

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: _____

In the matter between:

THE VOICE OF THE UNBORN BABY NPC

Applicant

and

MINISTER OF HOME AFFAIRS

First respondent

MINISTER OF HEALTH

Second respondent

NOTICE OF MOTION

KINDLY TAKE NOTICE THAT the applicant intends to apply to this Court for an order in the following terms:

1 THAT for purposes of this Court Order, the following words shall have the following meanings:

- a. 'bereaved parent or parents' shall mean, in the context of pregnancy loss, a person or persons who would have been a parent or parents as defined in the Children's Act, Act 38 of 2005, of such child that would have been born had the pregnancy resulted in a live birth.
- b. 'burial' shall have the meaning as defined in the Births and Deaths Registration Act, Act 51 of 1992 ('BADRA'), but shall be expanded to include dead fetuses; 'bury' shall have a corresponding meaning;
- c. 'loss of pregnancy' or 'pregnancy loss' shall mean the death of a fetus prior to or during separation from the pregnant woman's body, irrespective of whether through natural causes or human intervention;
- d. 'stillbirth' shall mean a species of pregnancy loss where the fetus at the time of separation is viable, and where the fetal death is not caused by human intervention;

- e. 'viable' with relation to a fetus, shall mean the gestational age (or other criteria) at which a fetus is considered able to survive outside the womb by legislation that provides what entities qualify to be buried. For clarity, BADRA currently sets the gestational age of viability at 26 weeks.
- 2 THAT it is declared that in the event of loss of pregnancy other than stillbirth, the bereaved parent or parents have the right to bury the dead fetus, if such bereaved parent or parents so elect.
 - 3 THAT section 20(1) of BADRA, read with section 1 (the definition of 'stillbirth') and subsections 18(1)–18(3) of BADRA, is declared inconsistent with the Constitution and invalid insofar as it does not make provision for the right declared in paragraph 2 supra.
 - 4 THAT the declaration of invalidity in paragraph 3 supra is suspended to allow Parliament the opportunity to amend BADRA to provide for the right declared in paragraph 2 supra.
 - 5 THAT pending the amendment by Parliament of BADRA to provide for the right stated in paragraph 2 supra:
 - a. A medical practitioner shall act lawful if he or she issues a stillbirth certificate in terms of section 18(1) of BADRA, upon request by a

bereaved parent or bereaved parents following loss of pregnancy other than stillbirth.

- b. If no medical practitioner was present at a loss of pregnancy other than stillbirth, or if no medical practitioner examined the remains of the dead fetus following said loss of pregnancy, any person who was present at the loss or pregnancy shall act lawful if he or she makes a prescribed declaration of stillbirth to any person contemplated in section 4 in terms of section 18(2) of BADRA, upon request by a bereaved parent or bereaved parents following a loss of pregnancy other than stillbirth.
- c. A person contemplated in section 4 of BADRA shall not refuse a burial order in terms of section 18(3) of BADRA because the stillbirth certificate or declaration of stillbirth relates to the loss of pregnancy other than stillbirth.

6 THAT the first respondent is ordered and directed to:

- a. take all reasonable steps to communicate the content of the right declared in paragraph 2 supra and the content of paragraph 5 supra to all persons contemplated in section 4 of BADRA; and
- b. serve on all the other parties to this application and file with the Registrar of this Court an affidavit, within 20 days of this judgement,

detailing the steps that he has taken to give effect to subparagraph 6a supra.

- 7 THAT should Parliament fail to amend BADRA to provide for the right stated in paragraph 2 supra within 12 months of the date of this order, any interested person may apply to this Court or any other division of the High Court for any appropriate further relief.
- 8 THAT the definitions of 'corpse' and 'human remains' in regulation 1 of the Regulations Relating to the Management of Human Remains, published by the second respondent in the *Gazette* of 22 May 2013, in terms of NHA, are declared inconsistent with the Constitution and invalid insofar as these definitions do not make provision for the right declared in paragraph 2 supra.
- 9 THAT the declarations of invalidity in paragraph 8 supra are suspended to allow the second respondent the opportunity to amend the Regulations referred to in paragraph 8 supra to provide for the right declared in paragraph 2 supra.
- 10 THAT pending the amendment by the second respondent of the Regulations referred to in paragraph 8 supra to provide for the right declared in paragraph 2 supra, the definitions of 'corpse' and 'human remains' in the Regulations referred to in paragraph 8 supra shall forthwith be read as including a dead

human fetus, if a burial order was issued in respect of such a fetus in terms of section 18(3) of BADRA.

