



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 120/21

In the matter between:

THE VOICE OF THE UNBORN BABY NPC First Applicant

CATHOLIC ARCHDIOCESE OF DURBAN Second Applicant

and

MINISTER OF HOME AFFAIRS First Respondent

MINISTER OF HEALTH Second Respondent

and

WOMEN'S LEGAL CENTRE TRUST First Amicus Curiae

**SEXUAL AND REPRODUCTIVE JUSTICE
COALITION** Second Amicus Curiae

CAUSE FOR JUSTICE Third Amicus Curiae

Neutral citation: *The Voice of the Unborn Baby and Another v Minister of Home Affairs and Another* [2022] ZACC 20

Coram: Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J, Tlaletsi AJ and Tshiqi J

Judgments: Tlaletsi AJ (unanimous)

Heard on: 4 November 2021

Decided on: 15 June 2022

Summary: Births and Deaths Registration Act 51 of 1992 — constitutional validity of sections 18(1) to (3) and 20(1) — order of constitutional invalidity not confirmed

ORDER

On application for confirmation of an order of constitutional invalidity granted by the High Court of South Africa, Gauteng Division, Pretoria:

1. The order of the High Court declaring section 18(1) to (3) of the Births and Deaths Registration Act constitutionally invalid is not confirmed.
2. The order of the High Court declaring section 20(1) of the Births and Deaths Registration Act constitutionally invalid is not confirmed.
3. The orders of the High Court are set aside and replaced with the following:
“The application is dismissed and each party is to pay its own costs”.
4. The cross-appeal by the second applicant falls away.
5. The rule 31 applications by the first respondent and the first and second amici curiae are dismissed.
6. In this Court, each party must pay its own costs.

JUDGMENT

TLALETSI AJ (Madlanga J, Madondo AJ, Majiedt J, Mhlantla J, Rogers AJ, Theron J and Tshiqi J concurring):

Introduction

[1] The applicants are seeking confirmation of an order of the High Court of South Africa, Gauteng Division, Pretoria (High Court)¹ which declared section 20(1), read with the definition of “still-birth” in section 1, and section 18(1) to (3) of the Births and Deaths Registration Act² (BADRA), as well as regulation 1 of the Regulations Relating to the Management of Human Remains³ (Regulations) inconsistent with the Constitution insofar as they prohibit the burial of foetal remains other than in cases of a still-birth. In addition to the confirmation application, an application for leave to appeal has also been noted against the judgment and order of the High Court.⁴

¹ *Voice of the Unborn Baby NPC v Minister of Home Affairs* [2021] ZAGPPHC 161; 2021 (4) SA 307 (GP) (High Court judgment).

² 51 of 1992.

³ Government Gazette Notice No. R 363 dated 22 May 2013. These Regulations are made in terms of the National Health Act 61 of 2003. Regulation 1 defines “corpse” to mean “a dead human body” and “human remains” to mean “a dead human body, or the remains of a dead human body whether decomposed or otherwise”.

⁴ In relevant part, the order of the High Court provided:

“2. THAT it is declared that in the event of a 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 (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 or loss of pregnancy through human intervention.

b. if no medical practitioner was present at a loss of pregnancy other than stillbirth or pregnancy through human intervention, 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 of 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 parents following a loss of pregnancy other than stillbirth or loss of pregnancy through or human intervention.

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. ...

7. ...

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

Parties

[2] The first applicant is The Voice of the Unborn Baby NPC⁵ and the second applicant is the Catholic Archdiocese of Durban (Catholic Archdiocese), a voluntary association.⁶ The first and second respondents are the Ministers of Home Affairs and of Health respectively. The Women’s Legal Centre Trust⁷ (WLCT), the Sexual and Reproductive Justice Coalition⁸ (SRJC) and Cause for Justice (CFJ)⁹ have been admitted as the first, second and third amici curiae (friends of the Court), respectively.

Preliminary issues

[3] The Minister of Home Affairs filed an application in terms of rule 31 of the Rules of this Court to adduce further evidence. The first and second amici curiae have also filed an application in terms of rule 31 of the Rules of this Court to adduce evidence. In view of the conclusion I have reached on the confirmation application, it is unnecessary to deal with these applications.

High Court

[4] The applicants challenged the constitutionality of section 20(1), read with section 1 and section 18(1) to (3) of BADRA, as well as regulation 1 of the Regulations on the basis that they infringe the rights to privacy, dignity, religion and equality of

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.”

⁵ The Voice of the Unborn Baby NPC describes itself as a non-profit organisation having been co-founded in September 2015 to drive legislative change that is the subject of the present matter. It has about 2000 members.

