

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 16402/2017

In the matter between :-

THE VOICE OF THE UNBORN BABY NPC Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

MINISTER OF HEALTH Second Respondent

In Re:

THE VOICE OF THE UNBORN BABY NPC Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

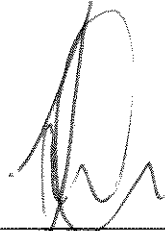
MINISTER OF HEALTH Second Respondent

FILING NOTICE

DOCUMENT: FIRST AND SECOND RESPONDENTS'
ANSWERING AFFIDAVIT

ON ROLL:

FILED BY:



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**TO: THE REGISTRAR
OF THE HIGH COURT
PRETORIA**

**AND
TO: APPLICANT'S ATTORNEYS**
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cnr SOLOMON MAHLANGU AND
HAYMEADOW CRESCENT
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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 16402/17

In the matter between:

CATHOLIC ARCHDIOCESE OF DURBAN

Applicant

And

MINISTER OF HOME AFFAIRS

First Respondent

MINISTER OF HEALTH

Second Respondent

VOICE OF THE UNBORN BABY NPC

Third Respondent

In re:

THE VOICE OF THE UNBORN BABY NPC

Applicant

And

MINISTER OF HOME AFFAIRS

First Respondent

MINISTER OF HEALTH

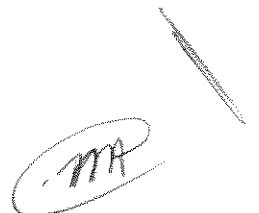
Second Respondent

FIRST AND SECOND RESPONDENT'S ANSWERING AFFIDAVIT

I, the undersigned;

MKUSELI APLENI

do hereby make oath and say:



1. I am employed by the Department of Home Affairs as Director-General. I am authorised to depose to this affidavit on behalf of the first respondent. I am also authorised to depose to this affidavit on behalf of the second respondent.
2. The confirmatory affidavit confirming same is annexed hereto marked “AA”.
3. Save where otherwise stated or where the context indicate to the contrary the facts herein contained are within my personal knowledge and belief both true and correct. I make legal submissions on the strength of legal advice from the respondents' legal team.
4. This affidavit is filed in opposition to the substantive relief sought by the Catholic Archdiocese of Durban in prayers 2 to 5 of the notice of motion. Prayer 1 of the notice of motion, the leave to intervene is not opposed.
5. The Applicant has launched an application with this Honourable Court dated 08 September 2017 to intervene in the application brought by the applicant in the main application. In the notice of motion the applicant in the main application seeks declaratory orders of unconstitutionality of the provisions of sections 20(1) read with 18(1) – 18(3) of the Birth and Death Registration Act 51 of 1992 (“BADRA”), as well as the unconstitutionality of 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 National Health Act 61 of 2003 ("NHA").

6. The Applicant seeks this Honourable Court to grant the following relief:

"2. Declaring that parents of a deceased unborn child have the right to bury or cremate the remains of such child if they so elect;

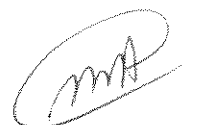
3. Declaring the definitions of "burial", corpse, stillborn and stillbirth contained in section 1 of the Births and Deaths Registration Act 51 of 1992 read with sections 18(1) to (3) and 20(1) of that Act inconsistent with;

3.1 the right to equality contained in section 9 of the Constitution; and

3.2 the right to freedom of religion contained in section 15 of the Constitution and therefore invalid, insofar as they prohibit or exclude parents of a deceased unborn child from burying or cremating such child if they so elect."

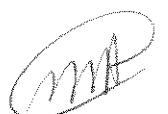
7. The substantive basis of the opposition to the relief sought has already been canvassed in detail in the answering affidavit filed in opposition to the Voice of Unborn Baby NPC application. The contents of that answering affidavit must be read as if herein specifically incorporated.

8. This is because the intervener's application is substantively the same as the Voice of Unborn Baby application. The only difference is that the intervenor has added the Freedom of Religions as the fourth



constitutional right purported to be infringed by the Birth and Death Registration Act ("BADRA").

9. I submit at the outset that there is no merit in the relief sought by the intervenor in this application. The application is misguided because its premise is flawed. It classifies a fetus as an unborn child irrespective of a gestational age notwithstanding there is no constitutional challenge of the gestational age of viability as contemplated in BADRA.
10. In terms of BADRA viability is set at 26 weeks. BADRA permits burial of stillborn but not fetus bellow 26 weeks. Fetuses of 26 weeks are in law not regarded as children. As a result, prayer 2 of the notice of motion which seeks a declaratory order that parents of a deceased "unborn child" have the right to bury or cremate the remains of such child if they so elect is misguided.
11. There is no child at inception, but instead there is products of conception which cannot conceivably be regarded as a child because of absence of viability. What is contended by the intervenor is to mean that even an embryo is a child and the parents shall be allowed to bury an embryo if they so elect or to bury products of conception of 2 weeks, 3 weeks or 4 weeks of gestation, and to be issued with a burial notice by the officer contemplated in section 4 of the BADRA as well as a death notice by a medical practitioner who was present when the pregnancy loss or miscarriage occurred. The proposition by the intervener, foreshadowed in



prayer 2 of the notice of motion is legally and factually untenable.

12. The question of whether a fetus of less than 26 weeks should be regarded as a child and whether upon a pregnancy loss should be buried is not a legal question which require Court's intervention, but it is a moral question which require societal debate the same with a debate surrounding euthanasia or assisted suicide. Besides, these are polycentric loaded questions which the Court should be slow to interfere with.
13. The Court should be slow not to be seen to be legislating on behalf of the Parliament, given the doctrine of separation of powers. Furthermore, there is no merit in prayer 3 of the notice of motion. There is nothing unconstitutional about the definitions of "burial", "corpse", "still-born" and "still-birth" in section 1 of BADRA.
14. These definitions are informed by the concept of live and born alive. It is only when you were born alive that one could be buried when one die. The exception is the still-born fetus which the law permits its burial based on the legal concept of viability. Prior to its death in utera, the fetus was viable that it could independently survive outside the mother's womb had it not been for the still-birth.
15. As I have alluded to above, the intervenor does not challenge the viability gestational age. My submission is that the intervenor is not completely



capable of attacking section 20(1) of BADRA and other related provisions without challenging the legal concept of viability, because the concepts such as burial, corpse are informed by viability in the legislation.

16. Therefore the distinction made legislatively between still-birth, which require burial and pre-viability fetus which does not require burial is based on rational grounds, and it is intended to serve a legitimate purpose in society.
17. There is therefore no infringement of the constitutional right to equality and Freedom of Religion because the differentiation is permissible in terms of the limitation clause in section 36 of the Constitution. The exclusion is permitted by law of general application which is justifiable, rational and for a legitimate purpose.
18. Prayer 4 has been dealt with already in the answering affidavit to the Voice of Unborn Baby application, and need not be repeated here.
19. I now answer to the allegations in the founding affidavit paragraph by paragraph. My failure to respond to an allegation in a paragraph should not be construed as an admission but a denial unless if the allegation is consistent with what I have already set out in this affidavit above.
20. AD PARAGRAPHS 1 – 3



Save to state that I deny that the contents of the founding affidavit are within the deponent's personal knowledge and that they are true and correct, the contents of paragraphs 1 and 3 are noted.

21. AD PARAGRAPHS 4 – 9

I note the contents of these paragraphs.

22. AD PARAGRAPHS 10 - 11

The intervention application is not opposed. The substantive relief sought in the notice of motion is opposed. The contents of paragraph 11 are admitted.

23. AD PARAGRAPHS 12- 13

The contents of paragraph 12.1 are admitted. The contents of paragraph 12.2 are denied. These are matters for legal argument which will be advanced at the hearing of the matter.

24. AD PARAGRAPHS 14

The law defines at what stage of gestation is viability recognised and that legal position as set by law is not contested by the intervenor. The intervenor's persistent reference to a fetus of bellow 26 weeks as child is wrong. It is neither medically nor legally supported. The law correctly prohibits burial in such circumstances, and such prohibition is not unconstitutional.



25. AD PARAGRAPH 15

25.1 I deny the contents of this paragraph. BADRA is a law of general application and does not only apply to members of the Catholic faith. Furthermore, BADRA regulates the registration of deaths.

25.2 Save as aforesaid, any manner of disposition does not preclude the opportunity to perform any mentioned rituals. Consequently, there is no need for a physical body for all the ceremonies and rituals to be performed.

26. AD PARAGRAPH 16- 17

I deny the contents of these paragraphs. The right to equality, dignity and privacy are not absolute. The state has an important and legitimate interest in the preservation and protection of health and welfare of human beings in general. The state's interest is compelling to warrant that fetal remains prior to 26 weeks gestation be disposed of in terms of the NHA Regulations.

27. AD PARAGRAPH 18 - 20

The locus standi and interest of the intervenor in this application is contested. The substantive relief that is sought by the intervenor is also contested.

28. AD PARAGRAPH 21

The intervention application on the basis of interest is contested. No interest worthy of protection has been demonstrated by the intervenor. As a result, the locus standi of the intervenor to seek the relief sought is disputed.

29. AD PARAGRAPH 22- 23

A belief is just a belief. Human beings of different background and religious beliefs are entitled to believe in anything as long as their belief does not trample upon other people's rights and belief. What matters for present purposes is not the belief but what the law prescribes. It will be wrong for the law to be legislated specifically to cater for one religion or face to the exclusion of others. The intervenor is not a representative of society.

30. AD PARAGRAPH 24 - 25

The application is baseless as it lacks merit. There is nothing unconstitutional about BADRA. The intervenor has failed to set out justifiable grounds in law as to why this Court should interfere with section 20(1) and 18(1) – (3) of BADRA and Regulation 1 of the Regulations promulgated in terms of NHA.

31. AD PARAGRAPH 26- 28

The contents of these paragraphs show the fundamental flaw in the application. The intervenor is incapable of sustaining the relief it seeks without attacking the gestational age of viability and the legal right attached to a



person as opposed to a fetus. The concession that a fetus has no legal rights is fatal to the relief sought and the unconstitutionality of BADRA as alleged.

32. AD PARAGRAPH 29- 30

This application has nothing to do with the right to equality and the right to freely practice one's religion. This application is about an intrusion into the legislative domain of Parliament and asking the Court to legislate on behalf of Parliament or prescribe to society on issues of morality.

33. AD PARAGRAPH 31- 37

The main application has been answered in the answering affidavit to Voice of Unborn Baby and its fundamental flaw has been exposed. The contents of paragraphs 35 to 37 are not disputed.

34. AD PARAGRAPH 38

Save for admitting that the definition of birth is complementary to a dead human body, I deny the rest of the allegations as contained in this paragraph.

35. AD PARAGRAPH 39- 48

I admit the contents of these paragraphs.

36. AD PARAGRAPH 49

A handwritten signature in black ink, appearing to be 'MA', is located in the bottom right corner of the page. There is also a diagonal line drawn above the signature.

I deny the contents of this paragraph. COTOPA does not deal with the issue of burial and therefore does not expressly exclude induced pregnancy loss post 26 weeks of gestation.

37. AD PARAGRAPH 50

I admit the contents of this paragraph.

38. AD PARAGRAPH 51

I deny the contents of this paragraph.

39. AD PARAGRAPH 52

I admit the contents of this paragraph.

40. AD PARAGRAPH 53- 60

I note the contents of these paragraphs. However, the Applicant cannot impose its beliefs on the general public. As such the legislation cannot be amended to cater for the interests of one particular religious group to the exclusion of the others. The intervenor should rather focus its energies on stimulating a debate in society about these issues instead of steamrolling them through the Courts. Or the intervenor should rather persuade the Parliament to legislate on this issues and amend BADRA. It is not for the Court to prescribe to the lawmakers to legislate on these types of issues.