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

12 THAT the second respondent is ordered and directed to:

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

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

13 THAT, in the event that this application is opposed, the costs of the application, including the costs incumbent upon the employment of two counsel, and including the qualifying costs of the experts, be paid by such respondent that is opposing, or if both respondents oppose this application, by

the respondents jointly and severally, the one to pay the other/s to be absolved.

14 THAT the applicant be granted such further and/or alternative relief as the Court deems meet.

TAKE NOTICE FURTHER THAT the accompanying affidavit of Ms Sonja Smith together with annexures thereto will be used in support of this application.

TAKE NOTICE FURTHER THAT the applicant has appointed Ingram Attorneys, [counsel's drafting note: please insert full address], Pretoria.

TAKE FURTHER NOTICE THAT if any respondent intends opposing this application, he or she is required:

- 1 To notify the applicant's attorney in writing, within **fifteen (15) days** of the service of the notice of motion of such intention to oppose;
- 2 Within **fifteen (15) days** of notifying the applicant's attorney of such intention to oppose the application, to deliver his or her answering affidavit, if any, together with any relevant documents in answer to the allegations made by the applicant; and

3 To appoint in his or her notice of opposition an address, within eight kilometres of the office of the Registrar at which she will accept notice and service of all documents in these proceedings.

TAKE FURTHER NOTICE THAT, unless a notice of intention to oppose the relief sought is delivered as specified above, application for the said relief will be made on the _____ at 10h00 or as soon thereafter as counsel may be heard.

APPLICANT'S ATTORNEYS

Ms Renaldi Ingram

Ingram Attorneys

[address]

[email]

[tel & fax]

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

AND TO: THE MINISTER OF HEALTH

Care of the State Attorney
8th Floor Bothongo Heights
167 Andries Street
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FOUNDING AFFIDAVIT

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I the undersigned,

SONJA SMITH-JANSE VAN RENSBURG

hereby state under oath as follows:

[1] I am an adult female businesswoman. I am the founder and managing director of *Sonja Smith Funeral Group (Pty) Ltd.* I reside at 43 Drienie Street, Eldoraigne, Centurion, 0157.

[2] I am also the co-founder and an executive director of the applicant. I am duly authorised to depose to this affidavit for and on behalf of the applicant.

[3] The facts contained herein are within my personal knowledge unless otherwise apparent from the context and are both true and correct.

[4] Given the nature of this application as a constitutional challenge to legislation, I will, where relevant and necessary, set out the relevant law in order to assist the Court in adjudicating the matter. Where I make legal submissions, these are based on the legal advice that I have received from my legal representatives in the course of the preparation of this affidavit. I verily believe that the legal advice concerned is correct and rely on it in support of this application. I attach hereto marked '**Smith1**' a confirmatory affidavit by my attorney of record, Ms Renaldi Ingram.

THE PARTIES

[5] The applicant is THE VOICE OF THE UNBORN BABY NPC, a non-profit company that I founded in September 2015 to drive the legislative change that is the subject of the present matter. The applicant has over 2 000 signed-up members.

[6] The applicant brings this application in its own interest pursuant to section 38(a) of the Constitution, and in the public interest pursuant to section 38(d) of the Constitution.

[7] The first respondent is the MINISTER OF HOME AFFAIRS, cited care of the State Attorney, Pretoria, at 8th Floor Bothongo Heights, 167 Andries Street, Pretoria. The first respondent is cited in his capacity as the minister responsible for the administration of the Births and Deaths Registration Act, Act 51 of 1992 ('BADRA').

[8] The second respondent is the MINISTER OF HEALTH, cited care of the State Attorney, Pretoria, at 8th Floor Bothongo Heights, 167 Andries Street, Pretoria. The second respondent is cited in his capacity as the minister responsible for the administration of the Regulations Relating to the Management of Human Remains ('the Regulations'), made in terms of the National Health Act, Act 61 of 2003 ('NHA').

INTRODUCTION

Pregnancy loss and the rights of bereaved parents

[9] The application relates to the loss of pregnancy by expecting parents, the emotional consequences of such loss, and how the state should deal with such bereaved parents in our constitutional dispensation.

[10] The present application does not explicitly or implicitly aim to allocate any legal rights or quasi-rights to a fetus. Rather, this application is grounded on the reality that many expecting parents make a significant emotional investment in their prospective child long before birth and that pregnancy loss consequently has an undeniable negative emotional impact on such bereaved parents. This application focuses on the rights of such bereaved parents.

Working definitions

[11] I employ the terminology 'fetus' to describe the human conceptus until born *alive*.

