



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### **The Voice of the Unborn Baby NPC and Another v Minister of Home Affairs and Another**

**CCT 120/21**

**Date of hearing: 4 November 2021**

**Date of judgment: 15 June 2022**

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#### **MEDIA SUMMARY**

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On 15 June 2022 at 10h00, the Constitutional Court handed down a judgment in an application by The Voice of the Unborn Baby NPC (First Applicant) and the Catholic Archdiocese of Durban (Second Applicant) to confirm an order of the High Court which declared certain sections of the Births and Deaths Registration Act 51 of 1992 (BADRA) and the Regulations Relating to the Management of Human Remains published in terms of the National Health Act 61 of 2013 (Regulations) inconsistent with the Constitution and invalid insofar as they do not allow for a notice of death to be issued in the case of a pregnancy loss other than a still-birth. The First Applicant and Second Applicant contended that this precludes the registration and burial of foetal remains in all cases other than a still-birth. In addition to the confirmation application, the Second Applicant also sought to appeal against the order of the High Court insofar as it precluded burial in cases of a loss of pregnancy through “human intervention”. The Minister of Home Affairs noted an appeal against the judgment and order of the High Court.

In the High Court, the applicants challenged the constitutionality of sections 18(1) to (3) and 20(1) of BADRA read with the definition of “still-birth” in section 1 of BADRA. They also challenged the definitions of “corpse” and “human remains” in regulation 1 of the Regulations. The applicants argued that these provisions infringe on the constitutional rights of the prospective parents, in cases of a pregnancy loss at less than 26 weeks and an induced pregnancy loss, by denying them the right to bury the foetal remains. Importantly, the applicants did not challenge the concept of viability as established in BADRA.

The High Court held that the respondent's argument – that the use of the criterion of viability in order to accord burial rights is a necessary limitation as contemplated in section 36 of the Constitution – was not convincing. According to the High Court, the issue was the emotional loss and the pain felt by prospective parents, which is the same in instances of a still-birth as in pregnancy loss other than a still-birth. Thus, the High Court held that no rational reason exists as to why these two kinds of pregnancy loss are treated differently.

The High Court further held that there is no reason why the impugned provisions cannot be adapted to cater for a loss of pregnancy other than a still-birth for those prospective parents who wish to conduct a burial. The High Court found that this would restore the dignity of the prospective parents who have suffered a loss. The High Court concluded that the impugned provisions of BADRA and the Regulations are inconsistent with the Constitution and invalid to the extent that they restrict the foetal burial right to cases of loss of pregnancy by way of a still-birth. The High Court order declared that bereaved parents have the right to bury the foetus in the event of a loss of pregnancy other than a still-birth. The High Court did not, however, extend the application of the declaration of invalidity to cases of loss of pregnancy through “human intervention”.

Before this Court, the First Applicant accepted that it is settled law that a foetus is not a legal subject and does not have any legal interests or rights. The First Applicant submitted that there is no reason to prohibit prospective parents who suffer pregnancy loss by way of a miscarriage from burying the foetal remains if such burial is their wish. However, the First Applicant submitted that the provisions of BADRA have the effect that no burial order can be issued for foetuses lost through a miscarriage before the 26-week mark, and the Regulations only make provision for the burial of “corpses” and “human remains” but not for foetal remains. As a result, the First Applicant contended that the impugned provisions of BADRA and the Regulations infringe on the constitutionally protected rights of prospective parents, who are denied the choice to bury the foetal remains. The First Applicant submitted that prospective parents who suffer a miscarriage have a clear interest in choosing to bury the foetal remains, and there is no legitimate governmental purpose in restricting the foetal burial right.

The Second Applicant submitted that its members hold the sincere religious belief that they become parents and their children are human persons from the moment of conception. In line with this, the Second Applicant sought not only to confirm the High Court's order of constitutional validity but also to appeal against the High Court's qualification of the burial right. The Second Applicant argued that the burial right should be extended so that it also applies in cases of pregnancy loss by way of “human intervention”. The Second Applicant argued that BADRA prohibits its members from burying foetal remains (other than in cases of still-birth) and therefore limits their constitutional right to freedom of religion as enshrined in section 15 of the Constitution. The Second Applicant also submitted that qualification of the burial right, and the distinction between different categories of foetal remains, limits the right to equality and fails to disclose of any rational basis for such limitation.

The Minister of Home Affairs made the submission that confirmation of the High Court's order of constitutional invalidity would be strenuous on both the Department of Home Affairs and the Department of Health. Such confirmation would require the category of buriable foetuses to be extended to pre-viability foetuses. This would require additional processing of the death and burial registrations by the state, a task that is beyond its capacity. The Minister also submitted that the issues that arise in this matter are polycentric and emotive in nature and should be dealt with by the Legislature. It was the Minister's submission that it is not the role of the judiciary to decide moral dilemmas or to dictate society's ethics when medicine, philosophy and theology are unable to arrive at any consensus. The Minister further submitted that the High Court overemphasised the subjective pain experienced by bereaved parents, yielding to a plea *ad misericordiam*, and failed to dissect, distil and apply the applicable legal principles in this matter. Finally, the Minister contended that the relief granted by the High Court usurps the powers of the Legislature and contravenes the doctrine of separation of powers.

