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 Applicant

and

MINISTER OF HOME AFFAIRS First respondent

MINISTER OF HEALTH Second respondent

REPLYING AFFIDAVIT

TABLE OF CONTENTS

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.

POINT IN LIMINE

[5] The respondents filed their answering affidavit about six months late.

[6] Yet, the respondents failed to request the court to condone their late filing. Also, the respondents failed to provide the court with any explanation for being six months late.

[7] Accordingly, the applicant respectfully requests the court not to allow the filing of the answering affidavit absent a condonation application that is supported by good reasons.

[8] The respondents are not above the law.

[9] The applicant further respectfully requests the court to show the court's dissatisfaction with the six-month delay caused by the respondents – with no reasons offered – by granting a special cost order against the respondents.

[10] *In the alternative*, in the event that the court decides to condone the late filing of the answering affidavit by the respondents, the applicant's reply is contained in the following paragraphs.

THE MAIN ARGUMENTS

The applicant's position

[11] The applicant's position, to briefly summarise, is that pregnancy loss can have drastic psychological effects on parents, and that in order to better deal with such drastic psychological effects, parents should have the right to elect to bury the fetal remains in the event of miscarriage and induced pregnancy loss. This burial right is based on the bereaved parents' constitutional rights to dignity, privacy, and equality. It follows that the impugned legislation, which denies the burial right, infringes on the constitutional rights of bereaved parents and is therefore unconstitutional.

[12] The respondents have employed four main arguments that I briefly analyse in the following paragraphs:

Respondents' main argument 1: Fixation on viability

[13] The respondents' first main argument is that burial is inextricably connected to viability, and that absent a challenge to the gestational age of viability, the present application cannot succeed. The respondents repeat this argument like a mantra throughout the answering affidavit. However, the argument is false.

[14] Viability in an important milestone in the intra-uterine development of the fetus. However, this does not explain why viability should be the criterion for burial of a fetus. The respondents fail to suggest any reason for the inextricable connection that they contend exists between fetal viability and fetal burial. I state that there is no fundamental reason in law why fetal viability should be the criterion for burial of a fetus.

[15] The fact that extant legislation uses fetal viability as the criterion for fetal burial in the event of spontaneous pregnancy loss in no way provides such a reason: First, the extant legislation is the subject of a constitutional challenge in the present application and can therefore not be used to justify itself. Second, the fact that extant legislation uses a certain criterion does not imply that there is necessarily a good, rational reason for using this criterion – it could have simply been political expediency.

[16] The applicant's position is that fetal burial is justified by the important value that burial has for the bereaved parents. Accordingly, the applicant's position refocuses the lens of legal concern on the persons in esse who can benefit psychologically from the burial. This refocusing of legal concern to actual living persons is aligned with our constitutional values of dignity, openness, and ubuntu.

[17] The respondents' preoccupation with viability misses the point of the applicant's position. The respondents appear to be mentally imprisoned in a paradigm that narrowly focuses on the fetus itself, and excludes the broader consideration of the well-being of the parents. The values of our new constitutional dispensation requires that we must break out of this mental prison.

[18] Accordingly, the fixation with viability should be rejected in favour of an approach that take due cognisance of the constitutional rights of the parents.

Respondents' main argument 2: The false dichotomy

[19] The respondents' second main argument is that the issue of fetal burial – and more specifically the applicant's position – is a matter of emotions and morality, and not a matter of law that should be adjudicated by a court of law.

[20] Essentially, the respondents construct a dichotomy: According to the respondents, the issue of fetal burial is either a moral/emotional issue, or it is a legal issue; it cannot be both.

[21] First, the issue of fetal burial is not only an emotional and moral issue, but very clearly also a legal issue, given that the *law* – the impugned legislation – bans fetal burial after miscarriage and induced pregnancy loss.

[22] Second, regarding the applicant's position in particular, the fact that the applicant's human rights analysis is informed by psychological facts about bereaved parents' *emotions*, in no way detracts from the *legal* nature of the applicant's position. Clearly, the applicant's position raises legal issues, and not only emotional and moral issues.

[23] Accordingly, the dichotomy is false. The issue of fetal burial can be a moral/emotional issue *and* a legal issue.

Respondents' main argument 3: Second-best alternatives

[24] The respondents' third main argument is that there are alternatives to fetal burial, like a ceremony without the body of the dead fetus, and grief counselling, that will also assist bereaved parents in dealing with the grief that they experience. As such, the respondents argue that fetal burial is not necessary to enable bereaved parents to deal with the grief that they experience.

[25] This argument misses the point. The point is that the impugned legislation is unconstitutional because it bans an important way in which bereaved parents can deal with their grief – fetal burial – and *not* because it bans the *only* way for bereaved parents to deal with their grief.

[26] It is a principle in our constitutional jurisprudence that the law cannot compel a person to follow alternative avenues when an impugned provision is unconstitutional; the fact that there are alternatives does not take away the unconstitutionality of an impugned provision.

[27] Furthermore, in the present case, the alternatives suggested by the respondents are clearly second-best alternatives:

a. Counselling without a burial would be bereft of an important clinical technique – the burial – to manage the bereaved parents' mental health.

b. Ceremony without the physical presence of the dead body would lose much of its therapeutic value. Both Dr Olivier and Rev Klopper make it clear that the physical presence of the dead body is important to the ceremony. For instance, with reference to traditional Black South African culture, Dr Olivier states as follows:[1]

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

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1 Olivier expert opinion pp4–5.

> It is thus according to the African rituals and belief in mourning of the utmost importance to have a body (or part of a body in the case of a foetus) to bury and to be part of the ritual.

[28] The fact that there are (second-best) alternatives to the burial right is no reason to deny the burial right.

Respondents' main argument 4: The unknown legitimate government purpose

[29] The respondents aver that the impugned legislation serves a legitimate government purpose. However, the respondents fail to state what this purported legitimate government purpose is. The respondents only restate the content of the impugned legislation, and fail to identify any purpose served by the impugned legislation.

[30] The respondents' failure to propose a legitimate government purpose confirms that there is *no* legitimate government purpose that is served by the impugned legislation.