[12] I use the terminology 'prospective child' to describe the intangible, mental construct of the hoped-for child in people's minds. As such, I use 'prospective child' in

the same way as the Children's Act, Act 38 of 2005, in the context of surrogate motherhood, employs the terminology 'the child that is to be born' to refer to the mental construct of the future child.¹

[13] With 'pregnancy loss', I mean any manner in which a fetus dies before being born alive. Pregnancy loss can either be spontaneous or induced. The latter type of pregnancy loss is governed by the Choice on Termination of Pregnancy Act, Act 92 of 1996 (COTOPA).

[14] With 'burial', I mean burial in earth or cremation, as defined in BADRA. Importantly, in practice, a burial entails the opportunity for a ceremony or ritual in which the bereaved parents, their family and friends, and religious, cultural, and/or other counsellors can participate.

The miscarriage–still-birth dichotomy

[15] Spontaneous pregnancy loss is categorised as either *early* spontaneous pregnancy loss (traditionally 'miscarriage') or *late* spontaneous pregnancy loss (traditionally 'still-birth'), based on whether the fetus is deemed *viable* – id est

¹ s295(d) and s295(e).

capable of surviving outside the mother's womb – at the stage when pregnancy loss occurs.

[16] Given that the core legislation that is the subject of this constitutional challenge, BADRA, employs the term 'still-birth', it is convenient to use 'still-birth' and 'miscarriage' in this affidavit.

[17] There is no international consensus on how to determine viability. The World Health Organisation recommends 28 weeks of gestation for purposes of international comparison, given that a fetus has little chance of survival outside the mother's womb in low-income countries prior to 28 weeks of gestation. However, in high-income countries, the gestational age of viability can be as low as 22 weeks. Also, body weight is sometimes proposed as a more reliable indicator of viability than gestational age – yet, there is no international consensus on what the minimum weight to constitute viability should be. Viability – and therefore miscarriage and still-birth – are essentially social constructs.

[18] BADRA posits viability at *26 weeks of gestation*. Whether such pregnancy loss takes place prior to or after 26 weeks of gestation has a dramatic effect on what happens to fetal remains: If the fetus was in utero at least 26 weeks, it is legally posited as a still-birth and the fetal remains *must* be buried; if the fetus was in utero

for less than 26 weeks, the fetal remains *cannot* legally be buried and are as default standard practice treated as medical waste.

[19] The purpose of this application is not to engage the issue of the appropriate gestational age (or body weight) for viability in the South African context. The applicant does not challenge 26 weeks as the benchmark for viability. In the context of *spontaneous* pregnancy loss, the purpose of this application is to ameliorate the drastically divergent legal effects of miscarriage vis-à-vis still-birth from the perspective of the bereaved parent – irrespective of how viability is legally established in current or future legislation.

[20] As such, when I refer to ‘viability’ in this affidavit, I use it as a concept with a potentially variable content that is to be determined by relevant legislation at any given time.

An inclusive approach to pregnancy loss

[21] Although this application may superficially appear to relate to the pro-life versus pro-choice debate, it actually transcends such debate: This application relates to the loss of pregnancy *irrespective* of the cause of such loss. Just as expecting parents who experience the loss of pregnancy due to natural causes may be emotionally impacted by such loss, so may expecting parents who experience the

loss of pregnancy due to their own *conscious decision* to end the pregnancy, for example due to medical advice that the fetus will be born with a severe physical abnormality and will not survive longer than a few hours or days. As I analyse in this affidavit, the emotional impact of pregnancy loss on the latter type of parents may even be greater than on the former.

[22] In the event of induced pregnancy loss, the fetal remains – irrespective of viability – are legally regarded as medical waste and *cannot* legally be buried.

[23] The position of bereaved parents in the context of induced pregnancy loss accordingly mirrors the position of bereaved parents in the context of miscarriage.

The constitutional challenge: an overview

[24] In this affidavit, I show that many expecting parents make significant emotional investment in their prospective child before birth, and that the gravity of the consequent attachment is not necessarily determined by gestational age. As such, 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] I further show that such 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.

[26] Accordingly, I conclude that bereaved parents have a clear interest in electing whether to bury the fetal remains of their prospective child following pregnancy loss – with the exception of still-birth qua species of pregnancy loss where burial is mandatory. The applicant does not challenge the mandatory nature of burial in the event of still-birth.

[27] I proceed to analyse the human rights dimensions of said interest, and conclude that said interest falls within the protective ambit of the constitutionally enumerated rights to dignity, privacy, and equality of the bereaved parent or parents.

[28] Accordingly, I conclude that in the case of pregnancy loss other than still-birth, the bereaved parent or parents have the right, based on our constitution, to elect to bury the remains of the fetus.

[29] I further state that there is no legitimate government purpose that is served by the current legislative *ban* on burying the fetal remains of a prospective child following pregnancy loss other than still-birth.