⁶ The Catholic Archdiocese has its head offices situated in Durban.

⁷ WLCT is a registered non-profit organisation that conducts litigation in the public interest on matters concerning the promotion and protection of gender equality in South Africa.

⁸ SRCJ is a coalition of organisations and individuals engaged in advocacy, research, service delivery, education, policy analysis and activism in the fields of gender, sexual and reproductive justice, health rights and healthcare services.

⁹ CFJ is a non-profit voluntary association with objectives that include the defence and active promotion of constitutional justice in South Africa.

prospective parents who have suffered pregnancy loss through miscarriage or conscious human intervention.

[5] The applicants submitted that there is no justification for the distinction between the burial of the foetal remains of a pregnancy loss through miscarriage or induced pregnancy loss by human intervention and pregnancy loss through still-birth. They further submitted that there is no legitimate governmental purpose served by depriving these prospective parents the option of burial.

[6] The respondents submitted that there is no legal or scientific justification for why the law should recognise the right to bury a foetus that is less than 26 weeks upon termination of pregnancy or induced pregnancy loss. The emotional attachment of the prospective parents does not mean that a legal right to bury the foetus exists. They further submitted that the emotional and psychological trauma suffered by the prospective parents does not give rise to the infringement of their constitutional rights. Finally, they submitted that there is a legitimate government purpose served by regulating aspects relating to the burial of a dead foetus.¹⁰

[7] The WLCT and Wish Associates, which were admitted as amici curiae in the High Court, argued that if the High Court decides to grant a declaratory order conferring rights on the bereaved prospective parents, the order should exclude persons who voluntarily terminate pregnancy in terms of the Choice on Termination of Pregnancy Act¹¹ (CTOPA). They submitted that blanket foetal burial rights would burden the designated facilities, undermine the confidentiality provisions of the CTOPA, and create additional barriers to accessing facilities that offer services under the CTOPA. They also submitted that if the declaratory order was to apply to people seeking voluntary termination of pregnancy under the CTOPA, the order should include

¹⁰ It was submitted that the government has an interest in ensuring the proper disposal of foetal remains in compliance with the law.

¹¹ 92 of 1996.

provisions to ensure that the right does not disproportionately interfere with pregnant women's rights to access termination of pregnancy procedures.

[8] The High Court held that the impugned provisions of BADRA should be extended to cater for loss of pregnancy, other than in cases of a still-birth, for those who wish to bury the foetal remains. This extension would restore dignity, ameliorate pain and assist in the healing process of the prospective parents who have terminated their pregnancy or suffered pregnancy loss through a miscarriage. Absent such extension, the High Court seemingly held, prospective parents' rights to dignity and equality would be unjustifiably limited. On this score, the High Court reasoned that there is no rational basis for permitting the burial of the remains of a still-born child while prohibiting the burial of the remains of a pregnancy loss other than in cases of a still-birth. The High Court therefore concluded that the limitation is not reasonable or justifiable in terms of section 36 of the Constitution.

[9] The High Court concluded that the impugned provisions of BADRA are inconsistent with the Constitution and invalid to the extent that they exclude the issuance of a still-birth notice in the case of a pregnancy loss other than a still-birth.¹²

¹² Section 18 provides:

“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 authorising burial.
- (4) If, before a prescribed burial order has been issued, a person contemplated in section 4 has reasonable doubt whether the child was still-born, he or she shall not issue a burial order and he or she shall inform a police officer as to such doubt.
- (5) If, after a prescribed burial order has been issued, a person contemplated in section 4 has reasonable doubt whether the child was still-born, he or she shall inform a police officer as to such doubt, and before the police officer acts in terms of the provisions of section 16, he or she shall, if the corpse has not yet been buried, withdraw and cancel the burial order.”

This declaration of invalidity did not, however, apply in the case of a pregnancy loss through human intervention.

This Court

First applicant's submissions

[10] Before this Court, The Voice of the Unborn Baby largely made the same submissions it had made in the High Court. It was 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 that the Regulations only make provision for the burial of “corpses” and “human remains” but not for foetal remains. As a result, the first applicant submits 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.

Second applicant's submissions

[11] The Catholic Archdiocese submitted that its members hold the sincere religious belief that they become parents and their children are persons from the moment of conception. In line with this, the Catholic Archdiocese seeks not only the confirmation of the High Court's order of constitutional invalidity, but also to appeal against the High Court's qualification of the burial right. The Catholic Archdiocese argues that the burial right should be extended so that it also applies in cases of pregnancy loss by way of human intervention.

First respondent's submissions

[12] The Minister of Home Affairs submitted that confirmation of the High Court's order of constitutional invalidity would be burdensome on the Department of Home Affairs and the Department of Health. Such confirmation would require the category of foetuses that can be buried to be extended to pre-viable foetuses. This would require

additional processing of the death and burial registrations by the state, a task that is beyond its capacity. In addition, the Minister contends that the relief granted by the High Court usurps the powers of the Legislature and contravenes the doctrine of separation of powers.

Second respondent's submissions

[13] The Minister of Health submitted that the statutory provisions imposing a duty to register a still-birth are established for legal purposes and not for 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 gives municipalities the authority and obligation to administer cemeteries and to regulate the burial of foetal remains, and that the High Court erred in not considering BADRA and the Regulations in the context of the provincial and municipal legislation dealing with cemeteries, funeral parlours and crematoria. Finally, the Minister submitted that the impugned legislation does not violate any constitutional rights.

First and second amici curiae's submissions

[14] The WLCT and the SRJC submitted 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 healthcare services, including reproductive healthcare, in section 27(1)(a) of the Constitution. They further contend that South Africa has ratified international instruments 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 submit that if the foetal burial right is extended, this would have a profound impact on the termination of pregnancy services offered to women. They submit that the additional burdens would lead to a decrease in facilities offering termination of pregnancy services and a concomitant diminution of associated sexual and reproductive rights.

Third amicus curiae's submissions

[15] The CFJ contended that the disposal of foetal remains as medical waste is inconsistent with the value of human dignity. They further submitted 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. The CFJ submitted further that prospective parents should be allowed to choose how they dispose of the foetal remains, regardless of the gestational age. Denying them that opportunity is a denial of their constitutional rights and the inherent value of the deceased foetus. The CFJ argued, however, that the Regulations, in contrast to BADRA, 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. The CFJ further submitted that a differentiation between people who suffer pregnancy loss because of natural causes, and people who choose to terminate their pregnancy under the CTOPA, bears no rational connection to a legitimate government purpose. Alternatively, such differentiation would amount to unfair discrimination, and in either event would be inconsistent with section 9 of the Constitution.

Jurisdiction

[16] In terms of section 167(5) of the Constitution, this Court must confirm an order of constitutional invalidity made by the Supreme Court of Appeal, the High Court, or a court of similar status, before that order has any force.¹³ It also makes the final decision regarding the constitutionality of an Act of Parliament, provincial Act or conduct of the President. Because these are confirmation proceedings, this Court's jurisdiction is automatically engaged.

¹³ Section 167(5) of the Constitution provides:

“The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, the High Court of South Africa, or a court of similar status, before that order has any force.”

Issues

[17] Primarily, the issue before this Court is whether the High Court’s declaration of invalidity should be confirmed. The High Court declared that section 20(1), read with section 1, and section 18(1) to (3) of BADRA are inconsistent with the Constitution insofar as they prohibit the burial of foetal remains other than in cases of a still-birth (in other words, the remains of a pre-viable or terminated foetus). Confirmation is not there for the taking. This Court must itself be satisfied that the impugned provisions are unconstitutional. Therefore, whether the High Court’s order should be confirmed depends on whether the provisions of BADRA actually prohibit the burial of pre-viable foetal remains (the interpretation issue); and, if so, whether those provisions limit any of the rights in the Bill of Rights and whether any such limitation is justified in terms of section 36(1) of the Constitution (the constitutional validity issue). In view of the conclusion I reach on the interpretation issue, which is that BADRA does not prohibit the burial of a pre-viable or terminated foetus, the constitutional validity issue does not arise.

Does BADRA prohibit the burial of foetal remains other than in cases of a still-birth?

[18] It is significant to recall the purpose BADRA is intended to serve. Its purpose is to regulate the registration of births and deaths and to provide for matters connected therewith.¹⁴

[19] Section 20(1)¹⁵ of BADRA provides that “[n]o *burial* shall take place unless notice of the death or still-birth has been given to a person contemplated in section 4

¹⁴ See the preamble to BADRA.

¹⁵ The full text of section 20 reads:

“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.
- (2) The burial order mentioned in subsection (1) shall be delivered by the person who has charge of the burial to the person who has control of the burial place concerned.

and he or she has issued a prescribed burial order” (own emphasis). Of relevance to this matter is section 1 of BADRA which defines the words “burial”, “corpse” and “still-born”. Burial is defined as “burial in earth or the cremation or any other mode of disposal of a *corpse*” (own emphasis). “Corpse” is defined as “any dead human body, including the body of any *still-born child*” (own emphasis). “Still-born” is defined in relation to a child, as meaning “that it has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth”. Section 1 further provides that “still-birth” in relation to a child, has a corresponding meaning.