[31] Accordingly, there is no basis to limit the rights of bereaved parents.

Conclusion

[32] All four the main arguments employed by the respondents fall to be rejected.

SERIATIM REPLY TO THE ANSWERING AFFIDAVIT

[33] I do not intend to deal with each and every averment made by the respondents. Insofar as I do not specifically deal with any particular averment, I request the court to read such averment as denied unless it accords with the facts set out in the applicant's founding affidavit.

Ad paragraphs 1–6

[34] The content of these paragraphs is noted.

[35] The confirmatory affidavit that the respondents in paragraph 1 aver is attached to the answering affidavit is not attached.

Ad paragraph 6

[36] For the reasons stated herein, I deny that all the statements made in the answering affidavit are true and correct.

[37] Also, the deponent does not have personal knowledge of crucial aspects of the answering affidavit, such as the extent to which 'internal processes' were followed by the officials of the second respondent who developed the Draft Policy.

Ad paragraphs 7–9

[38] The content of these paragraphs is noted.

[39] The position that the second respondent has adopted in the answering affidavit (denying the burial right) is a complete reversal of its position previously communicated to the applicant, and recorded in the Draft Policy.

[40] The second respondent fails to offer the court any explanation of this complete reversal of its position.

[41] This unexplained reversal of its position by the second respondent is indicative of bad faith.

Ad paragraph 10

[42] The concept 'viability' is both a medical and a legal concept. For legal purposes, 'viability' is implicitly – not explicitly – defined in BADRA. The rest of the content of this paragraph is admitted.

Ad paragraph 11

[43] The content of this paragraph is denied.

[44] In this paragraph, the respondents introduce their first main argument – the fixation on viability.

[45] Whether a dead foetus is legally held to have been able to survive outside the womb or not has *no effect* on the psychological impact of pregnancy loss on the *parents*.

[46] The applicant's position is *not* that a dead fetus is worthy of burial because of some inherent attribute such as viability. The applicant's position is based on factors extrinsic to the fetus, for instance the grief experienced by the bereaved parents and the way in which burial of the fetus can help the bereaved parents in the process of grief.

[47] The respondents' averment that viability gives meaning to the concept of human life is specifically denied. In our legal system, it is well established that human life in the sense of legal personhood starts at *live birth*, not viability, and not at any other point in the process of human procreation. Human life in other non-legal, moral, religious, and/or biological senses may start at other points in the process of human procreation. However, the inquiry about the start of human life is not relevant for present purposes. The applicant's position rests *not* on any inherent attribute of the fetus, but on the *extrinsic meaning* that specific fetuses have for their parents.

[48] The respondents make a vague reference to a legitimate government purpose, but fails to explain what exactly the purported legitimate government purpose is. There is *no* legitimate government purpose that is served by the impugned legislation.

Ad paragraph 12

[49] The content of this paragraph is admitted.

Ad paragraph 13

[50] It is disingenuous and incorrect of the respondents to portray as 'concessions' the fact that the applicant states that the fetus does not have rights.

[51] The fact that the applicant states that the fetus does not have rights can only be perceived as a 'concession' from within the mental prison that narrowly focuses on the fetus itself. Our constitutional dispensation requires that the law frees itself from this mental prison, and refocuses on the well-being of parents as persons in esse.

[52] The applicant's position rests purely on the constitutional rights of *parents*, who are persons in law. The fact that these rights relate to dead fetuses as objects, does not imply that dead fetuses (or alive fetuses) have or should have any rights.

[53] Legal subjects have various kinds of *rights* in legal objects. However, this does not mean that the objects of such rights have or should have any rights. To explain by way of example: A person (subject) who owns a car (object) has the right to repaint the car. This does not imply that the car (object) has the right to be repainted or any other right. Similarly, the right of bereaved parents to bury a dead fetus does not imply that the dead fetus has any rights.

[54] With reference to the example above, to make the statement that a car does not have the right to be repainted, is in no way a concession from the perspective of the owner who has the right to repaint the car. Similarly, to make the statement that the fetus does not have rights in our law, is in no way a concession from the perspective of bereaved parents.

Ad paragraph 14

[55] In this paragraph, the respondents introduce their false dichotomy argument, namely that the applicant's position is merely a matter of emotions and morality, and not a matter of law that should be adjudicated by a court of law. This argument is false and is denied.

[56] Tellingly, the respondents compare the current matter to the issues of euthanasia and the death penalty. It should be noted, with respect, that with both of these issues – euthanasia and the death penalty – the issues were indeed dealt with by the courts. These issues might be emotive and might evoke strong moral stances, but they also have a clear human rights dimension that places them squarely within the jurisdiction of the court to adjudicate. The same applies to the present matter.

Ad paragraph 15

[57] The content of this paragraph is denied.

[58] In this paragraph the respondents revert to fixating on viability. The respondents are wilfully ignoring the applicant's actual position, namely that the burial right is based on the bereaved parents' constitutional rights to dignity, privacy,

and equality; and that the impugned legislation infringes on these constitutional rights of bereaved parents.

Ad paragraph 16, regarding terminology

[59] The term 'bereaved parent' is used for convenience. It is difficult to understand why the respondents have taken issue with the applicant's use of this term. The term 'bereaved parent' clearly denotes a person that would have had parental rights and responsibilities towards a prospective child, had the prospective child not been lost during a pregnancy.

[60] In our law in general, the term 'parent' is not only used with relation to children as persons in esse, but also with relation to prospective children. For instance, the Children's Act refers to the commissioning *parent* of a surrogacy child, even before the prospective child's conception. Accordingly, the applicant's use of the term 'parent' is aligned with current legal practice.

[61] Throughout the applicant's affidavits, care is taken to differentiate between a *prospective* child and a child *in esse*. The fetus, as the embodiment of the prospective child is a unique type of legal object that enjoys certain legal protections depending on its stage of development, while the child in esse is a legal subject. This is at a fundamental level the established position in our law.

