

Rights of the fetus: Voice of the Unborn Baby and Constitutional Court decision

On 26 March 2021, Judge Mngqibisa-Thusi of the High Court, Gauteng Division, ruled in favour of the organisation the Voice of the Unborn Baby and the Catholic Archdiocese of Durban,^[1] who challenged various provisions of the Births and Deaths Registration Act No. 51 of 1992^[2] (BADRA). These sections relate to the definition of 'burial' as well as 'stillbirths'. They challenged these sections of BADRA, which they argued did not oblige the Department of Health to provide the remains of fetuses to bereaved parents who wished to bury them according to their cultural and religious beliefs, unless the remains complied with the definitions in the Act. BADRA defines a stillbirth as a fetus of at least 26 weeks' gestation that shows no signs of life after delivery.

The High Court, in its judgment,^[2] made wide-ranging rulings. The court redefined stillbirth to mean 'a species of pregnancy loss where the fetus at the time of separation is viable'. While the court noted that BADRA sets viability at 26 weeks of gestation, it defined viability more broadly as the 'age at which a fetus is considered able to survive outside the womb'. This opens the door for courts to consider a lower gestational age when determining viability.

On the rights of the parent(s) to bury a dead fetus, the High Court declared that 'in the event of a loss of pregnancy other than stillbirth, the bereaved parents or parent have the right to bury the dead fetus, if such bereaved parents or parent so elect,' and that section 20(1) of the Act, which defines stillbirth, and subsections 18(1) to 18(3) were unconstitutional and declared invalid. These sections relate to issuing of a death certificate in the case of stillbirths, which will enable parents to bury the fetus.

The Ministers of Home Affairs and Health took the judgment on appeal to the Constitutional Court (ConCourt), given that certain sections of BADRA had been declared unconstitutional. In their representation to the court, the Ministers relied on the scientific advice and legal counsel from two of the authors (first and second) in which they argued that the viability threshold in South Africa (SA) is 26 weeks (or 1 kg) of intrauterine existence. Viability at population level is defined as that gestational age where at least 50% of babies born alive will survive until discharge from the neonatal service.^[3] The neonatal mortality rate at primary care level for SA for the triennium 2016 - 2018 in the birthweight category 500 - 999 g was 965.5/1 000 live births.^[3] These data therefore justify the threshold of viability used in SA. Furthermore, the 'born-alive common law rule' prescribes that an unborn child, which was not born alive, is not a bearer of rights and obligations. This approach accords with the 'single-entity approach' where the fetus is part of the woman's body, and all products of conception fall under this category. There is, however, a category of fetuses to which the law confers certain benefits – these are fetuses with an intrauterine existence of 26 weeks and above. At this stage, the fetus becomes a quasi-legal subject with benefits such as stillbirth registration, death certificate, burial benefit and medical care. The purpose of burial is therefore not to assuage the pain suffered by the would-be parents, but is a protection accorded to a viable fetal life. The aim is not for the law to identify the point of grief but to attribute rights at a stage where scientific findings back greater viability of the fetus.

In their court application, the ministers opposing the confirmation of the order of Constitutional invalidity, basing their arguments

on Prof. Soma-Pillay's affidavit, made the case that viability at 26 weeks be accepted by the ConCourt, and that the sections of BADRA that the High Court found to be unconstitutional be declared as Constitutional. They further argued that obliging the Department of Health to provide the remains of fetuses to parents would increase the burden on already overburdened public hospitals.

The Catholic Archdiocese of Durban joined the Voice of the Unborn Baby in opposing the application of the ministers. The Voice of the Unborn Baby argued that it does not serve the government any purpose by restricting the right of parents to bury fetal tissue, while the Catholic Archdiocese argued that a fetus is human at conception.

The Women's Legal Centre Trust and the Sexual and Reproductive Justice Coalition and the Cause for Justice were admitted as *amicus curiae* by the ConCourt. The first and second *amicus curiae* submitted that the rights to reproductive health, pregnancy termination and health services were all guaranteed by the Constitution, and that if the right to burial of fetal tissue was guaranteed, this would have to be extended to fetal material from pregnancy terminations, and this would place a further burden on facilities that provided terminations. The Cause for Justice submitted that in their view, the disposal of fetal tissue as medical waste was inconsistent with human dignity.