[20] Having regard to these definitions, it is clear 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 is not a still-born child, as such a foetus will not have had 26 weeks of intra-uterine existence. It is unnecessary to decide whether the termination of a pregnancy of a viable foetus by human intervention results in a “still-birth” for purposes of BADRA. Part of the new evidence which the first respondent wanted to adduce was evidence that such terminations are treated by the state as resulting in a “still-birth”, such that BADRA applies. Part of the new evidence was medical evidence to explain why this approach was followed. All that I can say is that if this approach to the definition of “still-born” is correct, burial orders may, indeed must, be obtained before burying such foetal remains, and this after all is the relief sought by the applicants. If this approach is incorrect, BADRA simply does not apply, meaning that there is no prohibition in BADRA against the burial of such foetal remains.

[21] A further question we must consider is whether a pre-viable foetus is a “dead human body” as contemplated by the definition of corpse. That interpretation would unduly strain the meaning of the words “dead human body”. It also would not make sense for the Legislature to refer to a more developed foetus as still-born and a far less

(3) If the burial of a corpse is to take place outside the magisterial district within which the death occurred, the corpse may only be removed by virtue of a burial order to a place outside the said magisterial district.”

developed one as a human body, which ordinarily and plainly refers to people or “the born alive”.

[22] Since a pre-viable foetus is not a corpse for purposes of BADRA, it therefore means that BADRA does not prohibit or restrict the interment or cremation of a pre-viable foetus, as it falls outside of the two categories of corpse i.e., a still-born child or dead human body that BADRA regulates. Put differently, the burial of a pre-viable or terminated foetus simply falls outside of BADRA’s scope.

[23] This reading accords with the self-evident purpose of BADRA in requiring a burial order in relation to the “burial” of any “corpse”. Chapter III of BADRA, which deals with the registration of deaths, distinguishes between death from natural causes and death which was or might have been due to something other than natural causes. In the latter case, the matter must be reported to a police officer who must then act in accordance with the Inquests Act.¹⁶ This applies also to the case of a death at or near the time of birth – if there is doubt as to whether the infant was still-born or was born alive and then died, such death must be reported to the police.¹⁷ While the state has a self-evident and legitimate interest in investigating the possible unnatural death of a person born alive (such as an infant), there is no similar interest in relation to a pre-viable foetus.

[24] In *Makate* this Court held:

“[C]ourts must at all times bear in mind the provisions of section 39(2) when interpreting legislation. If the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated. The court is duty-bound to promote the purport, spirit and objects of the Bill of Rights in the process of interpreting the provision in question.”¹⁸

¹⁶ Section 16 of BADRA reads: “Whenever a police officer receives information mentioned in section 14(3) or (4), 15(3) or 18(4) or (5), he or she shall act in terms of the provisions of section 3 of the Inquests Act 1959 (Act No. 58 of 1959).”

¹⁷ See section 18(4) to (5) of BADRA.

¹⁸ *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 88.

[25] In the absence of a clear prohibition of the interment or cremation of a pre-viable or terminated foetus, and in the face of the command in section 39(2) of the Constitution,¹⁹ an interpretation of BADRA that commends itself is one that leaves untouched any right which parents may have to inter or cremate their pre-viable foetuses. While it may be true, as the applicants argued, that throughout the years the practice has been to deny parents this right in the apparent belief that this is what the law provides, this matters not. BADRA simply contains no such prohibition.

[26] The impugned provisions of BADRA do not provide for foetal burial other than in cases of a still-birth. The High Court therefore declared the impugned legislation constitutionally invalid in the mistaken understanding (held by the litigants as well) that BADRA applies to and regulates the burial of pre-viable foetuses. The relevant sections of BADRA cannot be declared inconsistent with the Constitution because of such omission. It follows that the declaration of invalidity can therefore not be sustained.

Relief

[27] The applicants are, among others, seeking declaratory relief to the effect that in the event of a loss of pregnancy other than still-birth or loss of pregnancy through human intervention, the bereaved parent or parents have the right to bury the dead foetus, if such bereaved parent or parents so elect. While there is no prohibition in BADRA on the burial or cremation of pre-viable foetuses, this Court is not in a position to grant the declaratory relief sought, namely, that there is a right to bury such a foetus. Where the evacuation or removal of some or all of the foetal remains from the mother takes place in a healthcare facility, the implication of such a declaration for hospitals and other healthcare service providers becomes a challenging question. The question as to what medical staff at public hospitals must do if would-be parents express the wish to bury or cremate pre-viable foetal remains, is not clear. The burial or cremation of

¹⁹ Section 39(2) of the Constitution provides that “[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights”.

pre-viable foetal remains would no doubt require the cooperation of healthcare professionals, and public hospitals would be expected to allocate the necessary resources. Because of the way the case was pleaded, we do not have the necessary evidence to evaluate the considerations relating to how hospitals would manage the burial or cremation of pre-viable foetuses. This is not the case which the applicants pleaded, and we are in any event not in a position on the facts to adjudicate it.