[62] However, it would be a denial of reality and counterproductive to argue that because the law only recognises legal personhood at live birth, parents should only start to love a prospective child once the baby has been born (or once the fetus becomes viable).

[63] The reality is that many parents during a pregnancy already form an emotional bond with their prospective child, and accordingly perceive of their prospective child as their 'child' or 'baby'. It follows that in the event that the pregnancy is lost, many parents experience emotional trauma – this appears to be common cause.[2]

[64] The appropriate way to deal with this reality is to acknowledge that many parents – who are persons with constitutional rights – have the right to choose to bury the fetal remains in the event of miscarriage or induced pregnancy loss. In this way, the law will acknowledge that the prospective child, as embodied in the fetus, had *meaning* for the bereaved parents. This will not imply that the fetus itself had legal subjectivity.

[65] In this context it is important to note that a stillborn fetus is also not a legal subject and never was – still, it must be buried. Accordingly, burying a dead fetus cannot imply that the fetus itself had legal subjectivity.

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2 Answering affidavit [24].

Ad paragraph 16, regarding the purported rational basis

[66] The respondents aver that viability is a rational basis to differentiate between fetuses with regard to whether they must or must not be buried. To the extent that viability is used to exclude some parents who suffer pregnancy loss from having a burial, it is denied that viability can be a rational basis. The reason is simple: Parents do not suddenly at the point of viability become emotionally attached to their prospective child. Especially nowadays with 4D ultrasound technology, parents can literally *see* the fetus in the womb long before viability, and often become emotionally attached to their prospective child before viability. This appears to be common cause.[3] A burial for the prospective child is instrumental in helping the bereaved parents deal with their grief.

[67] From a legal perspective, a burial does not imply that the body that is being buried used to embody a legal subject. The burial of stillborn fetuses has already set that precedent.

Ad paragraph 17

[68] In this paragraph, the respondents revert to their false dichotomy argument.

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3 Answering affidavit [84.2].

[69] The respondents self-servingly misrepresent the applicant's position, by alleging that the applicant's position is that *most* parents are emotionally attached to their prospective children *from conception* of pregnancy. The applicant's position is that *many* parents become emotionally attached to their prospective children at some stage before birth, which does not necessarily mean *from conception*. In fact, it is common knowledge that women typically only find out that they are pregnant several weeks after conception. As such, the respondents' misrepresentation of the applicant's position is calculated to make the applicant's position seem extreme and unrealistic.

[70] Next, after attempting to make the applicant's position seem extreme, the respondents attempt to attack the burial right by using an extreme hypothetical example of a two-week old embryo. All legal rules, such as the burial right, should be refined for extreme cases – hence the reason why the applicant requests the court to refer this matter to parliament, which is best suited to develop new detailed legislation to provide for various extreme cases *within the framework of recognition of the burial right*.

[71] Furthermore, the respondents introduce a subspecies of their false dichotomy argument: The respondents aver that the applicant's position is based on *emotional attachment*, which does not give rise to any legal rights.

[72] There are many types of emotional attachment in life. While any type of emotional attachment does not automatically give rise to a legal right, the type of emotional attachment in the present case *does* give rise to legal rights, because it is unique in the following respects:

a. The emotional attachment by a parent to a prospective child is *reasonable*. As is evident from the expert opinions before the court, many parents form such an emotional attachment to their prospective children.

b. The emotional attachment by a parent to a prospective child is *valuable*. From a public policy perspective, parents are expected to care for their children. The emotional attachment by a parent to a child is foundation to this expectation. It is unrealistic to think that an emotional attachment by a parent to a child should only commences at birth.

c. The emotional attachment by a parent to a prospective child relates to *one of life's most important and intimate aspects,* namely to bring new life into this world and to build a family.

[73] Accordingly, it is appropriate that the emotional attachment by a parent to a prospective child should inform the application of human rights in the present matter, and to give rise to the burial right.

[74] The relevant scientific justification was placed before the court in the expert opinions filed by the applicant.

[75] Given all the above, I deny the averment by the respondents that the applicant did not provide legal and scientific justification for its position.

Ad paragraph 18

[76] The content of this paragraph is denied.

[77] The respondents fixate on viability, while wilfully ignoring the applicant's actual case.

Ad paragraph 19

[78] First, regarding Dr Danie Botha's expert opinion: Any person with normal faculties can observe an emotion such as excitement or sadness in others. Also, any person with normal faculties can observe words such as 'baby' and how frequently

such a word is utilised by others. One does not need to be a psychologist to make such observations. This is exactly what Dr Botha has done. The relevance of his opinion is his vantage point as a gynaecologist and obstetrician who has been in practice since 2001. As such, he has interacted with parents who are expecting a baby on a daily basis for about 17 years. This places him in a unique position to have observed expecting parents' typical statements and emotions. Moreover, Dr Botha also refers to the findings of journal articles to show that his observations in his practice are aligned with observations generally. I respectfully state that the court can receive significant insights from Dr Botha's observations. Accordingly, Dr Botha's expert opinion should be admitted into evidence.

[79] Second, the applicant relies on three expert opinions, not only one. It is conspicuous that the respondents are silent on the expert opinions filed by Dr Louise Olivier, a psychologist, and Rev Braam Klopper, a pastoral therapist. These expert opinions deal with the grief that is often experienced by bereaved parents not only in the event of stillbirth, but also in the event of miscarriage and induced pregnancy loss. These expert opinions emphasise the importance of burial as instrumental to the bereaved parents' overcoming of grief. Again, I respectfully state that the court can receive significant insights from these expert opinions.

Ad paragraph 20

[80] The content of this paragraph is denied.

[81] The relevance of the emotional attachment by a parent to a prospective child has been analysed in paragraphs [72]–[73] above. This emotional attachment gives rise to an interest that falls within the protective ambits of constitutional rights. Accordingly, the observations by Dr Botha from his 17 years' of practice as a gynaecologist and obstetrician are indeed relevant to this case.

Ad paragraph 21

[82] Apart from the statement that section 36 of the Constitution provides that rights can be limited by a law of general application, the content of this paragraph is denied.