[30] It follows that any legislation that is not in conformity with this right is unconstitutional and invalid to the extent of its nonconformity. Given the extensive nature of the legislation involved, I respectfully request the Court to refer the revision of the relevant primary legislation to parliament, and the relevant secondary legislation to the relevant respondents for revision.

[31] I further respectfully request the Court to provide interim relief through a set of simple, common sense, declaratory orders.

Voice of the Unborn Baby

[32] The name of the applicant, *Voice of the Unborn Baby*, is based on the recognition that many bereaved parents who experience pregnancy loss have already made such a significant emotional investment in their prospective child that they perceive the pregnancy loss as the loss of a 'baby' – a 'baby' that such bereaved parents wish to give the dignity of a burial, thereby giving a metaphorical 'voice' to such bereaved parents' subjective psychological reality of their prospective child as their 'unborn baby'.

ANALYSIS OF LEGISLATION

Births and Deaths Registration Act

[33] BADRA is the statute that governs burials, and in particular governs which entities qualify to be buried. It is also the statute that establishes viability for present purposes. 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;

Still-birth

[34] Given that still-birth qua medico-legal concept is generally understood as the delivery of a dead fetus post-viability, BADRA per necessary implication determines viability at 26 weeks. The applicant does not take issue with the determination of viability at 26 weeks.

[35] The definitions of 'birth' and 'still-birth' present a paradox: 'Birth' per its definition *requires* live birth; however, the term 'birth' is used in the definition of 'still-birth' although still-birth per definition *excludes* live birth.

[36] Beyond this paradox, the definition of 'still-birth' posits the still-born fetus as a dead 'child'. In fact, the word 'child' is employed throughout BADRA with reference to a still-born fetus. This terminology is problematic: If the well-established position in our law is accepted that life (in the *legal* sense of a person coming into existence) starts at live birth, a still-born fetus cannot in law be posited as a 'child' (still-born or otherwise), because the still-born fetus was never a child in esse.

[37] For clarity, the applicant does not seek to challenge the legal status of the fetus in our law (as not being a person). As is clear from my human rights analysis at paragraphs [79]–[97] below, no legal anomalies will be caused or legal fictions need

to be invented about the legal status of the fetus in order to recognise and protect bereaved parents' rights in the case of pregnancy loss.

Still-birth and induced pregnancy loss

[38] While I prefer to use the terminology 'induced pregnancy loss' as it recognises the emotional dimension of fetal death, the same concept is referred to in COTOPA as 'termination of pregnancy'. Section 1 of COTOPA defines termination of pregnancy as follows:

"termination of a pregnancy" means the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman;

[39] The question can be raised as to whether a late-term (post-26 weeks of gestation) termination of pregnancy would qualify as a still-birth in terms of BADRA. The difference between still-birth through caesarean section and the 'separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman' appears semantic, if there is a difference at all.

[40] In its general meaning, still-birth is a species of *spontaneous* pregnancy loss. This general meaning of still-birth should, with respect, supplement the statutory definition as being implicitly intended by the legislature.

[41] Accordingly, late-term (post-26 weeks of gestation) *induced* pregnancy loss (or termination of pregnancy) would not qualify as still-birth in terms of BADRA.

Burial per definition limited to corpses and still-born fetuses

[42] From the definitions of 'burial', which limits burial to a corpse, and the definition of 'corpse', which excludes dead fetuses other than still-born fetuses, it is evident that BADRA does not make provision for the burial of fetuses in the event of pregnancy loss other than still-birth. In fact, as I show in the following, BADRA even goes further by *specifically prohibiting* the burial of fetuses in the event of pregnancy loss other than still-birth.

The process of obtaining authorisation for a burial

[43] 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.

[44] 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.

[45] 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 induced pregnancy loss; 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 other than still-birth.

[46] To obtain a burial order, the only alternative to a notice of still-birth is a notice of death. However, what all types of pregnancy loss have in common is that there is never live birth, and as such there is no person capable of death. Accordingly, it is clear that a notice of death would not be applicable in the event of either miscarriage or induced pregnancy loss.

Regulations Relating to the Management of Human Remains

[47] Neither COTOPA, nor NHA deals with burials in general or with the burial of dead fetuses. However, the Regulations made in terms of NHA govern certain aspects regarding funeral undertakers and burials.

[48] It is important to note, with respect, that the Regulations fail to make any reference to BADRA. In fact, on a definitional level, there appears to be a misalignment between the Regulations and BADRA.

[49] 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;

[50] In contrast with BADRA, the Regulations do not include still-born fetuses in its definition of a 'corpse'. Nowhere in the Regulations is there any reference to still-birth or any other form of pregnancy loss.

