remains of a human fetus as provided in sections 194.375 to 194.390 for protection of a mother's right pursuant to section 194.378 and for notice as required in section 194.387.

194.387. Miscarriage — mother's right to determine final disposition of remains — counseling made available, when. — 1. Within twenty-four hours after a miscarriage occurs spontaneously or accidentally at a hospital, outpatient birthing clinic, or any other health care facility, the facility shall disclose to the mother of the miscarried fetus, both orally and in writing, the mother's right to determine the final disposition of the remains of the fetus. The facility's disclosure shall include giving the mother a copy of the facility's written standards adopted pursuant to section 194.384. 2. The facility shall make counseling concerning the death of the fetus available to the mother. The facility may provide the counseling or refer the mother to another provider of appropriate counseling services.

194.390. Right to legal abortion not affected. — Nothing in sections 194.375 to 194.390 shall be construed to prohibit a woman's ability to obtain a legal abortion.

Nebraska Code § 71-20,121 (2014)

Disposition of remains of child born dead; hospital; duties.

(1) Every hospital licensed under the Health Care Facility Licensure Act shall maintain a written policy for the disposition of the remains of a child born dead at such hospital. A parent of such child shall have the right to direct the

disposition of such remains, except that disposition may be made by the hospital if no such direction is given by a parent within fourteen days following the delivery of such remains. Such policy and such disposition shall comply with all applicable provisions of state and federal law. Upon the delivery of a child born dead, the hospital shall notify at least one parent of such parents' right to direct the disposition of the remains of such child and shall provide at least one parent with a copy of its policy with respect to such disposition.

(2) For purposes of this section, child born dead means a child at any stage of gestation (a) who has died in utero, (b) whose remains have been removed from the uterus of the mother, for whom pregnancy has been confirmed prior to such removal, and (c) whose remains are identified with the naked eye at the time of such removal by the attending physician or upon subsequent pathological examination if requested by a parent. This section shall not apply to the performance of an elective abortion.

(3) Except as otherwise provided by law, nothing in this section shall be interpreted to prohibit any hospital from providing additional notification and assistance to the parent of a child born dead at such hospital relating to the disposition of the remains of such child, even if such remains cannot be identified with the naked eye at the time of delivery or upon subsequent pathological examination.

Ohio Revised Code § 759.49 (2017)

Rules governing product of fetal death.

(A) As used in this section and section 759.491 of the Revised Code, "fetal death" has the same meaning as in section 3705.01 of the Revised Code.

(B) The legislative authority of a municipal corporation owning a public burial ground or cemetery, whether within or without the municipal corporation, may pass and provide for the enforcement of ordinances for the burial, re-interment, or disinterment of the product of a fetal death in that public burial ground or cemetery.

(C) With regard to the product of a fetal death, on the request of the mother and in compliance with the public burial ground or cemetery's ordinances, a public burial ground or cemetery shall inter the product of the fetal death in accordance with one of the following:

- (1) In a single grave within the public burial ground or cemetery that contains, or will contain, the remains of a parent, sibling, or grandparent;
- (2) In another location of the public burial ground or cemetery, including a separate burial ground for infants, on a temporary or permanent basis.

Oregon Revised Statutes § 432.143 & § 432.158 (2013)

432.143 (1) (a) A report of each fetal death of 350 grams or more or, if the weight is unknown, of 20 completed weeks gestation or more, calculated from the date the last normal menstrual period began to the date of the delivery, that occurs in this state shall be submitted within five calendar days after the delivery to the Center for Health Statistics or as otherwise directed by the State Registrar of the Center for Health Statistics. The state registrar shall register the report of fetal death if it has been completed and submitted in accordance with this section and any rules adopted by the state registrar under this section.

(b) All induced terminations of pregnancy shall be reported in the manner prescribed in ORS 435.496 (Report to Center for Health Statistics) and shall not be reported as fetal deaths.

432.158 (4) Upon request of a parent or the parent's authorized representative, a disposition permit may be issued for a fetus that is not reportable as a fetal death.

South Dakota Codified Laws § 34-25-32.3 to 34-25-32.6 (2017)

34-25-32.3. Disposition of remains of embryo or fetus. Remains of a human embryo or fetus resulting from an abortion or miscarriage, induced or occurring accidentally or spontaneously at a hospital, clinic, or medical facility shall be disposed of in the manner provided by §§ 34-25-32.3 to 34-25-32.7, inclusive.