[83] The respondents make references to a 'purpose' of the limitation, but does not specify what such 'purpose' is. As such, the second sentence of this paragraph is meaningless and irrelevant.

Ad paragraph 22

[84] The content of this paragraph is admitted.

Ad paragraph 23, regarding burial according to the law

[85] In the first two sentences of this paragraph, the respondents assume that the burial right will entail that dead fetuses will be physically given to the bereaved parents to bury. This assumption is not necessarily correct.

[86] In the event of stillbirth, the dead fetus would typically be collected by a funeral undertaker directly from the hospital where the stillbirth happened. There is no reason why the same should not apply in the event of miscarriage or induced pregnancy loss.

[87] Accordingly, the fear expressed by the respondent, namely that the government has no way of ensuring that bereaved parents actually bury the dead fetus according to the law, is misplaced and amounts to scaremongering.

[88] The relief sought will allow Parliament full opportunity to legislate on how to give effect to the burial right.

[89] Lastly, the fear expressed by the respondent is just as applicable under extant law where the burial right is denied, as it will be in the event that the burial right is recognised. Consider the following hypothetical example, which is commonplace in our country: A woman living on a farm in a rural part of South Africa miscarries at home after a pregnancy of five months (±20 weeks). She and her family decides to hold their own ceremony and bury the fetus under a tree on their farm. This tree will then serve as a memorial to the life that was hoped for, but lost before it even came into existence. Clearly, the family in this hypothetical example is contravening the extant law, as they should have dealt with the dead fetus (±25cm from head to heel) as medical waste, and not bury it.

[90] The relief sought will allow Parliament to consider circumstances in rural and urban areas, and the diversity of cultural customs, when developing detailed legislation on how to give effect to the burial right.

Ad paragraph 23, regarding burial without the dead fetus's body

[91] In the last sentence of this paragraph, the respondents introduce the second-best alternatives argument. The respondents propose that bereaved parents can still conduct a ceremony without the burial right – in other words, a funeral ceremony without the actual dead body; and that bereaved parents can receive government support in the form of counselling.

[92] I respectfully refer the court to paragraphs [24]–[28] above where I deal in detail with the second-best alternatives argument. The fact that there are (second-best) alternatives to the burial right is no reason to deny the burial right.

Ad paragraph 24

[93] The content of this paragraph is admitted.

[94] This paragraph constitutes an important concession by the respondents.

Ad paragraphs 25–26

[95] The content of these paragraphs is denied.

[96] In these paragraphs, the respondents revert to the second-best alternatives argument. I respectfully refer the court to paragraphs [24]–[28] above where I deal in detail with the second-best alternatives argument.

[97] The burial right will be an important clinical technique through which to manage the bereaved parents' mental health. The reasons are stated in the applicant's founding affidavit and the expert opinions of Dr Olivier and Rev Klopper respectively.

[98] The respondents made no averment to the effect that the deponent of the respondents' answering affidavit is qualified to express opinions about psychology or pastoral therapy. Accordingly, the statements made in these paragraphs about the role of the burial right – or any aspect related thereto – to 'ameliorate' bereaved parents' emotional trauma are irrelevant and inadmissible. I respectfully request the court to strike out these paragraphs.

Ad paragraph 27

[99] The first sentence of this paragraph appears to state that the burial right will 'infringe' on the right to bury stillborn fetuses. No further explanation is offered. I deny that the burial right will 'infringe' on any other right.

[100] Many elections in our law carries with it financial consequences. The fact that some persons cannot afford the financial consequence of making a certain election does not mean that no persons should have the right to make the election. The proper role of government is not to prohibit the election, but, where appropriate, to assist those who cannot afford its consequences. Accordingly, the averment that the burial right would amount to discrimination is incorrect and is denied.

Ad paragraph 28

My personal involvement

[101] The respondents take issue with the fact that, apart from my involvement in the applicant, I am in my personal capacity the founder and managing director of *Sonja Smith Funeral Group (Pty) Ltd*, which means that I have in my personal capacity an indirect financial interest in the outcome of this litigation. My interests are declared to the relevant boards, and are in fact clear for all to see. Contrary to the respondents' innuendo, there is nothing untoward about my positions on the board of directors of the applicant and my own funeral company.

[102] Furthermore, I deny the cynical averment by the respondents that my motivation for establishing the applicant was 'purely for economic interest and to advance a commercial gain'. On the contrary, my motivation was of a personal nature:

a. My first encounter with the unfortunate effects of the impugned legislation started one evening in 2004, when I was called to a hospital to fetch triplets, all three born dead. Although the gestational age of the triplets was only an estimated 20 weeks, the bereaved parents desperately wanted a burial for the triplets. Out of sympathy with the

bereaved parents, the attending medical practitioner agreed to sign a stillbirth certificate, in order for the bereaved parents to have a burial. However, when I arrived at the hospital, the triplets were missing. The hospital staff informed me that the triplets were already removed by a medical waste truck to the incineration plant. The unit manager at the hospital drove to the incineration plant and found the triplets between amputated limbs, organs, blood and other medical waste. Eventually, the triplets were buried, and the bereaved parents can still live the knowledge that their 'babies' were laid to rest in a manner that respects the fact that the triplets had meaning to them as bereaved parents.

b. In 2011, my own daughter suffered a miscarriage. Given the extant law, she could not bury her 'baby' to properly say goodbye. I felt like screaming: 'Somebody should do something about this.' And then I realised that I was that somebody. In 2012, I raised a parliamentary questionnaire about this issue. In the subsequent years, I gave several presentations on the issue at relevant meetings. In 2015, I decided to form *Voice of the Unborn Baby NPC*, the applicant.

[103] The applicant currently has over 2 000 signed-up members, and more than 4 000 'likes' on our Facebook page.

[104] The averment by the respondents that my personal (indirect and negligibly small) financial interest in the outcome of this litigation is 'not permissible' in the context of Section 38 of the Constitutional is incorrect and is denied.

[105] Constitutional litigation should be decided on its merits. There should be no place in this litigation for personal attacks.

The applicant's locus standi

[106] The respondents' attack on the applicant's locus standi is without any substance.

