**IN THE HIGH COURT OF SOUTH AFRICA**

**GAUTENG DIVISION, PRETORIA**

Case number: 16402/2017

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

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**SECOND APPLICANT’S HEADS OF ARGUMENT**

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**INTRODUCTION**

1. In these heads of argument, we refer to –
	1. the first applicant as “**the applicant**”;
	2. the second applicant as “**the Church**”;
	3. the first and second respondents as "**the respondents**";
	4. the Births and Deaths Registration Act 51 of 1992 as “**BADRA**”;
	5. the definitions of “birth”, “burial”, “corpse” and “still-born” contained in section 1 together with sections 18 and 20(1) of BADRA as "**the impugned legislation**".
2. The Church contends that –
	1. the impugned legislation infringes the Church’s members’ constitutional rights to equality and to freedom of religion contained in sections 9 and 15 of the Constitution (“**the infringements**”);
	2. the infringements are not justified under section 36 of the Constitution (“**the lack of justification**”); and consequently
	3. the impugned legislation is liable to be declared inconsistent with the Constitution and invalid to the extent of that inconsistency.[[1]](#footnote-0)
3. In these heads of argument, we first address the infringements. We then address the lack of justification. Finally, we address several residual issues.

**THE INFRINGEMENTS**

***The right to freedom of religion***

1. Section 15 of the Constitution guarantees to everyone the right to freedom of conscience, religion, thought, belief and opinion.[[2]](#footnote-1)
2. The Constitutional Court has on at least three occasions considered the contents of the right to freedom of religion.[[3]](#footnote-2) On each occasion it has accepted that the right to freedom of religion includes at least:
	1. the right to entertain such religious beliefs as a person chooses;
	2. the right to declare religious beliefs openly and without fear of hindrance or reprisal; and
	3. the right to manifest religious belief by worship and practice, teaching and dissemination.
3. The right to freedom of religion and its importance within the context of the Constitution was stated by Sachs J for a unanimous court in *Christian Education* as follows:[[4]](#footnote-3)

“*The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person’s dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or Creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concept of self-worth and human dignity which form the cornerstone of human rights. It affects the believer’s view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.*”

1. That freedom of religion is not limited to protecting the inner sanctum of the human conscience, but includes also the right of individuals to live and interact with others in society in accordance with their beliefs, is clear from the dictum.
2. According to the Constitutional Court:
	1. “*[t]he right to freedom of religion is probably one of the most important of all human rights*”;[[5]](#footnote-4)
	2. religious beliefs and practices are held sacred by those who hold them;[[6]](#footnote-5)
	3. the right to freedom of religion is a key part of human dignity.[[7]](#footnote-6)
3. The respondents are therefore wrong when they aver that “*a belief is just a belief*”.[[8]](#footnote-7)
4. Implicit also in the text of the right to freedom of religion contained in section 15(1) is “*the absence of coercion or constraint*”.[[9]](#footnote-8)
5. In *Solberg*, the first occasion in which the Constitutional Court was called upon to interpret the right to freedom of religion, the court had to determine whether a provision in the Liquor Act 27 of 1989 which prohibited the sale of wine on Sundays was inconsistent with the right of Ms Solberg to sell wine at a Seven Eleven store.
6. In regard to “*coercion or constraint*”, the Constitutional Court has held that the right to freedom of religion is impaired by measures that force people to refrain from acting in accordance with their religious or non-religious beliefs.[[10]](#footnote-9)
7. Therefore, a law that prevents individuals from holding religious or non-religious beliefs or prevents them from living in accordance with such beliefs infringes the right to freedom of religion.[[11]](#footnote-10)
8. The Church’s members sincerely believe that human life begins at conception. They believe that conception engenders a unique individual with full human dignity and an immortal soul. They accordingly believe that unborn children are fully human, endowed with dignity, and entitled to respect.[[12]](#footnote-11)
9. The respondents belittle this belief.[[13]](#footnote-12) But they do not deny that the belief is sincerely held by the Church’s members.[[14]](#footnote-13)
10. The Church’s members wish to manifest and live in accordance with this belief by engaging in the religious practice of burying their deceased unborn children.[[15]](#footnote-14) This practice includes prayer, blessings, and the invocation of sacred rites.[[16]](#footnote-15) By engaging in this practice, the Church’s members wish, among other things, to give their deceased unborn children the same dignity and respect as they give to human beings that die after being born.[[17]](#footnote-16)
11. The Church also asserts that there are many who similarly may wish to bury their deceased unborn children in accordance with their own religious or non-religious beliefs.
12. The impugned legislation prevents such persons and the Church’s members from doing so. It provides that:
	1. only a “corpse” can be buried;[[18]](#footnote-17)
	2. a “corpse” is a dead human body. A deceased unborn child, other than a child that is still-born, is not a corpse;[[19]](#footnote-18) and by necessary implication that
	3. deceased unborn children, other than children that are still-born, may not be buried.
13. As a result, a deceased unborn child, other than a child that is still-born, is treated as medical waste, and deceased unborn children, other than children that are still-born, must be incinerated together with human and medical waste.[[20]](#footnote-19)
14. The impugned legislation prevents and prohibits the Church’s members (and others) from manifesting and living in accordance with their religious beliefs.
15. Accordingly, we submit that the impugned legislation infringes the Church’s members right to freedom of religion contained in section 15 of the Constitution.