34-25-32.4. Medical facility to provide for disposal of aborted fetuses. Any hospital, clinic, or medical facility in which abortions are induced or occur spontaneously or accidentally or any laboratory to which the remains of human embryos or fetuses are delivered shall arrange for the disposal of the remains by cremation, interment by burial, or by incineration in a medical waste incinerator approved by the Department of Environment and Natural Resources. If incineration is used, the remains of the human embryo or fetus shall be incinerated separately from other medical waste. The hospital, clinic, medical facility, or laboratory may perform any laboratory tests necessary for the health of the woman or her future offspring, or for the purposes of a criminal investigation, or for determination of parentage prior to disposing of the remains.

34-25-32.5. Failure to comply as public nuisance. Any failure to comply with the provisions of §§ 34-25-32.3 to 34-25-32.7, inclusive, constitutes a public nuisance.

Any person, firm, or corporation failing to comply with the provisions of §§ 34-25-32.3 to 34-25-32.7, inclusive, is guilty of a Class 1 misdemeanor.

34-25-32.6. Disposition of fetal remains--Method. No religious service or ceremony is required as part of the disposition of the remains of a human embryo or fetus. The hospital, clinic, or medical facility shall discuss or disclose the method of disposition with the woman who had the miscarriage.

Texas Statutes 241.010

DISPOSITION OF FETAL REMAINS. (a) A hospital shall release the remains of an unintended, intrauterine fetal death on the request of a parent of the unborn child, in a manner appropriate under law and the hospital's policy for disposition of a human body. (b) Notwithstanding Subsection (a), if the remains of an unintended, intrauterine fetal death weigh less than 350 grams, a hospital shall release the remains on the request of a parent of the unborn child, in a manner that is appropriate under law and consistent with hospital policy.

West Virginia Code §16-5-23

(b) Prior to final disposition of a fetus, irrespective of the duration of pregnancy, the funeral director, the person in charge of the institution, or other person assuming responsibility for final disposition of the fetus shall obtain from a parent authorization for final disposition on a form or in a format prescribed by the state Registrar.

(22 May 2013 - to date)

NATIONAL HEALTH ACT 61 OF 2003

(Government Notice 869 in Government Gazette 26595 dated 23 July 2004. Commencement date: 2 May 2005, unless otherwise indicated. [Proc. R19, Gazette No. 27503, dated 18 April 2005]. See Act for list of commencement Proclamations.

REGULATIONS RELATING TO THE MANAGEMENT OF HUMAN REMAINS

Government Notice R363 in Government Gazette 36473 dated 22 May 2013. Commencement date: 22 May 2013.

The Minister of Health, has in terms of section 68(1)(b) read with section 90(4)(c) of the National Health Act 2003 (Act 61 of 2003) made the regulations contained in the Schedule hereto.

SCHEDULE

ARRANGEMENT OF THE REGULATIONS

CHAPTER 1

DEFINITIONS IN THE REGULATIONS

1. Definitions

CHAPTER 2

FUNERAL UNDERTAKER'S PREMISES AND MORTUARIES

2. Application of and exemption from these Regulations

CHAPTER 3

FUNERAL UNDERTAKER'S PREMISES AND MORTUARIES

3. Issue of certificate of competence
4. Application for the issue or transfer of a certificate of competence
5. Issue or transfer of certificate of competence
6. Validity and transfer of certificate of competence
7. Issue of provisional certificate of competence
8. Duties of certificate holder
9. Suspension or revocation of a certificate of competence or provisional certificate of competence
10. Requirements relating to funeral undertakers and mortuary premises
11. Hygiene requirements for funeral undertaker's and mortuary premises

Prepared by:

In partnership with:

**CHAPTER 4
CONVEYANCE (TRANSPORTATION, IMPORTATION AND EXPORTATION) OF HUMAN REMAINS**

12. Conveyance of human remains of persons who died of diseases or conditions that remain infectious
13. Requirements for transportation of human remains inland and across the borders of the Republic of South Africa
14. Authorization to import and export human remains

**CHAPTER 5
BURIAL IN EXCAVATED LAND**

15. Burial sites and burials

**CHAPTER 6
CREMATORIUMS AND CREMATION**

16. Disposal of human remains by cremation
17. Issuance of cremation permit
18. Minimum requirements for a cremation facility
19. Register for cremations