[107] As stated in the applicant's founding affidavit, 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. In the following paragraphs, I elaborate on the applicant's locus standi:

[108] The very objective of the applicant is to drive legislative change to allow for the burial right. This is the raison d'être of the applicant. Accordingly, the applicant has a direct and material interest in the present matter (that the applicant brought to court), and accordingly has locus standi in terms of section 38(a) of the Constitution.

[109] Furthermore, the public at large has an interest in this present matter, as parenthood is part of the life plans of most people, and loss of pregnancy is something that can affect any expecting parent – and can have a devastating psychological effect. Given that fetal burial can play an important role in overcoming such loss, the public at large has an interest in the burial right, and hence in the present litigation. A non-profit company that aims to promote the burial right is accordingly well suited to drive the present litigation in the public interest.

[110] The applicant has presented extensive expert evidence to the court – by a medical practitioner (gynaecologist and obstetrician), a clinical psychologist, and a pastoral therapist – all with significant experience in their fields and with working with pregnancy loss. The expert evidence covers both spontaneous loss of pregnancy (stillbirth and miscarriage) and induced pregnancy loss.

[111] Adding to this, the nature of the relief sought by the applicant is of a general and prospective nature that will benefit all parents in our country who suffer pregnancy loss.

[112] Accordingly, besides from acting in its own interest, the applicant also has locus standi to act in the public interest in the present matter, as provided for in section 38(d) of the Constitution.

Ad paragraph 30

[113] It is worth highlighting that the respondents note and *do not deny* that 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.

Ad paragraph 32

[114] The emotional consequences of pregnancy loss give content to the current legal challenge. It is unrealistic and incorrect to divorce the psychological reality of emotional trauma from legal principles, as the one informs the other.

[115] I respectfully refer the court to the analysis of the false dichotomy argument in paragraphs [19]–[23] above.

[116] The fact that the fetus does not have any rights is well-established in our law, it cannot be constructed as a 'concession'. It would only be a concession from the paradigm of narrowly focusing on the fetus, rather than on the parents. This paradigm is misleading and incorrect.

Ad paragraph 33

[117] The relevant definition in BADRA reads as follows:

> 'burial' means burial in earth or the cremation or any other mode of disposal of a corpse;

[118] Accordingly, the respondents' contention that 'burial' can include a ceremony without a physical body is incorrect and is denied.

Ad paragraph 35

[119] In these paragraphs, the respondents revert to the second-best alternatives argument. I respectfully refer the court to paragraphs [24]–[28] above where I deal in detail with the second-best alternatives argument.

Ad paragraph 40.1

[120] The respondents' preoccupation with viability avoids the real issue, namely that bereaved parents experience grief irrespective of viability, and that burial is about helping the bereaved parents.

[121] The content of this paragraph is denied.

Ad paragraph 40.2

[122] In this paragraph, the respondents fall back on their second-best alternatives argument.

[123] The content of this paragraph is denied.

[124] Conspicuously, the respondents completely fail to inform the court of the nature, scope, availability, and – most importantly – impact of the support that government purportedly provides. Without such information, such purported government support is a mirage in a desert.

[125] The respondents only make a vague statement that the *applicant* should have investigated these purported government support. This is far-fetched and is denied. If the respondents wish to show that there is in fact relevant government support provided to bereaved parents, the onus falls squarely on the respondents to place such information before the court. The respondents – after taking six months – failed to do so.

[126] Instead of assisting the court – as is the respondents' constitutional duty – the respondents launch into vague and fallacious arguments against the applicant and fail to provide the court with any facts that can help the court adjudicate this matter.

[127] No amount of counselling – even if offered by government in abundance, which is denied – would be a proper substitute for the right to bury: If bereaved parents view the dead fetus as the embodiment of a hoped-for child and desire to bury such dead fetus in a manner that they deem fit in their culture or personal belief system, the denial of such a burial and the knowledge that the dead fetus was unceremoniously incinerated with medical waste, is an insult to the bereaved parents which no amount of counselling will remedy. Moreover, it is a violation of the parents' dignity, a violation of their privacy, and a violation of their equality that call for the immediate invalidation of the impugned legislation.

Ad paragraph 41

[128] Viability as a *medical* concept changes as technology improves, and depends on various variables, such as access to the required resources to provide active lifesaving treatment to a premature baby.

[129] Viability as a *legal* concept is implicitly defined in BADRA, but can be changed by parliament at any future time to more accurately reflect medical reality. In some countries, viability is already legally determined at 22 weeks.

Ad paragraph 42

[130] In this paragraph, the respondents beat the drum of their false dichotomy argument. This argument is false. An issue can both be a matter of morality *and* a matter law.

[131] The respondents aver that the court cannot 'prescribe' to society on the matter of fetal burial. Yet, the respondents wish to preserve the impugned legislation, which does exactly that: Prescribe to society on the matter of fetal burial. As such, the respondents' position is deeply ironic and self-destructive.

[132] This challenge to the constitutionality of the impugned legislation is a matter of human rights, and falls squarely within the jurisdiction of the court. In fact, the court has a *constitutional duty* to remedy the violation of constitutional rights by the impugned legislation.

Ad paragraph 43

[133] In this paragraph, the respondents simply offer a bare denial of the applicant's interpretation of the extant law, namely that in the event of induced pregnancy loss, the fetal remains – irrespective of viability – are legally regarded as medical waste and cannot legally be buried.

[134] However, the respondents fail to provide any reasons to explain their denial of the applicant's interpretation of the extant law.

[135] Again, given that this is a constitutional challenge, the respondents have a duty to assist the court. The respondents' bare denial does nothing to assist the court.

Ad paragraph 44

[136] The content of this paragraph is denied.

[137] What the applicant refers to in the relevant paragraph of the founding affidavit is the position of bereaved parents relating whether they can legally bury the fetal remains. *As a matter of law*, this position is similar in the case of miscarriage and induced pregnancy loss, namely the bereaved parents has no choice and the fetal remains are dealt with as medical waste. Accordingly, no 'study' is needed as averred by the respondents.