***The right to equality***

1. The Constitution guarantees to everyone the right to equality.[[21]](#footnote-20)
2. The test to be applied in determining whether the right to equality is infringed was laid down by the Constitutional Court in *Harksen v Lane*.[[22]](#footnote-21)
3. We now apply that test to the impugned legislation.
4. The impugned legislation implicitly differentiates between two categories of people.
5. The first category consists of parents who consider deceased unborn children to amount to medical waste, and who consequently do not wish to bury their deceased unborn children.
6. The second category consists of bereaved parents who for religious or non-religious reasons consider deceased unborn children to be fully human, and who consequently wish to bury their deceased unborn children in a way they consider just.
7. The members of the Church belong to the second category.
8. As we demonstrate in paragraphs 43 – 47 below, this differentiation is not rationally connected to a legitimate governmental purpose.
9. It follows that the impugned legislation infringes section 9(1) of the Constitution.
10. Furthermore, and in any event, the differentiation is on a “listed ground” in section 9(3) of the Constitution, that is, “*religion*”. The differentiation is therefore presumed to be unfair discrimination.[[23]](#footnote-22)
11. The respondents fail to rebut this presumption.
12. It follows that the impugned legislation also infringes section 9(3) of the Constitution.
13. Accordingly, we submit that the impugned legislation infringes the right to equality contained in section 9 of the Constitution.

**THE ABSENCE OF JUSTIFICATION**

1. Given that the impugned legislation limits the right to religion and the right to equality, the next question is whether the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.[[24]](#footnote-23)
2. If the answer to that question is “yes”, the limitation is justifiable and the impugned legislation is not invalid.
3. It is trite that the respondents carry the burden of justification.[[25]](#footnote-24) They establish that the answer is “yes”.[[26]](#footnote-25)
4. The respondents fail to do so for three reasons:
	1. first, there is no evidence in support of their proffered justification;
	2. second, there is no rational connection between the impugned legislation and their proffered justification; and
	3. third, there are less restrictive means to achieve the proffered justification.

***The proffered justification***

1. It is hard to find the justification for the impugned legislation in the respondents’ affidavits.
2. To the extent that there is any coherent justification, it seems to be that the impugned legislation protects “the health and welfare of human beings”.[[27]](#footnote-26)

***No evidence in support of the proffered justification***

1. But the respondents do not provided any evidence – other than the *ipse dixit* of Dr Pillay and Mr Apleni – that the health and welfare of human beings is protected by prohibiting the burial of deceased unborn children (other than children that are still-born). The respondents have not, for instance, provided data, statistics, expert medical opinion, or even corroborating statements to support Dr Pillay’s and Mr Apleni’s say-so.
2. This means that the respondents have failed to make out a case that the impugned legislation is justifiable under section 36 of the Constitution. This is because the Constitutional Court has held that:

