

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

CAUSE FOR JUSTICE

HEADS OF ARGUMENT

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INTRODUCTION

1. Cause for Justice (“CFJ”) supports the relief sought by the applicants for the reasons set out in their respective heads of argument. Nonetheless, there are further arguments which CFJ believes may be of assistance to this Court.
2. In particular, CFJ submits that insofar as the law compels bereaved parents to dispose of certain unborn babies as medical waste, it not only infringes the rights identified by the applicants, but it is also inconsistent with the value of human dignity.
3. The parties to this application consented to CFJ participating in this matter as an *amicus curiae* and making oral submissions at the hearing of the matter.¹
4. CFJ respectfully submits that it has satisfied the requirements for admission as an *amicus*.
5. In these heads of argument, submissions are made in respect of the following issues:
 - 5.1. The relationship between pre-natal life and human dignity, and the impact this relationship has on the relief sought by the applicants; and

¹ See the correspondence at record pgs 607-612.

- 5.2. Whether there should be an exception in respect of voluntary terminations of pregnancy performed in terms of the Choice on Termination of Pregnancy Act 92 of 1996 (“CTOPA”).

PRE-NATAL LIFE AND HUMAN DIGNITY

Human dignity and the Constitution

6. Dignity functions as a guaranteed right,² but also stands as a foundational value.³
7. Dignity, as a value, is manifest in the following sections of the Constitution:
- 7.1. Section 1 of the Constitution proclaims that South Africa is founded on certain values, the first of which is human dignity.
- 7.2. Similarly, s 7 of the Constitution states that the Bill of Rights enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom.
- 7.3. Section 36(1) of the Constitution provides that the rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and

² Section 10 of the Constitution.

³ MH Cheadle *et al* South African Constitutional Law The Bill of Rights 2nd ed §5.2.2

democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

- 7.4. According to s 39(1)(a) of the Constitution, when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.
8. In *Makwanyane* O'Regan J held that: *“The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern”*⁴ (emphasis added).
9. O'Regan J returned to this topic in *Dawood*, observing that human dignity informs constitutional adjudication and interpretation at a range of levels, and that dignity is a value which informs the interpretation of many, possibly all, other rights.⁵
10. The value of human dignity is thus distinct from the right to dignity articulated in s 10 of the Constitution.

⁴ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at [328].

⁵ *Dawood and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at [35].

11. According to the former justice of the Constitutional Court, Laurie Ackermann, in the context of the Constitution, ‘dignity’ means ‘human worth’ or ‘inherent human worth’.⁶
12. How then does this value of human dignity impact on how the law treats the unborn?

Respect for pre-natal life

13. In 1999 Professor Denise Meyerson published an article in the South African Law Journal entitled ‘*Abortion: The Constitutional Issues*’.⁷ In this article she considered whether the state has a constitutional duty to protect foetal life.
14. Prof Meyerson takes the view that even though a foetus is not the beneficiary of any of the specific rights contained in the Bill of Rights, the value of human dignity is nonetheless implicated by the destruction of foetal life:

“It is the value of human dignity which is most obviously under threat when abortion is permitted, because it is hard to deny that the destruction of foetal life, although it violates no constitutionally protected subject’s right to life, nevertheless undermines human dignity.”⁸

⁶ Human Dignity: Lodestar for Equality in South Africa 2012 pg 98.

⁷ 1999 Vol 116 p 50.

⁸ *Supra* pg 56.

15. Prof Meyerson concludes that the CTOPA strikes the right balance between the value of human dignity and the rights of women who do not wish to continue with their pregnancies.
16. Nonetheless, in the course of discussing this issue, she states:

“A foetus is not just a bit of human tissue, comparable to something like the appendix. It is a living human organism, whose destruction is not a morally trivial matter but something to be regretted. Ronald Dworkin makes something like this point, saying that although the foetus does not have a right to life, it does embody an intrinsic value. Like, for instance, a work of art, it is something whose destruction is objectively bad, on account of the marvellously complex and creative processes it embodies.”⁹ (emphasis added)

17. The pages in Professor Dworkin’s Life’s Dominion¹⁰ referred to by Prof Meyerson include the following passages:

“Any human creature, including the most immature embryo, is a triumph of divine or evolutionary creation, which produces a complex, reasoning being from, as it were, nothing, and also of what we often call the “miracle” of human reproduction, which makes each new human being

⁹ *Supra* pg 56.

¹⁰ 1994. This book has been frequently cited by our courts, specifically in support of abortion rights. See in this regard *Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T) at 523A-G; *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 (4) SA 1113 (T) at 1124I. See also *Makwanyane supra* at fn 224 and *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at [55].

both different from and yet a continuation of the human beings who created it...¹¹

The life of a single human organism commands respect and protection, then, no matter in what form or shape, because of the complex creative investment it represents and because of our wonder at the divine or evolutionary processes that produce new lives from old ones...^{12,}

18. Although these opinions are expressed in a different context, it is nonetheless submitted that if the destruction of the unborn implicates the value of human dignity, then the disposal of the unborn likewise implicates the value of human dignity.

19. There is a significant difference between the disposal of an appendix, and the disposal of an unborn child. By the time a foetus reaches the 26-week point contemplated by the Births and Deaths Registration Act 51 of 1992 (“**BADRA**”), the child is well-developed.¹³ But even an immature embryo commands respect, in a way that an appendix does not.

20. CFJ submits that the present legal regime under BADRA fails to recognise the profound difference between an unborn child and a body part, and in doing so fails to respect the worth which attaches to all human beings, even before birth.

¹¹ *Supra* pg 83.

¹² *Supra* pg 84.

¹³ For a description of the development of an unborn child, see the affidavit of Dr La Grange, record pgs 622-625.

Dignity and the unborn under German law

21. As in South Africa, the German Constitution places a high value on dignity. Article 1(1) of the German Basic Law states that “*Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.*”¹⁴
22. According to Ackermann, German dignity jurisprudence is singularly important for a proper understanding of dignity under the South African Constitution.¹⁵
23. Under German law, human dignity accrues to human life, regardless of the stage of development of this life, and the protection of human worth does not end with the death of the individual.¹⁶
24. The German Constitutional Court has held that in the case of an unborn child, one is already dealing with an individual whose genetic identity and accordingly its uniqueness and distinctiveness has been fixed, and who, in the process of its growth and self-evolvement, develops as a human being and not towards becoming a human being.¹⁷

¹⁴ Ackermann *supra* pg 96.

¹⁵ Ackermann *supra* pg 96.

¹⁶ Ackermann *supra* pg 127.

¹⁷ Ackermann *supra* pg 159.

25. Ackermann refers to the views of the following German scholars in relation to the unborn:

25.1. Professor Josef Isensee, writes that human worth is present in the embryo, however conceived, and it also extends beyond life. He goes on to state that worth does not require the actual ability to use reason and therefore the unborn child, as well as the mentally disabled share in dignity.¹⁸

25.2. Similarly, according to Professor Klaus Stern, the moment fusion takes place between egg and sperm, a ‘totipotent’ cell is created; that is to say, it has the total potential to develop into a complete human being. The embryo is already human for purposes of art 1(1) and is no longer a mere thing.¹⁹

25.3. Professor Böckenförde argues that to choose any time *after* the very beginning of life²⁰ for the accrual of human dignity is to ‘tear a whole in the development of each and every human being’.²¹

26. Ackermann considers that the recognition of the dignity of the unborn child is not a uniquely German preoccupation (as suggested by Henk Botha), and challenges

¹⁸ Ackermann *supra* pg 147.

¹⁹ Ackermann *supra* pg 152.

²⁰ Which he says is the moment of fertilisation.

²¹ Ackermann *supra* pg 162.

the implication that the dignity of the unborn child receives no recognition under South African law. Ackermann concludes that the question of the dignity of the unborn child flows directly and inevitably from any serious grappling with the constitutional idea of fundamental human dignity (worth) against the background of its theological and philosophical development.²²

27. CFJ thus submits that the German jurisprudence regarding the dignity of the unborn is relevant and helpful and may be considered by this Court in terms of s 39(1)(c) of the Constitution.

International Law

28. The International Covenant on Civil and Political Rights of 1966 (to which South Africa has acceded), provides in Part III, article 6(5) that: “*Sentence of death shall not be... carried out on pregnant women*”.
29. It is implicit in this prohibition that international law accords value to pre-natal life.
30. Similarly, the preamble to the Declaration of the Rights of the Child,²³ provides that children, by reason of their physical and mental immaturity, need

²² Ackermann *supra* pg 176.

²³ Adopted by UN General Assembly Resolution 1386 (XIV) of 10 December 1959.

special safeguards and care, including appropriate legal protection, before as well as after birth.²⁴

31. Again, this international instrument recognises the worth of unborn human beings.

Discussion

32. The applicants correctly emphasise the rights of bereaved parents.
33. CFJ goes further and submits that it is not only parents, but our society as a whole, which has an interest in treating the bodies of unborn babies with respect. In doing so we protect and cherish the value of human dignity.
34. It is submitted that the stance adopted by the respondents is uncaring, cynical, and paternalistic. For example, the respondents deny that parents who have suffered a miscarriage are ‘bereaved parents’ and will have them described merely as ‘prospective parents’.²⁵ Not only this, but the respondents argue that the trauma suffered by bereaved parents is not ameliorated by burial, but rather by psychological and counselling support made available by the government.²⁶ It is doubtful that this is correct. In any event, it is not for the state to prescribe how

²⁴ Cited in the preamble to the United Nations Convention on the Rights of the Child. South Africa became a party to this Convention on 16 July 1995.

²⁵ Respondents’ heads of argument para 40.

²⁶ Respondents’ heads of argument para 52.

people should address something as personal, and distressing, as the loss of an unborn child.

35. In *Makwanyane*, Mokgoro J described how the concept of *ubuntu* envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, and in its fundamental sense denotes humanity and morality.²⁷
36. The contentions pursued by the respondents are far removed from the values of *ubuntu* highlighted by Mokgoro J in *Makwanyane*. The denial of choice to bereaved parents lacks compassion and respect and undermines the value of human dignity.
37. It is of course correct that as the law presently stands, the unborn are not bearers of constitutional rights. But the same may be said of all human beings who have died. Whether they were born or not, upon death, human beings do not have any legal rights.
38. Yet, just as there are laws ensuring that those humans who die after being born are treated with dignity and respect,²⁸ so, it is submitted, the law should permit

²⁷ *Supra* at [308].

²⁸ For example, it is a crime to violate a grave or a corpse. According to CR Snyman, the reason for punishing the violation of a grave is the affront to the family or friends of the deceased or the community's feelings of decency (Criminal Law 6th ed pg 435). In terms of s 14 of the Criminal

parents to treat all those humans who die before being born, with dignity and respect.

39. In *Christian Lawyers (2)*, Mojapelo J held that the state has a legitimate role in the protection of pre-natal life as an important value in our society.²⁹ If the law recognises that protecting pre-natal life is an important societal value, then by the same token the law should accord respect to the bodies of all unborn human beings, and not only those who survive beyond a certain gestational period.
40. Put differently, if the law seeks to protect all pre-natal human beings while they are alive, it follows logically that the law should also allow for them to be respected, if they die.
41. This approach is consistent with the decisions which allow a child, after being born, to claim in relation to pre-natal injuries,³⁰ and (possibly) for incorrect medical diagnoses.³¹

Law (Sexual Offences and Related Offences) Amendment Act 32 of 2007 it is a crime to commit a sexual act with a corpse. Furthermore, the Regulations Regarding the Rendering of Forensic Pathology Service GN R636 in GG 30075 of 20 July 2007 provides for pauper burials or cremation in certain circumstances (regulations 31 and 32).

²⁹ *Supra* at 527D-E.

³⁰ *Road Accident Fund v Mtati* 2005 (6) SA 215 (SCA). See paras 36-37 where it was held that the driver owed a duty of care to the unborn child.

³¹ *H v Fetal Assessment Centre* 2015 (2) SA 193 (CC).

42. The respondents submit that in legal terms, there is no human life in the absence of viability³² and a foetus does not have legal rights because it is not yet a human being or not capable of surviving on its own.³³
43. It is correct that the law does not accord legal rights to the unborn, before or after viability. However, it does not follow that the law does not recognise that a foetus is a human life, even before it reaches viability.
44. The undisputed evidence of Dr Jané La Grange is that human life begins at the sperm-egg fusion, and an unborn child is a living human being from that moment onwards.³⁴
45. The academic writers, and the judgments described above, also recognise that the foetus is a living human being.
46. The fact that a foetus may not be able to survive without the umbilical support obtained from her mother, does not mean that she is not a living human being. If this reasoning were correct, a sick person who is not able to survive without the support of a ventilator, would also not be a living human being.

³² Heads of argument, para 15.

³³ Heads of argument, para 37.

³⁴ Dr La Grange para 29, record pg 621.

Summary

47. To sum up:

47.1. The value of human dignity demands that unborn children be respected, as living human beings, regardless of their gestational age.

47.2. Such unborn children have an inherent worth, like any human being.

47.3. Upon the death of an unborn child, parents should be allowed to choose how they dispose of the child's body, irrespective of gestational age.

47.4. This choice is not only necessary to protect the constitutional rights of the parents, but it also serves to recognise the inherent worth of the deceased child.

47.5. To deny parents the opportunity to bury their unborn children, is to deny the worth of the unborn child, and infringes the value of human dignity.

VOLUNTARY TERMINATIONS PERFORMED IN TERMS OF CTOPA

48. It appears from the expert evidence adduced by the applicants that, especially with wanted pregnancies, parents who terminate pregnancies under CTOPA suffer grief and may benefit from burying the foetuses.³⁵
49. The WLC Trust and WISH Associates submit, however, that the relief sought by the applicants will have an adverse impact on women's rights to access safe and legal abortions.³⁶
50. These *amici* thus argue that women who terminate their pregnancies under CTOPA (and the fathers) should be denied the right to choose whether to bury their foetuses.
51. They contend that the following factors support their submission:
- 51.1. The relief sought will mean additional burdens will be placed on designated facilities.³⁷
- 51.2. The relief will undermine the confidentiality provisions of the CTOPA.³⁸

³⁵ See Dr Botha para 44, record pg 70; Dr Olivier record pg 127 and 120-122; Rev Klopper para 19, record pg 400 and para 36, record pg 408. See also Cardinal Napier paras 118-128, record pg 1016-1017.

³⁶ Heads of argument para 22.

³⁷ Heads of argument paras 24-34.

- 51.3. The right to bury may create an additional barrier to access.³⁹
52. It is perhaps telling that the Minister of Health, under whose authority the CTOPA lies, has not raised the issues identified by the other *amici*, and appears not to support the approach adopted by these *amici*.
53. Mindful of the role of an *amicus*, CFJ does not wish to address the submissions of the other *amici* in detail at this stage. Depending on the approach adopted by the parties to the application CFJ may, if the Court permits, make further submissions at the hearing in relation to the submissions of the other *amici*.
54. For present purposes, CFJ makes only the following brief submissions in relation to the three factors relied upon by the other *amici*:
- 54.1. It does not follow from the granting of an option to bury a dead foetus, that designated facilities will be obliged to identify, separate and store foetal remains. It will be incumbent upon the parents concerned to make the appropriate arrangements. There is also no evidence that this has been a difficulty in the many jurisdictions which allow parents or women to choose to bury the foetuses after an abortion.

³⁸ Heads of argument paras 35-41.

³⁹ Heads of argument paras 42-45.

54.2. As regards the undermining of the confidentiality provisions of the CTOPA, it is submitted that the interim relief set out in paragraph 5 of the amended notice of motion will not, on its own, interfere with the rights of women under sections 5(2) and 7(5) of CTOPA. Furthermore, CFJ would not oppose an appropriate amendment to the relief sought to make it clear that during the period that the invalidity is suspended, if a termination is performed under CTOPA, only the mother shall have the right to choose whether to bury the dead foetus.

54.3. CFJ does not consider that the right to bury may create a barrier to access. But, in any event, CFJ would not object to the Court making an order that the option must be presented to women seeking a termination under CTOPA in a way which is not only non-mandatory and non-directive, but also does not involve intrusive questioning or increased stigma.

CONCLUSION

55. CFJ accordingly submits that the relief sought by the applicants should be granted, subject to those revisions which the Court finds are necessary to ensure that a woman's rights under CTOPA are not compromised.

Darryl Cooke

Chambers

Cape Town

21 June 2019