Ad paragraph 45

[138] It is common cause that different bereaved parents will react differently to pregnancy loss irrespective of the cause of that loss.[4]

[139] It is also common cause that there cannot be any generalisations that all bereaved parents will react in certain ways.[5]

[140] However, the respondents deny that the state of mind of bereaved parents matters for legal purposes. The respondents' position is incorrect, and is denied.

[141] The respondents' fixation on viability brings them nowhere.

[142] I state the exact opposite: What matters for legal purposes *is* the state of mind of bereaved parents. We live in a constitutional dispensation, where people have human rights, not in an autocratic state.

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4 Answering affidavit [24], [84.1], and [84.3].

5 Answering affidavit [84.1].

Ad paragraph 46

[143] Again, the respondents are focusing on the margins of possible real life scenarios. The applicant does not need to have answers for every possible situation, as the *legislature* will develop new legislation that gives effect to the burial right, with relevant and reasonable checks and balances.

[144] To reply to the specific marginal scenario sketched by the respondents: I deny that burying an embryo would necessarily be 'absurd and legally untenable', as proposed by the respondents. This may be new and previously unheard of, but there is no reason to be condescending and describe it as 'absurd and legally untenable'. Same-sex marriage was also new and previously unheard of a generation ago, and must have surely seemed 'absurd and legally untenable' to many people. However, in our constitutional dispensation, the courts have a constitutional duty to continuously develop the law to make it ever more aligned with the constitutional values.

Ad paragraph 47

[145] The content of this paragraph is denied.

[146] Bereaved parents in the event of miscarriage or induced pregnancy loss clearly have an interest in electing whether to bury the fetal remains or not.

[147] The respondents do not provide reasons why they aver that bereaved parents do not have such an interest.

Ad paragraph 48

[148] The impugned legislation violates three constitutional rights of these bereaved parents:

a. *Dignity*. Loss of pregnancy can be a weighty life event, with drastic psychological consequences. If our society values individuals as autonomous moral agents, we should value the autonomy of parents who suffer pregnancy loss in the form of miscarriage or termination of pregnancy to decide for themselves whether they want to bury the fetal remains to better deal with the psychological consequences of loss of pregnancy. By denying them this choice, and insisting that the dead fetus must be disposed of as medical waste, without the choice of a burial, the impugned legislation violates their dignity.

b. *Privacy*. Pregnancy loss falls within the private, personal sphere, as it relates to the mother's body, and to the parents' intimate family life. The state should not intrude in this sphere. The decision whether to bury the fetal remains is a highly personal decision that should be left

to the bereaved parents. By prescribing to bereaved parents that the dead fetus must be disposed of as medical waste, without the choice of a burial, the impugned legislation violates their privacy.

c. *Equality*. Consider the following hypothetical example: Alice falls pregnant, followed by her sister Beauty two weeks later. Alice and Beauty and their respective partners gradually become emotionally attached their expected 'babies'. Unfortunately, Alice and Beauty are in a car accident and both suffer spontaneous pregnancy loss on the same day – Alice at 25 weeks of gestation, Beauty at 27 weeks of gestation. Both Alice and Beauty and their respective partners suffer from the same grief, and would benefit psychologically from having a burial if they so choose. However, while Beauty's 'baby' must be buried, Alice and her partner are legally prohibited from burying their 'baby', and must live with the knowledge that their 'baby' was incinerated as medical waste. Clearly, the impugned legislation violates Alice and her partner's right to equality.

Ad paragraph 50

[149] In this paragraph the respondents appear to propose a purpose for the impugned legislation. The purported purpose reads as follows:

to confine burial to human remains, corpse and still born, which is determined by viability.

[150] However, on closer inspection, this is simply a restatement or summary of the impugned legislation: Confining burial to human remains, corpse and still-born, as determined by viability is in brief exactly what the impugned legislation provides for. Accordingly, the purported purpose proposed by the respondents is no purpose at all, but simply a restatement of the impugned legislation.

[151] Section 36 of the Constitution requires a legitimate government purpose, not a mere restatement of the impugned legislation.

[152] What is the legitimate government purpose served by confining burial to human remains, corpse and still-born, as determined by viability? This is the question that section 36 of the Constitution requires the respondents to answer. The respondents failed to answer this question.

Ad paragraphs 51–52

[153] Instead of engaging with the merits of the relief sought by the applicant, the respondents prejudge the outcome of the case in their favour, and assume that there will be no relief. Apart from exposing hubris, this attitude by the respondents is also profoundly unhelpful to the court in assessing the relief sought. This hubris by the

respondents contributes to the already-established theme of the respondents failing in their constitutional duty to assist the court.

Ad paragraph 53

[154] I deny that the contents of paragraph 32 of the applicant's founding affidavit is 'hypothetical and speculative', as averred by the respondents. It is a *fact* 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.

[155] Moreover, in paragraph 24 of the respondents' answering affidavit, the respondents concede as follows:

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

Ad paragraph 58

[156] The applicant's position is based *not* on any intrinsic attributes of the fetus, but on the extrinsic attribute that the fetus is the embodiment of their prospective child in the eyes of many expecting parents, and as such has meaning for many expecting parents. These expecting parents value the fetus regardless of the fact that the fetus is not the bearer of rights, and irrespective of whether the fetus is viable or not.

[157] The respondents' preoccupation with the fetus's legal status misses the point of the applicant's position.

Ad paragraphs 61–62

[158] The only way in which a fetus can be buried in terms of extant law is by qualifying as a stillbirth in terms of BADRA. The applicant in its founding affidavit concludes that a late-term (post-26 weeks of gestation) fetus that has been aborted would *not* qualify as a stillbirth in terms of BADRA, and would therefore be dealt with as medical waste. However, the respondents deny this conclusion. Does this mean that the respondents' position is that an aborted late-term fetus qualifies as a stillbirth in terms of BADRA, and can therefore be buried? Either an aborted late-

term fetus qualifies as a stillbirth, or it does not. As such, it appears that the question can only be answered in the affirmative.

[159] If this is indeed the respondents' position, it means that fetal remains in the event of late-term abortions must be buried in terms of BADRA. However, the respondents only offer cryptic denials, which is unhelpful in ascertaining their reasons or actual position.

[160] More likely – given the cryptic, blanket denials – is that the respondents have carelessly denied the statements in the applicant's founding affidavit.

Ad paragraph 76

[161] The Regulations in terms of the NHA do govern various aspects of burials. This is evident from the provisions of the Regulations. Accordingly, the Regulations are relevant to the present matter.

[162] From the definitions of the Regulations, it is further evident that the Regulations fail to make provision for the burial of fetuses. This is a legal fact, and is easily ascertainable from the Regulations.

[163] Accordingly, the respondents' averment that the failure of the Regulations to make provision for the burial of fetuses is 'absurd' is incorrect and is denied.

Ad paragraph 77

[164] The content of this paragraph is denied.

[165] The violation of bereaved parents' dignity, the violation of bereaved parents' privacy, and the violation of bereaved parents' equality are certainly not 'abstract' considerations as averred by the respondents. These are very concrete, legal considerations.

Ad paragraph 80

[166] In this paragraph, the respondents again appear to assume that the burial right will entail that dead fetuses will be physically given to the bereaved parents to bury. This assumption is not necessarily correct. I respectfully refer the court to paragraphs [85]–[90] above.

Ad paragraph 82

[167] Viability is not at issue. The respondents are persisting with their fixation on viability, which completely misses the point of the applicant's position. The respondents' fixation on viability serves as a tactic to avoid the applicant's actual position.

Ad paragraph 83

[168] The expert opinions of Dr Botha, Dr Olivier, and Rev Klopper are all three relevant to the present case. The respondents' averment that these expert opinions 'do not take the applicants [sic] case any further' is denied.

Ad paragraph 84.1

[169] The fact that the expert opinions relate to the context of wanted pregnancies is specifically stated by the applicant, but makes no difference to the applicant's position. The applicant need not prove that *all* cases of pregnancy loss cause grief to the expecting parents. The applicant's position is that, in the case of wanted pregnancies, pregnancy loss often causes grief to expecting parents. This is completely sufficient as a basis for the burial right.

[170] Consider the following example: Not all lesbian women want to marry. But the fact that some do, means that there must be marriage equality for all. In other words, from a human rights perspective, all lesbians couples must have the opportunity to choose whether they want to marry, irrespective of whether all, most, or only a few actually want to exercise this right.

[171] Similarly, all bereaved parents in the case of miscarriage and induced pregnancy loss must have the burial right, irrespective of whether all, most, or only a few actually want to exercise this right.

Ad paragraph 84.2

[172] In this paragraph, the respondents make a stunning concession, namely that 'the loss of pregnancy for this category [expecting parents who make use of 4D technology] may be expected to be devastating'.

[173] Clearly, the retention of the ban on fetal burial in the case of miscarriage and induced pregnancy loss is untenable from a human rights perspective. Parents who are devastated by pregnancy loss should not be obstructed by the state in how they choose to deal with their grief.

Ad paragraph 84.3

[174] The respondents confuse the concepts 'wanted pregnancy' and 'planned pregnancy'. Of course, as suggested by the respondents, an unplanned pregnancy can upon discovery be a wanted pregnancy.

Ad paragraph 84.4

[175] The respondents make the important concession that induced pregnancy loss also leads to grief.

[176] However, the respondents' averment that grief cannot be used as an 'independent reason' against the impugned legislation is non sequitur.

[177] As stated in the applicant's founding affidavit, grief is not limited to stillbirth and miscarriage, but *also* occurs with induced pregnancy loss.

Ad paragraph 85

[178] I deny the contents of this paragraph.

[179] The deponent of the respondents' answering affidavit is not qualified to proffer an opinion on whether incineration is 'accepted in practice' or not. Accordingly, this paragraph is irrelevant and inadmissible. I respectfully request the court to strike out this paragraph.

[180] The notion that a ceremony without the fetus's body is an alternative to the burial right is a rehashing of the second-best alternative argument, and is dealt with in paragraphs [24]–[28] above.

Ad paragraph 86

[181] The notion that counselling can obtain the same result as burying the fetus, and is therefore an alternative to the burial right, is again a rehashing of the second-best alternative argument, and is dealt with in paragraphs [24]–[28] above.

Ad paragraph 87

[182] The respondents make a vague reference to the 'interests of society', but refrain from suggesting what exactly the interests of society may entail in the present case.

[183] I state that the interests of society in the context of the present case are that bereaved parents should be *supported* in their process of grief, rather than *obstructed*.

[184] Furthermore, the interests of society surely demand that legislation that violates constitutional rights and serves no legitimate government purpose be invalidated by the court.

Ad paragraph 88

[185] This paragraph is comprehensively vague. The respondents fail to aver what exactly 'public interest' entails in this context. As 'public interest' is equivalent to 'interests of society', I respectfully refer the court to paragraphs [183]–[184] above where I deal with 'interests of society'.

[186] Moreover, the respondents completely fail to deal with the applicant's statements that the decision to elect to bury the remains of one's dead prospective child can be an important life decision, and that such decision falls within the right to human dignity.

[187] The respondents avoid engaging the human rights analysis.

Ad paragraph 89

[188] To the applicant's statement that the decision to elect to bury the remains of one's dead prospective child is a decision within the core personal sphere of a person, the respondents offer only a bare denial.

[189] Again, the respondents avoid engaging the human rights analysis.

Ad paragraph 90

[190] BADRA clearly only demands fetal burial in the event of stillbirth, and bans fetal burial in the event of miscarriage and induced pregnancy loss *at any gestational age*. Accordingly, two categories of bereaved parents are created by BADRA, as stated in the applicant's founding affidavit.

[191] I deny that the applicant uses the term 'bereaved parents' carelessly.

Ad paragraph 91

[192] To denote the human rights analysis of the present case as a 'moral issue and not a legal issue' is incorrect and is denied. This is a repeat of the respondents' false dichotomy argument.

