

## **EXCERPT FROM CAUSE FOR JUSTICE HEADS OF ARGUMENT:**

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

---

## **PRE-NATAL LIFE AND HUMAN DIGNITY**

### **Human dignity and the Constitution**

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

---

<sup>2</sup> Section 10 of the Constitution.

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

limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors.

- 7.4. According to s 39(1)(a) of the Constitution, when interpreting the Bill of Rights, a court must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.
8. In *Makwanyane* O'Regan J held that: “*The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right to dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern*”<sup>4</sup> (emphasis added).
9. O'Regan J returned to this topic in *Dawood*, observing that human dignity informs constitutional adjudication and interpretation at a range of levels, and that dignity is a value which informs the interpretation of many, possibly all, other rights.<sup>5</sup>
10. The value of human dignity is thus distinct from the right to dignity articulated in s 10 of the Constitution.
11. According to the former justice of the Constitutional Court, Laurie Ackermann, in the context of the Constitution, ‘dignity’ means ‘human worth’ or ‘inherent human worth’.<sup>6</sup>

---

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

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

<sup>6</sup> Human Dignity: Lodestar for Equality in South Africa 2012 pg 98.

12. How then does this value of human dignity impact on how the law treats the unborn?

### **Respect for pre-natal life**

13. In 1999 Professor Denise Meyerson published an article in the South African Law Journal entitled ‘*Abortion: The Constitutional Issues*’.<sup>7</sup> In this article she considered whether the state has a constitutional duty to protect foetal life.

14. Prof Meyerson takes the view that even though a foetus is not the beneficiary of any of the specific rights contained in the Bill of Rights, the value of human dignity is nonetheless implicated by the destruction of foetal life:

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

15. Prof Meyerson concludes that the CTOPA strikes the right balance between the value of human dignity and the rights of women who do not wish to continue with their pregnancies.

16. Nonetheless, in the course of discussing this issue, she states:

*“A foetus is not just a bit of human tissue, comparable to something like the appendix. It is a living human organism, whose destruction is not a morally trivial matter but something to be regretted. Ronald Dworkin makes something like this point, saying that although the foetus does not have a right to life, it*

---

<sup>7</sup> 1999 Vol 116 p 50.

<sup>8</sup> *Supra* pg 56.

*does embody an intrinsic value. Like, for instance, a work of art, it is something whose destruction is objectively bad, on account of the marvellously complex and creative processes it embodies.”*<sup>9</sup> (emphasis added)

17. The pages in Professor Dworkin’s Life’s Dominion<sup>10</sup> referred to by Prof Meyerson include the following passages:

*“Any human creature, including the most immature embryo, is a triumph of divine or evolutionary creation, which produces a complex, reasoning being from, as it were, nothing, and also of what we often call the “miracle” of human reproduction, which makes each new human being both different from and yet a continuation of the human beings who created it...”*<sup>11</sup>

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

18. Although these opinions are expressed in a different context, it is nonetheless submitted that if the destruction of the unborn implicates the value of human dignity, then the disposal of the unborn likewise implicates the value of human dignity.
19. There is a significant difference between the disposal of an appendix, and the disposal of an unborn child. By the time a foetus reaches the 26-week point contemplated by

---

<sup>9</sup> *Supra* pg 56.

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

<sup>11</sup> *Supra* pg 83.

<sup>12</sup> *Supra* pg 84.

the Births and Deaths Registration Act 51 of 1992 (“**BADRA**”), the child is well-developed.<sup>13</sup> But even an immature embryo commands respect, in a way that an appendix does not.

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

---

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