The Minister of Health submitted that the statutory provisions imposing a duty to register a still-birth are established for legal purposes and not reasons related to the mourning or recognition of the social and emotional consequences of a still-birth or miscarriage. The Minister further submitted that the Constitution imposes on municipalities the executive authority and obligation to administer cemeteries and to regulate the burial of foetal remains. Further still, the Minister submitted that constitutionally challenging BADRA and the Regulations, without interpreting and considering relevant legislation in the applicable constitutional and legislative context, does not support a finding of constitutional invalidity. Finally, the Minister submitted that the impugned legislation does not violate any Constitutional rights of the applicant or those they represent.

The Women's Legal Centre Trust and the Sexual and Reproductive Justice Coalition were admitted as the First and Second amicus curiae respectively. They made the submission that the right to terminate a pregnancy is guaranteed by the right to bodily integrity in section 12(2) of the Constitution and the right to have access to health care services, including reproductive health care, in section 27(1)(a) of the Constitution. They further contended that South Africa has ratified international instrument which impose clear obligations on the South African government to ensure the legal, economic and social conditions that enable and encourage women to exercise their sexual and reproductive rights, including their right of access to abortion services, freely and voluntarily. Finally, they submitted that if the foetal burial right is extended this would have a profound impact on the termination of pregnancy services that may be offered to women. Extending the foetal burial right, they contended, would give rise to a number of challenges relating to procedures for medical and surgical termination of pregnancy, including, *inter alia*, the need for additional infrastructure to identify and separate foetal remains in the early stages of pregnancy and the heavy burden that will be placed on facilities offering surgical termination. They submitted that these additional burdens would likely result in a decrease in facilities offering termination of pregnancy services and a concomitant diminution of associated sexual and reproductive rights.

Cause for Justice (CFJ) was admitted as the Third amicus curiae. It submitted that the disposal of foetal remains as medical waste is inconsistent with the value of human dignity.

It further submitted that that a foetus has intrinsic worth and must be respected. This flows from the value of human dignity and is buttressed by South African law, as well as international and foreign law. CFJ submitted that prospective parents should be allowed to choose how they dispose of the foetal remains, regardless of the gestational age, and denying them that opportunity is a denial of their constitutional rights and the inherent value of the deceased foetus. CFJ submitted that the Regulations do not limit the rights of parents to bury foetal remains, and, therefore, there was no need for the High Court to declare the definitions in the Regulations invalid. CFJ submitted that the differentiation between people who suffer pregnancy loss as a result of natural causes, and people who choose to terminate their pregnancy under the Choice on Termination of Pregnancy Act 92 of 1996 bears no rational connection to a legitimate government purpose, alternatively such differentiation amounts to unfair discrimination, and in either event is inconsistent with section 9 of the Constitution.

In a unanimous judgment penned by Tlaetsi AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J and Tshiqi J concurring), the Court held that the primary issue was whether the High Court's declaration of invalidity should be confirmed. The first judgment held that this depended on (i) whether the provisions of BADRA prohibit the burial of pre-viable foetal remains (the interpretation issue) and (ii) if so, whether those provisions are unconstitutional insofar as they unjustifiably limit any of the rights in the Bill of Rights (the constitutional validity issue). On the interpretation issue, the Court found that the impugned provisions of BADRA simply do not provide for foetal burial other than in cases of still-birth and accordingly, could not be declared inconsistent with the Constitution. The Court explained that section 20(1) of BADRA only requires a burial order for the burial of any corpse i.e., either a dead human body or a still-born child. A pre-viable foetus, the Court found, is not a dead human body or a still-born child and accordingly, the interment or cremation of a pre-viable foetus simply falls outside of the two categories of corpse i.e., a still-born child or dead human body that BADRA regulates. Although the Court concluded that there is no prohibition in BADRA on the burial or cremation of pre-viable foetuses, the Court held that because of the way the case was pleaded, the Court was not in a position to grant the declaratory relief sought, namely, that there is a right to bury a pre-viable foetus. This was because the Court did not have all the necessary evidence to evaluate the considerations relating to how hospitals would manage the burial or cremation of pre-viable foetuses.

In view of the conclusion the Court reached on the interpretation issue, i.e., that BADRA does not prohibit the burial of a pre-viable or terminated foetus, the Court held that the constitutional validity issue did not arise. It also held that the cross appeal sought by the Second Applicant falls away, and the High Court's declaration regarding regulation 1 of the Regulations became unnecessary to confirm.