[193] Instead of avoiding engagement with the human rights analysis by dismissing it as a 'moral issue and not a legal issue', the respondents should have properly engaged the human rights analysis, as is their constitutional duty.

Ad paragraph 92

[194] I deny the content of this paragraph.

[195] The dual nature of viability as both a medical and a legal concept is analysed above in paragraphs [128]–[129]. Even as a legal concept, viability is not set in stone, but can be changed by parliament to catch up with advances in technology.

[196] I specifically deny that any of the experts states that a pregnant woman would perceive proof or pregnancy as viability. This is a misrepresentation of the expert opinions by the respondents. More accurately, the experts state that expecting

parents' perception of the fetus as their unborn 'baby' is not affected by viability;[6] similarly, bereaved parents' grief in the event of pregnancy loss is not affected by viability.[7]

Ad paragraph 93

[197] The respondents only offer a bare denial of the burial right, without providing any reasons.

[198] Again, the respondents avoid properly engaging the human rights analysis.

Ad paragraph 95

[199] The respondents fail to explain why they aver that BADRA does not 'concern itself' with induced pregnancy loss after 26 weeks of gestation. Is it the respondents' contention that the fetal remains in the event of induced pregnancy loss after 26 weeks of gestation is free from the burial ban imposed by BADRA? The answer to this question is uncertain, given the dearth of reasons provided by the respondents.

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6 Botha Expert Opinion [29].

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

[200] For clarity, the applicant interprets BADRA to ban burial of dead fetuses in the event of (a) miscarriage, (b) induced pregnancy loss *before* viability, and (c) induced pregnancy loss *after* viability.

[201] The applicant's position is that parents in all these cases (a)–(c) should have the burial right: The right to choose whether to bury the fetus.

Ad paragraph 97

[202] Again, the respondents only offer a bare denial instead of properly engaging with the human rights analysis.

Ad paragraph 98

[203] It is not sufficient for the respondents to aver that there is some (unknown) legitimate government purpose that is served by the impugned legislation.

Ad paragraph 99

[204] The extent of the respondents' engagement in the limitation analysis is to make the statement that there exists a legitimate government purpose. The

respondents fail to explain what the legitimate government purpose is, and fail to engage in any other aspect of limitation analysis.

[205] Again, the respondents avoid properly engaging the human rights analysis.

Ad paragraph 101

[206] The respondents does not deny is that high-level officials of the second respondents drafted the Draft Policy.

[207] What is important and insightful about the Draft Policy is that it acknowledges that – in the light of our constitutional democracy – parents who suffer miscarriage have *legal rights*[8] regarding the disposal of a fetus, and that such parents should have the option to elect to have the fetal remains buried,[9] rather than incinerated.

[208] The respondents attempt to sweep these important and insightful facts under the carpet by averring that the Draft Policy was never 'internally processed'.

[209] The deponent of the respondents' affidavit is the Deputy Director General with a different portfolio than the Deputy Director General who was involved in the

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8 Draft Policy [2.4].

9 Draft Policy [6.5.12].

development of the Draft Policy. As such, it is unlikely that the deponent would have personal knowledge of which internal processes were followed in the development of the Draft Policy. As such, I deny the respondents' averment that the Draft Policy was never 'internally processed'.

[210] Irrespective of the extent to which the Draft Policy was 'internally processed' or not, the fact is that the relevant officials of the second respondent acted on behalf of the second respondent when they interacted with the representatives of the applicant, and presented the Draft Policy to the representatives of the applicant.

[211] Accordingly, by now *denying* the applicability of constitutional rights that was *acknowledged* in the Draft Policy, and by now *denying* the right of parents to elect to bury the fetus that was *acknowledged* in the Draft Policy, the second respondent is acting in bad faith.

[212] Moreover, the second respondent has failed to explain its reversal of attitude to the court.

[213] It is not sufficient to aver that the Draft Policy was never 'internally processed'. The fact is that the second respondent internally developed the Draft Policy. The second respondent must explain why its position in the present matter is contrary to

the position taken by its own high level officials, acting on its behalf, when previously interacting with the applicant. No such explanation has been offered.

Ad paragraphs 102–107

[214] The applicant has made a proper case for the relief sought.

[215] In contrast, the respondents failed to engage in any meaningful way in the human rights analysis. The respondents offered only bare denials of the violation of constitutional rights, and offered only the vague averment that there exists an unknown legitimate government purpose.

[216] In these paragraphs, the respondents again, instead of properly engaging with the merits of the various aspects of the relief sought, simply offer bare denials.

[217] In a constitutional matter such as the present case, there is a duty on the state parties to assist the court. The failure of the respondents to properly engage with the merits of the relief sought constitutes a failure by the respondents to comply with their constitutional duty.

SPECIAL COST ORDER

[218] This application was filed on 14 March 2017. The respondents filed notices of their intention to oppose, but failed to file their answering affidavits. In an attempt to force the respondents to comply with the Rules of Court and file their answering affidavit, the applicant had to take numerous legal steps, including amongst others:

a. Notice in terms of Rule 30A

b. Application in terms of Rule 30A

c. Approaching the Deputy Judge President for a directive

[219] Eventually, it took the respondents more than six months to file their answering affidavit.

[220] The respondents' dilatory conduct justifies a special cost order against the respondents.

[221] Shockingly, despite being so late, the respondents do not apply for condonation and do not provide any reasons for their lateness. This is an insult to the authority of the court.

[222] The Court should demonstrate its displeasure with an appropriate special cost order against the respondents.

[223] Furthermore still, the present matter is a constitutional challenge to legislation. As such, the respondents have a constitutional duty to assist the court. However, while the second respondent previously acknowledged the applicability of constitutional rights to parents who suffer miscarriage, and the right of such parents to elect to bury the fetus, the second respondent makes an unexplained about-turn in the answering affidavit. Instead of properly engaging with the human rights analysis and the relief sought by the applicant, the respondents offer the court bare denials.

[224] This is still further reason for the Court to demonstrate its displeasure by awarding a special cost order against the respondents.

CONCLUSION

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

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DEPONENT

Thus signed and sworn at _____ on this ____ day of December 2017 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: