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26/03/2021



Case no: 16402/17

In the matter between:

THE VOICE OF THE UNBORN BABY NPC 1st Applicant

CATHOLIC ARCHDIOCESE OF DURBAN 2nd Applicant

and

MINISTER OF HOME AFFAIRS 1st Respondent

MINISTER OF HEALTH 2nd Respondent

and

CAUSE FOR JUSTICE 1st amicus curiae

WOMEN'S LEGAL CENTRE TRUST 2nd amicus curiae

WISH ASSOCIATES 3rd amicus curiae

ORDER

MNGQIBISA-THUSI, J

HAVING READ THE PAERS AND HAVING CONSIDERED THE PAPERS, IT IS ORDERED:

- “1.1 That for purpose of this Court Order, the following words shall have the following meanings:
- a. ‘bereaved parent or parents’ shall mean, in the context of pregnancy loss, a person or persons who would have been a parent or parents as
 - b. defined in the Children’s Act, Act 38 of 2005, of such child that would have been born had the pregnancy resulted in a live birth.
 - c. ‘burial’ shall have the meaning as defined in the Births and Deaths Registration Act, Act 51 of 1992 (‘BADRA’), but shall be expanded to include dead fetuses; ‘bury’ shall have a corresponding meaning;
 - d. ‘loss of pregnancy’ or ‘pregnancy loss’ shall mean the death of a fetus prior to or during separation from the pregnant woman’s body, through natural causes;
 - e. ‘stillbirth’ shall mean a species of pregnancy loss where the fetus at the time of separation is viable, and where the fetal death is not caused by human intervention;
 - f. ‘viable’ with relation to a fetus, shall mean the gestational age (or other criteria) at which a fetus is considered able to survive outside the womb by legislation that provides what entities qualify to be buried. For clarity, BADRA currently sets the gestational age of viability at 26 weeks.
2. THAT it is declared that in the event of a loss of pregnancy other than stillbirth or loss of pregnancy through human intervention, 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.

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- 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. THAT the first respondent is ordered and directed to:
 - a. take all reasonable steps to communicate the content of the right declared in paragraph 2 supra and the content of paragraph 5 supra to all persons contemplated in section 4 of BADRA; and
 - b. serve on all the other parties to this application and file with the Registrar of this Court an affidavit, within 20 days of this judgment, detailing the steps that he has taken to give effect to subparagraph 6a supra.
7. THAT should Parliament fail to amend BADRA to provide for the right stated in paragraph 2 supra within 12 months of the date of this order, any interested person may apply to this Court or any other division of the High Court for any appropriate further relief.
8. THAT the definitions of 'corpse' and 'human remains' in regulation 1 of the Regulations Relating to the Management of Human Remains, published by the second respondent in the Gazette of 22 May 2013, in terms of NHA, are declared inconsistent with the Constitution and invalid insofar as these definitions do not make provision for the right declared in paragraph 2 supra.
9. THAT the declarations of invalidity in paragraph 8 supra are suspended to allow the second respondent the opportunity to amend the Regulations referred to in paragraph 8 supra to provide for the right declared in paragraph 2 supra.
10. THAT pending the amendment by the second respondent of the Regulations referred to in paragraph 8 supra to provide for the right declared in paragraph 2 supra, the definitions of 'corpse' and 'human remains' in the Regulations referred to in paragraph 8 supra shall forthwith be read as including a dead fetus, if burial order was issued in respect of such a fetus in terms of section 18(3) of BADRA.
11. THAT should the second respondent fail to amend the Regulations referred to in paragraph 8 supra to provide for the right stated in paragraph 2 supra within 12 months of the date of this order, any interested person may apply to this Court or any other division of the High Court for any appropriate further relief.

THE HIGH COURT OF SOUTH AFRICA
 JOHANNESBURG
 2021-05-29
 REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
 GAUTENG DIVISION

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12. THAT the second respondent is ordered and directed to:
- a. take all reasonable steps to communicate the content of the right declared in paragraph 2 supra and the content of paragraph 5 supra to all public hospitals and clinics in South Africa that provide pre-natal care; and
 - b. serve on all the parties to this application and file with the Registrar of this Court an affidavit, within 30 days of this judgment, detailing the steps that he has taken to give effect to subparagraph 12a supra

13. No order as to costs.



REGISTRAR OF THE HIGH COURT