[51] If the general rule of our law that a fetus is not a person in law is applied to the interpretation of the Regulations, 'human body' in the Regulations would pertain to the physical body of a *person*, and not to the physical body of a *fetus*. Accordingly, the Regulations would fail to provide for the burial of dead fetuses following any type of pregnancy loss, including still-birth.

[52] In the alternative, if the Regulations are interpreted with the aim of reconciling the Regulations with BADRA rather than with the general rule of our law that a fetus is not a person in law, 'dead human body' in the Regulations would be interpreted to include a still-born fetus as per the BADRA definition of a 'corpse'. I have already pointed out in paragraph [36] above the problematic nature of relegating the general rule of our law that a fetus is not a person in law. If the BADRA-aligned interpretation of the Regulations is adhered to, the Regulations would – similar to BADRA – fail to provide for the burial of dead fetuses following pregnancy loss other than still-birth.

[53] Accordingly, whichever one of the above alternative interpretative approaches is adopted is irrelevant to the outcome of this application, as the Regulations fail on

both approaches to provide for the burial of dead fetuses following pregnancy loss other than still-birth.

Conclusion

[54] The primary legal instrument in our law that governs burials is BADRA. The legal regime created by BADRA requires the issuance of a burial order as general precondition for a burial; in turn, the issuance of a burial order requires notice of either death or still-birth. The BADRA legal regime is rigid in the distinction that it draws between the following two categories:

- a. persons that died and still-born fetuses (that *must* be buried), and
- b. dead fetuses following either miscarriage or induced pregnancy loss (that *cannot* legally be buried).

[55] While not explicitly banning the burial of dead fetuses following pregnancy loss other than still-birth as done by BADRA, the Regulations made in terms of NHA simply fail to make provision for the burial of such fetuses.

[56] The purpose of this constitutional challenge is to make the legal regime that governs burial of fetuses less rigid and more attuned to the human side of bereavement in the event of pregnancy loss.

Postscript

[57] If not the object of burial, what is the fate of dead fetuses? The brief answer is that as a general rule dead fetuses are incinerated with medical waste.

[58] 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').

[59] The National Standard contains three parts, which are as follows:

- a. Part 1 (latest edition: 2008): Management of healthcare risk waste from a healthcare facility;
- b. Part 2 (latest edition: 2009): Management of healthcare risk waste for healthcare facilities and healthcare providers in rural and remote settings; and

- c. Part 3 (latest edition: 2011): Management of healthcare risk waste from minor generators, registered healthcare professionals and non-healthcare professionals.

[60] 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 emphasis]

[61] Importantly, the definition does not state that *all* fetuses (or *all* organs, blood, et cetera) are 'pathological waste' or 'anatomical waste' – it must first qualify as *waste*.

[62] Waste is defined in Part 1 of the National Standard 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

[63] The definitional framework of the National Standard is therefore sufficiently supple to accommodate the right of the bereaved parent or parents to elect to bury the dead fetus: In the event that a parent or parents elect to bury, the fetus will fall outside the definitional ambit of waste; in the event that a parent or parents elect not to bury, the fetus will effectively be 'discarded' and will as such fall within the definitional ambit of waste – more specifically anatomical or pathological waste.

[64] 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.

[65] Accordingly, the National Standard provides a ready and supple mechanism for dealing with those fetuses that will not be buried, without obstructing the right of the bereaved parent or parents to elect to bury the dead fetus.

PREGNANCY LOSS: THE FACTS

[66] In this section of my affidavit, I present evidence regarding the effect of pregnancy loss on expecting parents, and the significance of burial.

[67] In this section, I rely on expert opinions by the following experts, which I attach hereto:

- a. Dr Danie Botha, a gynaecologist and obstetrician, who currently serves on the governing council of the Southern African Society of Reproductive Medicine and Gynaecological Endoscopy. His expert opinion is attached hereto marked '**Smith2**'.
- b. Dr Louise Olivier, a clinical and counselling psychologist. Her expert opinion is attached hereto marked '**Smith3**'.
- c. The Reverend Braam Klopper, a pastoral therapist who specialises in bereavement counselling. His expert opinion is attached hereto marked '**Smith4**'.

[68] I incorporate the content of the abovementioned expert opinions herein.