On 15 June 2022 the ConCourt published its judgment.^[4] The ConCourt found that a pre-viable fetus is not a stillborn child or a dead body, that it was not in a position to provide a declaratory order of a right to bury pre-viable fetuses, that BADRA does not prohibit the burial of pre-viable or terminated fetal tissue and therefore that the sections of BADRA found unconstitutional by the High Court were not found to be unconstitutional by the ConCourt.

Given the emotive nature of the issue raised by the Voice of the Unborn Baby, it was not surprising that the media picked up on both the High Court and the ConCourt's judgments. In April 2021, the *Mail and Guardian's*^[5] headline was: 'High court ruling to allow parents to bury unborn babies offers dignity, but not to all', and after the ConCourt's judgment, *EWN's*^[6] headline read: 'NPO welcomes Concourt ruling on burying early-term foetuses', while *Daily Maverick*^[7] noted: 'Concourt rules high court wrong over burial of foetuses under 26 weeks: Apex court refused to confirm a Pretoria high court ruling that sections of the Births and Deaths Registration Act are unconstitutional' and *IOL's* Zelda Venter's^[8] headline was: 'Parents who want to bury foetus younger than 26 weeks left in limbo'.

Stillbirths and the burial of fetal tissue are emotive issues for both parents and health workers. Everything that can be done to prevent stillbirths should be done. However, there are many unknown causes of stillbirths. The issue of viability and how to deal with viability also needs further discussion. This editorial aims to highlight some of the issues presented to the courts and the issues that the courts ruled on. It is clear that despite the ConCourt's ruling, these issues are ethical, legal and health-related and need further ventilation.

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1. High Court of South Africa, Gauteng Division. The Voice of the Unborn Baby and Another v Minister of Home Affairs and Another (CCT 120/21) [2022] ZACC 20 (15 June 2022). <http://www.saflii.org/za/cases/ZACC/2022/20.html> (accessed 14 September 2022).
2. South Africa. Births and Deaths Registration Act No. 51 of 1992. https://www.saflii.org/za/legis/consol_act/badra1992301/ (accessed 14 September 2022).
3. Gebhardt GS, Rhoda N, Westwood A, Pattinson RC. Recommendations for the management of birth at the margins of foetal viability – a practical approach for South Africa. *Obstetr Gynaecol For* 2020;30:29-34.
4. Constitutional Court of South Africa. Voice of the Unborn Baby NPC and Another v Minister of Home Affairs and Another CCT120/21. <https://www.concourt.org.za/index.php/judgement/472-voice-of-the-unborn-baby-npc-and-another-v-minister-of-home-affairs-and-another-cct120-21> (accessed 14 September 2022).
5. Smit R. High court ruling to allow parents to bury unborn babies offers dignity, but not to all. *Mail & Guardian*, 14 April 2021. <https://mg.co.za/opinion/2021-04-14-high-court-ruling-to-allow-parents-to-bury-unborn-babies-offers-dignity-but-not-to-all/> (accessed 14 September 2022).
6. Wicks B. NPO welcomes CONCOURT ruling on burying early-term foetuses. *EWN*, 19 June 2022. <https://ewn.co.za/2022/06/19/NPO-welcomes-concourt-ruling-on-burying-early-term-foetuses> (accessed 14 September 2022).
7. Broughton T. Concourt rules high court wrong over burial of foetuses under 26-weeks. *Daily Maverick*, 17 June 2022. <https://www.dailymaverick.co.za/article/2022-06-17-concourt-rules-high-court-wrong-over-burial-of-foetuses-under-26-weeks/> (accessed 14 September 2022).
8. Venter Z. Parents who want to bury foetus younger than 26 weeks left in limbo. *IOL*, 17 June 2022. <https://www.iol.co.za/pretoria-news/news/parents-who-want-to-bury-foetus-younger-than-26-weeks-left-in-limbo-11dea93a-012b-4812-ae3d-856cbda5f15c> (accessed 14 September 2022).