“*As a starting point, it is important to note that where a justification analysis rests on factual or policy considerations, the party seeking to justify the impugned law – usually the organ of state responsible for its administration – must put material regarding such considerations before the court. Furthermore, ‘[w]here the state fails to produce data and there are cogent objective factors pointing in the opposite direction the state will have failed to establish that the limitation is reasonable and justifiable*”.[[28]](#footnote-27)

***No rational connection between the impugned legislation and the proffered justification***

1. In addition, a law that limits a fundamental right will only be justifiable under section 36 of the Constitution if there is a rational link between that limitation and the law’s purpose.[[29]](#footnote-28) The question, then, is whether the impugned law serves its purpose.
2. The impugned legislation does not serve its ostensible purpose. The respondents have provided no reasons – nor are any such reasons conceivable – why the health and welfare of human beings would be served by providing that:
	1. still-born children must be buried; but
	2. other deceased unborn children may notbe buried.
3. Presumably, the remains of a deceased unborn child could be a risk to the health of others. But this risk does not imply that deceased unborn children must be incinerated with medical waste. The risk could also be met by burying deceased unborn children. Indeed, that is exactly what the impugned legislation says must be done with deceased unborn children that are still-born.
4. It follows that there is no rational connection between the impugned legislation and its ostensible purpose.
5. On the contrary, it is irrational and arbitrary for the impugned legislation to prohibit the burial of deceased unborn children other than children that are still-born.

***Less restrictive means to achieve the purpose***

1. We submit further that even if the impugned legislation did serve its purpose, there would still be less restrictive means for the legislation to serve its purpose.
2. The legislation could, for instance, provide that:
	1. a deceased unborn child may be buried if a burial is requested by the bereaved parents and the other requirements of BADRA have been met (such as the issuing of a burial order by an authorise person);
	2. if a deceased unborn child is not buried his or her remains must be disposed of in terms of the standards published under the Standards Act 8 of 2008.

**CONCLUSION**

1. The impugned legislation infringes the Church’s members’ rights to freedom of religion and equality.
2. The limitation is not justifiable in terms of section 36 of the Constitution.
3. The impugned legislation is therefore inconsistent with the Constitution.
4. We submit that the Court must therefore declare the impugned legislation invalid to the extent of its inconsistency.[[30]](#footnote-29)

**RESIDUAL OR SUBSIDIARY ISSUES**

1. We turn to briefly address several residual or subsidiary issues that the respondents have raised in their answering affidavits.
2. We submit that none of these issues disturb the conclusion reached above.

***Legal subjectivity***

1. The commencement of legal subjectivity is not at issue in these proceedings. What is at issue in these proceedings is whether the impugned legislation unjustifiably limits bereaved parents’ constitutional rights.[[31]](#footnote-30)

***Viability***

1. The age of viability is also not at issue in these proceedings. What is at issue in these proceedings is whether viability – whenever that may be – should determine whether deceased unborn children may be buried.
2. The Church submits that it should not, given that viability is an arbitrary and unjustifiable standard.
3. Viability is also not the standard that BADRA uses. BADRA does not only prohibit the burial of unborn children who die before reaching viability. It also prohibits the burial of deceased unborn children who, after having reached viability, are removed from the womb by a medically induced termination of pregnancy.
4. It follows that BARDA contains no standard. Its burial regime is wholly arbitrary.

***Law and morality***

1. The respondents aver that this case turns on non-justiciable moral issues.[[32]](#footnote-31)
2. The respondents are incorrect.
3. While the case may have moral issues as its subject matter, it is still justiciable.
4. This is because our courts do decide cases that may have profound moral implications for some.[[33]](#footnote-32)
5. If the courts refused to do so, fundamental human rights such as the right to freedom of religion and the right not to be discriminated against on the basis of religion would be unenforceable and may be infringed by the state with impunity.

***Separation of powers***

1. The applicants ask this court to declare the impugned legislation invalid.
2. The Constitution empowers the Court to make such an order.[[34]](#footnote-33) The Constitution, indeed, obliges the Court to make such an order if it finds that the impugned legislation is inconsistent with the Constitution.[[35]](#footnote-34)
3. The applicants also ask the Court to suspend the declaration of invalidity in order to give Parliament the opportunity to remedy the defect in a manner that Parliament determines is most appropriate.
4. It follows that the application does not violate the doctrine of separation of powers. The application respects and coheres with the doctrine.