[69] It is clear from the three expert opinions that pregnancy loss often causes grief to expecting parents, and that the bereaved parents' process of dealing with their grief is aided by the burial of the fetus:

[70] In the context of wanted pregnancies, it is common for expecting parents to perceive the embryo or fetus in the mother's womb as the unborn 'baby'.²

[71] Modern technological developments in the field of prenatal healthcare, such as 4D ultrasound, facilitate early emotional bonding by the expecting parents with their unborn 'baby'.³

[72] As such, in the context of wanted pregnancies, pregnancy loss often causes grief to expecting parents.⁴

[73] Whether a fetus has reached the stage of viability or not, has no discernible impact on expecting parents' perception of their unborn 'baby',⁵ or on their grief in the event of pregnancy loss.⁶

[74] Also, grief is not limited to *spontaneous* pregnancy loss, but also occurs with *induced* pregnancy loss.⁷

² Botha Expert Opinion [28], [47]; Klopper Expert Opinion [15].

³ Botha Expert Opinion [24]–[26], [51]; Olivier Expert Opinion [5.2.1]; Klopper Expert Opinion [14].

⁴ Botha Expert Opinion [49], also see [44]; Olivier Expert Opinion [6]; Klopper Expert Opinion [11], [13], [19]–[21].

⁵ Botha Expert Opinion [29].

⁶ Botha Expert Opinion [50], also see [33].

⁷ Klopper Expert Opinion [19]–[21]; also see: Botha Expert Opinion [44], [46].

[75] Burial can be distinguished from incineration as burial provides the opportunity for a ceremony – either religious or secular – during which the bereaved parents and their loved ones can be present.⁸

[76] A burial fulfils the following functions in process of grief of the bereaved parents: (a) It facilitates a better comprehension of the reality of the pregnancy loss by the bereaved parents,⁹ (b) it provides an opportunity for the expression of emotion by the bereaved parents,¹⁰ and (c) it serves as an acknowledgement that the prospective child had meaning for the bereaved parents.¹¹

[77] Accordingly, the burial of the fetus impacts positively on the bereaved parents' process of grief – irrespective of whether the loss of pregnancy was spontaneous or induced.¹²

[78] Giving the bereaved parents the option to bury the fetal remains would therefore be an important clinical technique through which to manage the bereaved parents' mental health.¹³

⁸ Klopper Expert Opinion [25].

⁹ Olivier Expert Opinion [5.2.2]; Klopper Expert Opinion [30]–[31].

¹⁰ Olivier Expert Opinion [5.2.2]; Klopper Expert Opinion [32]–[33].

¹¹ Olivier Expert Opinion [6]; Klopper Expert Opinion [34]–[35].

¹² Klopper Expert Opinion [36], [40], [42].

¹³ Olivier Expert Opinion [5.2.3]–[6].

HUMAN RIGHTS ANALYSIS

The interest of the bereaved parent or parents

[79] Bereaved parents have a clear interest in electing whether to bury the remains of their late prospective child following pregnancy loss.

Human dignity

[80] The decision to elect to bury the remains of one's dead prospective child can be an important life decision. Accordingly, such decision falls within the right to human dignity, which entails the protection of a person's autonomy.

Privacy

[81] The decision to elect to bury the remains of one's dead prospective child is also a decision within the core personal sphere of a person. Accordingly, such decision falls within the protective ambit of the right to privacy.

Equality

[82] The current legislative regime effectively creates two categories of bereaved parents:

- a. *Category A*: Bereaved parents who suffered stillbirth – one kind of pregnancy loss.
- b. *Category B*: Bereaved parents who suffered pregnancy loss other than stillbirth.

[83] While bereaved parents in Category A have a right and a duty to bury the remains of their prospective child, bereaved parents in Category B have neither a right nor a duty to bury the remains of their prospective child.

The duty

[84] Given that not all bereaved parents in Category B experience pregnancy loss in the same way – some may be relatively unaffected, while others may be overcome with grief – it would not be justified to place a *general duty* on all bereaved parents in Category B to bury the remains of their prospective child.

[85] The general duty on all bereaved parents in Category A to bury the remains of their prospective child (still-born fetuses) is not the subject of this application and the applicant stands agnostic towards it: The most apparent justification for such general duty would be that the fetus passed the point of viability – id est the relative proximity of the viable fetus to actually becoming a person in esse. The counter-argument would be that viability is essentially an arbitrary social construct and that there should be no general duty on bereaved parents to bury a still-born fetus as if the still-born fetus was a person in esse – especially because not all bereaved parents in Category A necessarily experience emotional loss because of the still-birth.

The right

[86] In the present context, the *duty* and the *right* to bury one's dead prospective child are completely severable.

[87] Equality demands that, given that our law gives bereaved parents in Category A the benefit of the right to bury the remains of their dead prospective child, bereaved parents in Category B should be afforded the same *right*. The expert evidence clearly shows the following:

- a. Some bereaved parents in Category B experience the emotional loss associated with pregnancy loss in the same way as (or even more intense than) bereaved parents in Category A in general; and
- b. Such bereaved parents in Category B would benefit in a similar way as (or even more than) bereaved parents in Category A in general from the experience of burying the remains of their prospective child.