**CHAPTER 7
BURIAL AT SEA**

20. Issuance of permit for burial at sea
21. Requirements for burial at sea

**CHAPTER 8
HANDLING OF RADIOACTIVE HUMAN REMAINS**

22. Storage of radioactive human remains
23. Embalming of radioactive human remains
24. Cremation of radioactive human remains
25. Burial of radioactive human remains

**CHAPTER 9
EXHUMATIONS AND REBURIALS OF HUMAN REMAINS**

26. Authorisation for exhumation of human remains
27. Exhumation requirements
28. Reburial of human remains

CHAPTER 10 GENERAL PROVISIONS

29. Unclaimed bodies or unidentified human remains
30. Appeals
31. Delegation of powers
32. Offences

CHAPTER 1 DEFINITIONS

1. Definitions

In these regulations "**the Act**" shall mean the National Health Act 2003, (Act 61 of 2003) as amended, and any expression to which a meaning has been assigned to in the Act shall have such meaning and, unless the context otherwise indicates-

"adequately ventilated and illuminated" means adequately ventilated and illuminated as laid down in the National Building Regulations and Standards Act 1977 (Act 103 of 1977),

"approved" means approved by the local government concerned;

"approved container" means a coffin or other approved containers;

"certificate of competence" means a document contemplated in regulation (3)(1)(a) of these regulations;

"certificate holder" means the person in whose name a certificate of competence has been issued;

"crematorium" means a place used for the purpose of burning or cremating human remains and includes every part of those premises;

"Corpse" - means a dead human body;

"embalming" means the treatment of human remains in order to prevent decay;

"environmental authorization" means an environmental authorization as defined in the National Environmental Management Act 1998, (Act 107 of 1998) as amended;

"environmental health practitioner" shall mean a person registered as such in terms of section 34 of the Health Professions Act, 1974 (Act 56 of 1974) and who performs functions as listed in the Schedule of the Scope of Professions of Environmental Health, as amended;

"export permit" means the permit issued by the Director-General authorizing the exportation of human remains from South Africa;

"funeral undertaker's premises" shall mean premises that are used or intended to be used in connection with the preparation and storage of human remains and may undertake funeral and burial services;

"human remains" means a dead human body, or the remains of a dead human body whether decomposed or otherwise;

"import permit" means the permit issued by the Director-General authorizing the importation of human remains into South Africa;

"local government" means a relevant municipality as established under section 155 of the constitution Act, 1996 (Act No. 108 of 1996) as amended;

"mortuary" shall mean a premise in which human remains are kept for hygienic storage and preservation or for examination purposes;

"potable water" means water which complies with the SANS 241 for drinking water and its subsequent amendments, with regards to its chemical, microbiological and physical quality;

"port health officer" refers to an environmental health practitioner;

"preparation" means any action aimed at the preparation of human remains for a funeral or for cremation, export or other disposal and shall include the embalming of such human remains for the said purposes, and **"prepare"** and any word derived there from shall have a corresponding meaning;

"relevant health authority" means a municipality, provincial health or national sphere of government that has jurisdiction on a specific matter;

"Republic" means the Republic of South Africa;

"rodent proofing" refers to the construction of premises or containers in such a manner as to ensure the premises or container cannot be penetrated by rodents (rodent proof shall have a similar meaning)

CHAPTER 2 FUNERAL UNDERTAKER'S PREMISES AND MORTUARIES

Prepared by:



In partnership with:



2. Application of and exemption from these Regulations

(1) These regulation shall apply to -

- (a) any private or public mortuaries; funeral undertakers' premises and crematoriums, including those under the control of the state or any Government Department, such as the police services and public hospitals, funeral undertaker's premises and crematoriums;
- (b) any state owned or private owned burial sites;
- (c) any natural person who is not in the service of a funeral undertaker or mortuary and who does not, either directly or indirectly, undertake or arrange funerals but only prepares human remains; and
- (d) any natural person outside or within the Republic who undertakes the movement of, or requires the movement of any human remains to or from the republic.