41. AD PARAGRAPH 61- 65

Whether there was a child or not prior to termination or pregnancy loss is medically and legally defined. If in law there was no child, then, it matters not what the person believes, as a matter of fact and law there was no child is esse before the pregnancy loss. .

42. AD PARAGRAPH 66- 104

I have no knowledge of the contents of these paragraphs. They are however of no relevance to the relief sought.

43. AD PARAGRAPH 105- 112

There is no infringement of the right to Freedom of Religion. There is also no infringement of the right to equality. Constitutional rights are measured against the limitation clause in section 36 of the Constitution. The differentiation based on legal viability is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.

44. AD PARAGRAPH 113

I deny the contents of this paragraph. There is a proper justification for the differentiation.

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45. AD PARAGRAPH 114

I note the contents of this paragraph.

46. AD PARAGRAPH 115

I deny the contents of this paragraph. The differentiation is informed by medical and legal justification in the BADRA based on viability which is not contested by the intervenor.

47. AD PARAGRAPH 116- 117


I deny the contents of this paragraph.

48. AD PARAGRAPH 118

I note the contents of this paragraph. The Applicant is in fact trying to challenge the provisions of COTOPA which deals with choices of termination of pregnancy in order to advance its beliefs. The provisions of COTOPA are not the subject of a challenge in this application.

49. AD PARAGRAPH 122- 127

Again, I reiterate that the provisions of COTOPA are not the subject of legal challenge in this application.

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50. AD PARAGRAPH 128- 129

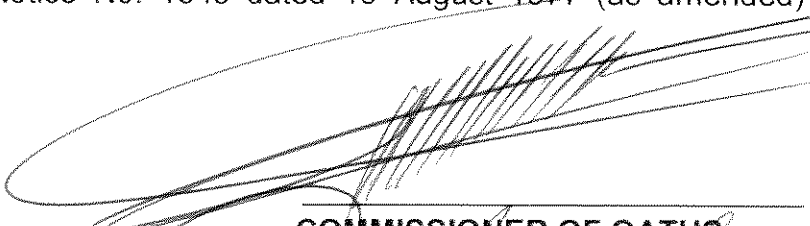
I deny the contents of these paragraphs.

51. The intervenor has failed to make out a case for the substantive relief it seeks.

52. It follows that the application should be dismissed with costs including the costs of the employment of three counsel.

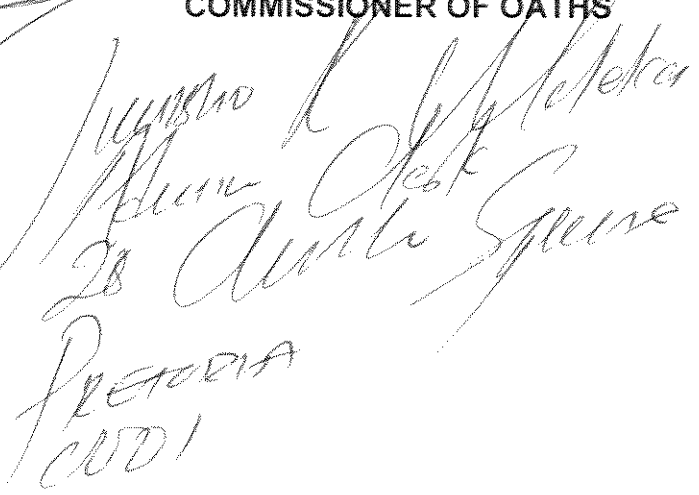

DEPONENT

I HEREBY CERTIFY that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn before me at Pretoria on this the 24th day of **NOVEMBER 2017**, the regulations contained in Government Notice N0. 1648 dated 19 August 1977 (as amended) having been complied with.



COMMISSIONER OF OATHS

DIRECTOR OF PUBLIC PROSECUTIONS
PRIVATE BAG X300
24 NOV 2017
DOCKET
PRETORIA 0001
NORTH GAUTENG: PRETORIA


28 April 2017
Pretoria
CVD1