**AJ D’OLIVEIRA**

**H W VAN EEDTVELDT**

Chambers, Sandton

22 February 2019

1. The Church concurs with the submissions in the first applicant’s heads of argument. We will not repeat those submissions in these heads of argument. [↑](#footnote-ref-0)
2. Section 15(1) of the Constitution. [↑](#footnote-ref-1)
3. *Solberg* para 92 (per Chaskalson P); *Christian Education South Africa v Minster of Education* 2000 (4) SA 757 (CC) para 18 (“*Christian Education*”); and *Prince v President, Cape Law Society, And Others* 2001 (2) SA 388 (CC)para 38 (“*Prince*”) [↑](#footnote-ref-2)
4. *Christian Education* para 36 [↑](#footnote-ref-3)
5. *Ibid* para 48. [↑](#footnote-ref-4)
6. *Ibid*. [↑](#footnote-ref-5)
7. *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) para 36. [↑](#footnote-ref-6)
8. Mr Apleni’s answering affidavit, paragraph 29. [↑](#footnote-ref-7)
9. *Prince* para 38 [↑](#footnote-ref-8)
10. *Solberg* para 92 (per Chaskalson P) [↑](#footnote-ref-9)
11. See also *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 38. [↑](#footnote-ref-10)
12. Church’s founding affidavit, paragraphs 53-55. [↑](#footnote-ref-11)
13. Mr Apleni’s answering affidavit, paragraph 29. [↑](#footnote-ref-12)
14. Mr Apleni’s answering affidavit, paragraph 40. [↑](#footnote-ref-13)
15. Church’s founding affidavit, paragraphs 59-60. [↑](#footnote-ref-14)
16. Church’s founding affidavit, paragraph 60. [↑](#footnote-ref-15)
17. Church’s founding affidavit, paragraph 59. [↑](#footnote-ref-16)
18. See the definition of “burial” and “corpse” in section 1 of BADRA. Also see the definition of “corpse” in regulation 1 of the Regulations Relating to the Management of Human Remains (“**the Regulations**”). [↑](#footnote-ref-17)
19. *Ibid*. [↑](#footnote-ref-18)
20. *Ibid*. [↑](#footnote-ref-19)
21. Section 9 of the Constitution. [↑](#footnote-ref-20)
22. *Harksen v Lane and others* 1998 (1) SA 300 (CC) para 53. [↑](#footnote-ref-21)
23. Section 9(5) of the Constitution. [↑](#footnote-ref-22)
24. See section 36 of the Constitution. [↑](#footnote-ref-23)
25. *Moise v Greater Transitional Local Council* 2001 (4) SA 491 (CC) para 19. [↑](#footnote-ref-24)
26. *Ibid*. [↑](#footnote-ref-25)
27. Mr Apleni’s answering affidavit, paragraph 26. Dr Pillay also suggests that the justification for the impugned legislation is that it serves to “*confine burial to human remains, corpse and still born, which is determined by viability*” (see paragraph 50 of Dr Pillay’s affidavit). This is a circular argument that does no merit further discussion. [↑](#footnote-ref-26)
28. *Teddy Bear Clinic for Abused Children v Minister of Justice and Constitutional Development* 2014 (2) SA 168 (CC), citing *S v Steyn* 2001 (1) SA 1146 (CC) paras 31-37. [↑](#footnote-ref-27)
29. See, for instance, *S v Makwanyane* 1995 (3) SA 391 (CC) para 184. [↑](#footnote-ref-28)
30. Section 172(1)(a) of the Constitution. [↑](#footnote-ref-29)
31. Church’s replying affidavit paras 21-28. [↑](#footnote-ref-30)
32. Mr Apleni’s answering affidavit, paragraph 12; Dr Pillay’s answering affidavit, paragraphs 14, 42, 77 & 91. [↑](#footnote-ref-31)
33. See, for instance, *S v Makwanyane* 1995 (3) SA 391 (CC). [↑](#footnote-ref-32)
34. Section 172(2)(a) of the Constitution. [↑](#footnote-ref-33)
35. Section 172(1)(a) of the Constitution. [↑](#footnote-ref-34)