(2) Exemptions to these regulations -

- (a) A local government may, with the approval of the Director- General, in writing exempt any person from compliance with any provisions of these regulations where, in the opinion of the local government, non-compliance does not or will not create a health nuisance, health hazard or endanger human health; and that
- (b) Such exemptions shall be subject to such conditions and valid for such a period as the local government may, with the approval of the Director-General or delegated person, lay down and stipulate.
- (c) A local government must issue a certificate of exemption to a person, for exemption of any provision of these regulations.

CHAPTER 3

FUNERAL UNDERTAKER'S PREMISES AND MORTUARIES

3. Issue of a certificate of competence

(1)

- (a) Subject to the provisions of these regulations, no person shall prepare or store any human remains except on approved funeral undertaker's premises or mortuary in respect of which a certificate of competence, the format of which is given in Annexure G, has been issued by the relevant local government, and is in effect.

Prepared by:

In partnership with:

- (b) A local government may, if it is satisfied that health nuisance exists on any funeral undertaker's premises or mortuary, situated in its area of jurisdiction, issue a written order, the format which is given in Annexure J, to the owner or person in charge of the premises in question to stop all activities connected with the handling, preparation and storage of human remains on the premises, until such time that the health nuisance referred to, in the order has been eliminated.

4. Application for the issue or transfer of a certificate of competence

(1)

- (a) Any person wishing to apply for a certificate of competence in respect of new funeral undertaker's premises or mortuary shall, not less than 21 days before submitting his application to the local government concerned, cause a notice to be published in one of the official languages in a newspaper that appears mainly in that language, and in the other official language in a newspaper that appears mainly in the latter language , where each of the said newspapers circulates in the area in which such premises are situated, or shall, where separate newspapers in each of the official languages do not so circulate, cause such notice to be published in both official languages in a newspaper that so circulates.
- (b) Such notice shall contain information to the effect that an application for the issue of a certificate of competence in terms of these regulations is to be submitted to the local government mentioned in the notice and that any person who will be affected by the use of such funeral undertaker's premises or mortuary and wishes to object to such use shall lodge his objection, together with substantiated representations, with the local government concerned in writing within 21 days of the date of publication of such notice.

(2)

- (a) An application for the issue or transfer of a certificate of competence shall be made in writing by the applicant or his authorised representative to the local government in whose area of jurisdiction the funeral undertaker's premises or mortuary is located, on such form as prescribed by the local government concerned.
- (b) An application for the issue of a certificate of competence shall be accompanied by-
 - (i) a description of the premises and the location thereof;
 - (ii) a complete ground plan of the proposed construction or of existing buildings on a scale of 1:100;
 - (iii) a block plan of the premises on which true north is shown indicating which adjacent premises are already occupied by the applicant or other persons and for what purpose such premises are being utilised or are to be utilised; and

- (iv) particulars of any person other than the holder or any of his employees who prepares or will prepare human remains on the premises.
- (3) A local government, when considering issuing or transferring a certificate of competence, may request from the applicant or any other person any such further information as it may deem necessary to enable it to properly consider the application concerned.
- (4) No local government shall consider any application for the issue or transfer of a certificate of competence unless a complete inspection of the premises concerned has been carried out by an Environmental Health Practitioner, a checklist of which is indicated in Annexure H, employed by the relevant municipality and his/her report on such inspection, including his/her recommendation on such issue or transfer, is available to such local government.

5. Issue or transfer of certificate of competence

Where a local government, after consideration of an application for the issue or transfer of a certificate of competence, the report concerned by a Environmental Health Practitioner including his/her recommendation, and any objections to the use of funeral undertaker's premises or mortuary, is satisfied that the premises or mortuary concerned-

- (a) comply with all requirements laid down in these regulations;
- (b) are in all respect suitable for the preparation of human remains; and
- (c) will not be offensive to any occupant of premises in the immediate vicinity of such premises,

shall, issue a certificate of competence in the name of the holder in such form as it may determine or shall by endorsement transfer an existing certificate of competence to a new holder subject to conditions as may be necessary, as the case may be.

6. Validity and transfer of certificate of competence

A certificate of competence excluding a provisional certificate of competence shall on endorsement by the issuing local government, be transferable from one holder to another, and such certificate shall be renewed every second year.

7. Issue of provisional certificate of competence

- (1) Notwithstanding the fact that the local government is not satisfied as contemplated in regulation 5, read with regulations 3 and 4 with regard to funeral undertaker's premises or mortuary in respect of which a certificate of competence has been applied for, a local government-