[88] Accordingly, the decision by bereaved parents in Category B to elect to bury the remains of their dead prospective child is protected within the ambit of the right to equality.

Conclusion on the interpretation stage

[89] I conclude that in the case of pregnancy loss other than still-birth, 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.

Infringement

[90] The current legislative regime, consisting of BADRA and the Regulations in terms of NHA, is analysed in paragraphs [33]–[56] above.

[91] Subsection 20(1) of BADRA, read with section 1 (the definition of 'still-birth') and subsections 18(1)–18(3) of BADRA, prohibits the burial of a dead fetus in the event of pregnancy loss other than still-birth.

[92] The Regulations in terms of NHA fail to make provision for the burial of fetuses in general, or for fetuses other than still-born fetuses.

[93] Accordingly, the current legislative regime infringes on the right of a bereaved parent or parents in the event of pregnancy loss other than still-birth to elect to bury the dead fetus.

[94] Given that this right of a bereaved parent or parents falls within the protective ambit of the constitutional rights to dignity, privacy, and equality, it follows that the current legislative regime infringes on these constitutional rights.

No justification

[95] I am neither aware of, nor can I conceive of, any legitimate government purpose that can be served by the infringement.

Conclusion on the limitation stage

[96] The right of a bereaved parent or parents in the event of pregnancy loss other than still-birth to elect to bury the dead fetus is infringed by the current legislative regime, and there is no justification for such infringement.

[97] Accordingly, the current legislative regime is unconstitutional and invalid to the extent that it infringes on such right.

INTERACTION WITH THE RESPONDENTS

The first respondent

[98] On [date], a letter was emailed to the first respondent on behalf of the applicant. I attach hereto marked '**Smith5**' a copy of this letter.

[99] In the letter, the applicant's position relating to the the legislative change that is the subject of the present matter is set out in short, and the first respondent is requested to meet with the applicant.

[100] Receipt of the letter was confirmed on behalf of the first respondent. I attach hereto marked '**Smith6**' a copy of an email on behalf of the first respondent.

[101] However, up till date no substantive response to the letter or the applicant's request for a meeting has been received from the first respondent. In this regard, the Court is respectfully referred to the confirmatory affidavit of my attorney of record ('**Smith1**').

The second respondent

[102] A similar letter to the letter sent to the first respondent was also sent to the second respondent on [date]. I attach hereto marked '**Smith7**' a copy of the letter sent to the second respondent.

[103] Receipt of the letter was confirmed on behalf of the second respondent. I attach hereto marked '**Smith8**' a copy of an email on behalf of the second respondent.

[104] During the course of 2016, I was able to establish contact with Dr Terence Carter, who was until his retirement at the end of October 2016 the second respondent's Deputy Director-General: Hospitals, Tertiary Health Services and Human Resource Development.

[105] Dr Carter was in the process of drafting a new policy document to address – at least in part – the problems articulated in this affidavit. I attach hereto marked ‘Smith9’ the latest version of this draft policy document, entitled *Draft Policy On the Management of Births Under 26 Weeks of Gestation*. I refer to this document as the ‘Draft Policy’. I respectfully refer the Court to the content of the Draft Policy.

[106] The Draft Policy states that there is currently ‘no policy’ that guides the handling of fetal remains in the event of miscarriage.¹⁴ The Draft Policy acknowledges that expecting parents develop an emotional bond with the prospective child.¹⁵ In the light of our constitutional democracy, the Draft Policy states that in the event of miscarriage bereaved parents have *legal rights*¹⁶ regarding the disposal of a fetus, and that such parents should have the option to elect to have the fetal remains buried,¹⁷ rather than incinerated.

[107] The Draft Policy is a significant move in the right direction. However, the Draft Policy has three main shortcomings:

- a. The Draft Policy, being merely a policy document, does not change the statutory framework – neither BADRA, nor the Regulations are

¹⁴ Draft Policy [2.1].

¹⁵ Draft Policy [2.2].

¹⁶ Draft Policy [2.4].

¹⁷ Draft Policy [6.5.12].

changed. As such, although well-intentioned, the Draft Policy will not have the desired effect. This is a fatal shortcoming.

- b. The Draft Policy fails to deal with induced pregnancy loss, and only deals with miscarriage.

- c. The Draft Policy seeks to deal with miscarriage by providing that a so-called 'notification of death' can be issued in the case of miscarriage. This is problematic, as a 'notice of death' is already a technical legal term used in BADRA, and refers to either death certificate or a death declaration relating to a person who died. However, in the case of miscarriage, the fetus was never born, so there was no person who died. Using a technical legal term that operates as a collective noun for a death certificate and a death declaration can cause unnecessary confusion. I suggest that a new term such as 'miscarriage notice' would be more appropriate.