[28] Where the foetal remains are evacuated or removed from the mother outside of a healthcare environment, there may still be other restrictions, for example, limitations imposed by municipal regulations. The content and validity of any such regulations are not the subject of the present litigation. All that can be said is that if there is no other legal impediment to the burial of pre-viable foetal remains, BADRA does not stand in the way of that burial.

Should the declaration of invalidity be extended to cases of pregnancy loss due to an inducement?

[29] In the cross-appeal, the Catholic Archdiocese contended that the declaration of invalidity made by the High Court should be extended to cases of pregnancy loss due to an inducement. Given that the declaration of invalidity order will not be confirmed, the cross-appeal falls away.

Should the High Court's declaration, that the definitions of "corpse" and "human remains" are inconsistent with the Constitution, be confirmed?

[30] The first applicant argued that the Regulations do not make provision for the burial of a pre-viable foetus. Because regulations are not Acts of Parliament, their validity or otherwise is not subject to confirmation by this Court.²⁰ It is therefore not necessary to confirm the High Court's order in terms of which regulation 1 of the Regulations was declared to be inconsistent and invalid.

²⁰ *Minister of Home Affairs v Liebenberg* [2001] ZACC 3; 2002 (1) SA 33 (CC); 2001 (11) BCLR 1168 (CC) at para 13.

Costs

[31] The applicants correctly submitted that the High Court misapplied the *Biowatch* principle.²¹ It declined to award costs in favour of the applicants, despite their success in that Court. *Biowatch* holds that courts have to shield a private party from an adverse costs order, where a party's intention is to vindicate its constitutional rights. According to *Biowatch*, the award of costs in constitutional litigation between the state and a private party is that, if the private party's application succeeds, the state should pay the costs, but where it does not, each party should pay its own costs.²² If the Court decides not to make an award as to costs, despite the private party's successful application, it must provide compelling reasons.²³

[32] This Court is careful not to be too eager to interfere with the costs orders of other courts.²⁴ However, because of the misapplication of *Biowatch* we are perfectly entitled to interfere with the High Court's costs order.

[33] The applicants were successful in the High Court and the respondents should have been ordered to pay their costs. The failure not to make such an order, or provide reasons therefor, was thus a misapplication of the *Biowatch* principle, and a material misdirection. The costs order of the High Court should consequently be set aside. However, in light of our finding, the applicants should not have succeeded in the High Court. An appropriate order would therefore be that each party should carry its own costs in the High Court.

²¹ *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) (*Biowatch*).

²² *Id* at para 43.

²³ *Id* at para 24.

²⁴ In *Public Protector v South African Reserve Bank* [2019] ZACC 29; 2019 (6) SA 253 (CC); 2019 (9) BCLR 1113 (CC) at para 144 this Court held that—

“unless it is satisfied that the discretion was not exercised judicially, or was influenced by wrong principles or a misdirection on the facts, or the decision is one that could not reasonably have been made by a court properly directing itself to all the relevant facts and principles. There must be a material misdirection on the part of the court below”.

[34] Moving on to costs before this Court. The applicants asked this Court to confirm the High Court's order for constitutional invalidity and they have been unsuccessful. Therefore, each party must pay its own costs.

Order

[35] The following order is made:

1. The order of the High Court declaring section 18(1) to (3) of the Births and Deaths Registration Act constitutionally invalid is not confirmed.
2. The order of the High Court declaring section 20(1) of the Births and Deaths Registration Act constitutionally invalid is not confirmed.
3. The orders of the High Court are set aside and replaced with the following:
“The application is dismissed and each party is to pay its own costs”.
4. The cross-appeal by the second applicant falls away.
5. The rule 31 applications by the first respondent and the first and second amici curiae are dismissed.
6. In this Court, each party must pay its own costs.

For the First Applicant:

D Thaldar instructed by Ingram Attorneys

For the Second Applicant:

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For the Second Respondent:

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For the First and Second Amici Curiae:

N Stein and T Poee instructed by the Women's Legal Centre

For the Third Amicus Curiae

D Cooke instructed by Guthrie and Theron Attorneys