[108] On 12 October 2016 my legal representatives and I met with Dr Carter and Mr [surname] from the second respondent's legal division. My legal representatives highlighted the concerns above to Dr Carter and Mr [surname]. My impression was that these gentlemen genuinely wanted to assist, but that the fact of the existing statutory framework posed an obstacle that they did not perceive as within their

purview to attempt to change. Essentially they wanted to seek solutions that would be within their power to implement, such as the Draft Policy.

[109] Although the Draft Policy represents an important move in the right direction, it *cannot* amend the statutory framework to bring the statutory framework in line with the constitutional right of a bereaved parent or parents and is hence not a competent solution.

[110] Accordingly, the applicant is forced to approach the Court to ensure the effective enforcement of the constitutional rights of the bereaved parents.

REMEDY

Declaration of rights

[111] The applicant respectfully requests the Court to grant a declaration in terms of section 38 of the Constitution that, in the case of pregnancy loss other than still-birth, 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'.

Declaration of invalidity

[112] Concomitantly, the applicant respectfully requests the Court to declare subsection 20(1) of BADRA, and the definitions of 'corpse' and 'human remains' in regulation 1 of the Regulations in terms of NHA invalid insofar as it does not make provision for the Burial Right.

Referrals to correct the defects

[113] Given the extensive nature of the legislation involved, it would be appropriate, with respect, to refer BADRA to parliament for revision, and the Regulations in terms of NHA to the second respondent for revision.

Suspension of invalidity; interim relief

[114] While the relevant legislation is being revised to align it with the Burial Right, the applicant respectfully requests that the declaration of invalidity be suspended on condition that the following interim relief be granted:

[115] In the context of BADRA, the use of certificates or declarations of still-birth will be expanded to provide for the exercise of the Burial Right by the right-bearers of the

Burial Right. Essentially, the interim relief entails the creation upon request of bereaved parents of a legal fiction that loss of pregnancy other than stillbirth is 'still-birth' for purposes of BADRA.

[116] Although not an elegant solution, it offers a simple and effective way to provide for the Burial Right *in the interim*.

[117] Importantly, in order to ensure that the officials in the service of the first respondent's department who deal with the issuing of burial orders are aware of and cooperate with the interim relief, the first respondent should, with respect, be ordered to take all reasonable steps to communicate the interim relief to such officials.

[118] In the context of the Regulations in terms of NHA, the definitions of 'corpse' and 'human remains' will be read as including a dead human fetus, if a burial order was issued in respect of such a fetus in terms of section 18(3) of BADRA.

[119] Just as important as it is that the officials in the service of the first respondent's department who deal with the issuing of burial orders are aware of and cooperate with the interim relief, so important is it that the health care personnel who are involved in pre-natal care all over the country is aware of and cooperate with the interim relief. Accordingly, the applicant respectfully requests the Court to order

the second respondent to take all reasonable steps to communicate the interim relief to pre-natal care units in all public hospitals.

[120] Furthermore, the applicant also respectfully requests the Court to exercise supervisory jurisdiction by requiring the respondents to report on affidavit within 20 days on the steps taken by them to communicate the interim relief within their respective spheres. There are at least two reasons to request the Court for such a structural interdict:

- a. It will facilitate compliance with the interim relief.
- b. In the event that obstructiveness is experienced at grassroots-level, the information contained in the affidavits to be filed by the respondents can assist all interested parties and the Court to better understand any potential problems and to propose and/or decide on the most appropriate remedial action.

Timeframe for revision

[121] The applicant respectfully suggests that the Court should allow 12 months for the respective legislative authorities to revise the relevant legislative instruments to bring them in line with the Burial Right.

[122] Should the 12 months expire without the respective legislative authorities having amended the relevant legislative instruments to give effect to the Burial Right, the applicant respectfully suggests that the Court should open the door to any interested person to apply to this Court or any other division of the High Court for any appropriate further relief.

CONCLUSION

[123] The applicant is not requesting a cost order against the respondents, except if a respondent decides to oppose this application.

[124] I respectfully request the Court to grant the relief set out in the notice of motion to which this founding affidavit is attached.

DEPONENT

Thus signed and sworn at _____ on this ____ day of December 2016
by the deponent who has declared that she has read this affidavit, understands the
contents thereof and has no objection to the taking of the prescribed oath, and
regards same as binding on her conscience.

COMMISSIONER OF OATHS

Ex officio:

Full names:

Address: