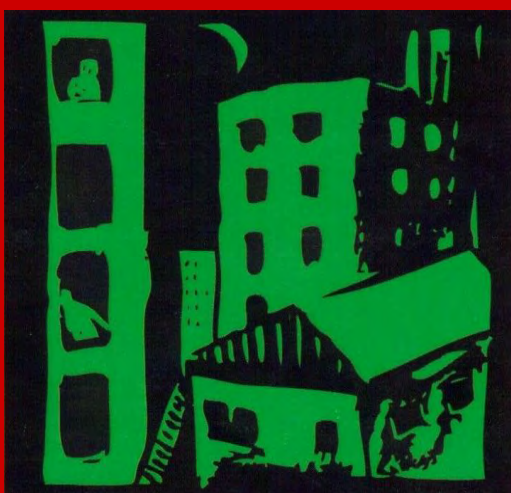


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Do prospective parents have a right to bury their deceased pre-viable foetuses? A discussion of how the Constitutional Court has created great legal uncertainty

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## ABSTRACT

*The Constitutional Court, in *Voice of the Unborn Baby NPC v Minister of Home Affairs*, was faced with a request to recognise a constitutionally protected right to bury a deceased pre-viable foetus. This is a sensitive topic, since many persons who lose a foetus in utero wish to bury the remains for personal or religious purposes. Prior to this case, the general understanding was that such burials were prohibited in terms of the Births and Deaths Registration Act (BADRA), which allows the burial only of viable foetuses. The case, therefore, turned on whether BADRA permits the burial of a deceased pre-viable foetus and, if not, whether this is unconstitutional. The applicants requested that the court declare that prospective parents have a right to bury their pre-viable foetuses. The High Court found that BADRA does not allow such burials, and that this is unconstitutional. The Constitutional Court, however, found that BADRA does not prohibit such burials, since such deaths are not covered by the Act at all.*

*This article discusses the lacuna that the Constitutional Court's decision created. It specifically considers whether such a right is protected in the Bill of Rights, and what the current law is regarding the burial of previable fetuses, given the finding that this matter is not covered by BADRA.*

**Keywords:** burial; previable foetus; rights; interpretation; Births & Deaths Registration Act.

## 1 INTRODUCTION

Recently, the Constitutional Court, in *Voice of the Unborn Baby NPC v Minister of Home Affairs (Voice (CC))*,<sup>1</sup> was faced with a request to recognise a constitutionally protected right to bury a deceased previable foetus.<sup>2</sup> This is a sensitive topic, since many persons who lose a foetus *in utero* wish to bury the remains. The loss of a foetus can be traumatic, and the opportunity to bury the foetus can help with the mourning process.<sup>3</sup> It may also be required for religious purposes.<sup>4</sup>

Prior to this case, the general understanding was that such burials were prohibited in terms of the Births and Deaths Registration Act (BADRA),<sup>5</sup> which allows the burial only of a viable foetus (classified as a stillborn child).<sup>6</sup> The case turned on whether, in terms of the Act, BADRA allows for the burial of a deceased foetus born prior to qualifying as a stillborn child, and if not, whether this is unconstitutional.<sup>7</sup> The applicants, two groups advocating for the burial of deceased fetuses,<sup>8</sup> requested that the court declare that prospective parents who had lost their pregnancies before the deceased foetus had reached 26 weeks' intrauterine existence (and could therefore be defined as stillborn in terms of the Act) had a right to bury the foetus.<sup>9</sup> The High Court found that BADRA does not allow this, and that this prohibition is unconstitutional.<sup>10</sup> The Constitutional Court, however, found that BADRA does not prohibit such burials, since such deaths are not

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<sup>1</sup> *Voice of the Unborn Baby NPC v Minister of Home Affairs* [2022] ZACC 20.

<sup>2</sup> *Voice of the Unborn Baby NPC v Minister of Home Affairs* [2021] (4) SA 307 (GP) (*Voice (HC)*) at para 1. In this article, references to the burial of foetal remains will include the cremation thereof unless otherwise clear from the context. Where reference is made to the burial of a "foetus" or "foetal remains", it can be accepted that the foetus was not born alive but died before birth. Once a foetus is born alive, it is no longer classified as a foetus, but as a child or a person.

<sup>3</sup> See *Voice (HC)* at para 16, 18.

<sup>4</sup> See *Voice (CC)* at para 25.

<sup>5</sup> Births and Deaths Registration Act 51 of 1992.

<sup>6</sup> See discussion below.

<sup>7</sup> See *Voice (CC)* at para 1.

<sup>8</sup> *The Voice of the Unborn Baby NPC and the Catholic Archdiocese of Durban*.

<sup>9</sup> See *Voice (HC)* at para 1.

<sup>10</sup> *Voice (CC)* at para 8–9. See also the order of the High Court.

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covered by the Act at all.<sup>11</sup> Hence, it found that the High Court order was unfounded, and suggested that municipal by-laws might instead govern the burial of deceased previable foetuses.<sup>12</sup>

This article details the lacuna created by the finding of the Constitutional Court that BADRA does not cover previable foetuses. In doing so, it first discusses the decisions of both the High Court and the Constitutional Court. The article then provides an analysis of the Constitutional Court's decision. It explores whether the court's approach reveals an acknowledgement that the rights of prospective parents would be violated if they were prohibited from burying their previable foetuses. It also examines each relevant constitutional right to determine whether they would in fact be limited by such a prohibition. Finally, it explores whether, as alluded to by the Court, municipal by-laws do in fact cover the burial of a foetus of any gestational age, and the effect of this. This is followed by some conclusions and recommendations.

### 2 THE CASE

As explained, this case turned on whether BADRA allows for the burial of a foetus born prior to qualifying as a still-birth in terms of the Act, and if not, whether this is unconstitutional.<sup>13</sup> The main sections of the Act at issue were sections 1, 18(1) to (3) and 20(1), read together.<sup>14</sup> The argument by the applicants was that these laws do not allow for the burial of a foetus born prior to qualifying as a stillborn child, and that this violates the rights to privacy,<sup>15</sup> religion,<sup>16</sup> equality<sup>17</sup> and dignity<sup>18</sup> of the person who suffered the pregnancy loss.<sup>19</sup>

Section 1(iv) of BADRA defines a "corpse" as "any dead human body, including the body of any still-born child". Section 1(xviii) defines "still-born" as a foetus that "has had at least 26 weeks of intra-uterine existence but showed no sign of life after complete birth". Hence, a foetus that is born prior to 26 weeks of intrauterine existence and shows no sign of life after complete birth is not covered by the definitions of "corpse" or "still-born" under the Act. Section 18(1) to (3) deals with stillborn children. It allows for the issuing of a "burial order" in respect of a stillborn child. It does not mention foetuses that do not qualify as stillborn children. Section 20(1) prohibits burials without a burial order. Hence, it was argued that section 20(1) does not allow for the burial of foetuses

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<sup>11</sup>*Voice* (CC) at para 26.

<sup>12</sup>*Voice* (CC) at para 26, 28.

<sup>13</sup>*Voice* (CC) at para 1.

<sup>14</sup>*Voice* (CC) at para 4.

<sup>15</sup>Section 14, Constitution of the Republic of South Africa, 1996.

<sup>16</sup>Section 15.

<sup>17</sup>Section 9.

<sup>18</sup>Section 10.

<sup>19</sup>*Voice* (CC) at para 4.

not classified as stillborn, because no burial order can be issued in respect of their deaths. The period of 26 weeks' intrauterine existence is seemingly determined in South Africa based on the viability of the foetus in South Africa.<sup>20</sup> Viability relates to the gestational age at which a foetus is considered able to survive outside the womb.<sup>21</sup>

The argument by the applicants was that the above-mentioned sections, by not allowing for the burial of pre-viable foetuses, infringed the rights of the prospective parents.<sup>22</sup> They argued that allowing the burial of foetuses lost after 26 weeks of intrauterine existence, but denying burial if they were lost before 26 weeks of intrauterine existence, amounts to an unfair differentiation in terms of section 9 of the Constitution;<sup>23</sup> furthermore, the fact that deceased pre-viable foetuses are treated as medical waste and incinerated disrespects the dignity of the prospective parents.<sup>24</sup> In addition, it was argued that such a denial infringed the right to freedom of religion and belief of those persons who believe that life begins at conception.<sup>25</sup> Persons subscribing to such religions believe that certain rites, including burial, must be performed when a person (including a pre-viable foetus) dies.<sup>26</sup> Finally, it was argued that the right to privacy is infringed, since the decision whether or not to bury a pre-viable foetus falls within the personal realm.<sup>27</sup>

The respondents argued that the main argument on behalf of the applicants was that burial would help to alleviate the grief of the prospective parents, but that this did not relate to any constitutional right.<sup>28</sup> They further contended that the differentiation between deceased foetuses pre- and post-26 weeks of intrauterine existence upheld a legitimate governmental purpose, something that was denied by the applicants.<sup>29</sup> No argument relating to the non-applicability of BADRA to the burial of pre-viable foetuses was made before the High Court. The Women's Legal Centre (WLC), an *amicus curiae*,<sup>30</sup> argued that allowing such burials would negatively affect the rights of pregnant women

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<sup>20</sup> Insinuated by the Constitutional Court in para 12. See also *Voice* (HC) at para 13.

<sup>21</sup> *Voice* (HC) at para 1. In scientific terms, viability is defined by determining "that gestational age where at least 50% of babies born alive will survive until discharge from neonatal services". See Gebhart GS et al. "Recommendations for the management of birth at the margins of fetal viability a practical approach for South Africa" (2020) 4 *Obstetrics and Gynaecology Forum* at 31.

<sup>22</sup> *Voice* (HC) at para 5. This term was used by the courts to refer to couples who had lost a foetus.

<sup>23</sup> *Voice* (HC) at para 17.

<sup>24</sup> *Voice* (HC) at para 17.

<sup>25</sup> *Voice* (HC) at para 25.

<sup>26</sup> *Voice* (HC) at para 25.

<sup>27</sup> *Voice* (HC) at para 35, referring to *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751.

<sup>28</sup> *Voice* (HC) at para 30–32.

<sup>29</sup> *Voice* (HC) at para 30.

<sup>30</sup> *Voice* (CC) at para 2.

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to terminate their pregnancies.<sup>31</sup> This is because a right to bury the remains of a terminated pregnancy would place additional burdens on institutions that offer the service.<sup>32</sup> The WLC therefore asked for the court to expressly exclude terminated pregnancies if the relief of the applicants was granted.<sup>33</sup>

Unfortunately, much of the court's analysis dealt with the grief of the prospective parents, without any reference to their constitutional rights.<sup>34</sup> Nevertheless, the court did refer to the dignity of the prospective parents later on (albeit without any real analysis).<sup>35</sup> It also seemed to find that the differentiation between viable and previable fetuses with respect to the right to bury them is arbitrary.<sup>36</sup> The court therefore declared the impugned provisions unconstitutional, but excluded voluntarily terminated pregnancies.<sup>37</sup> Furthermore, it declared that prospective parents who have lost their pregnancies prior to 26 weeks of intrauterine existence have a right to bury their fetuses.<sup>38</sup> The matter was brought before the Constitutional Court for confirmation.<sup>39</sup> Section 167(5) of the Constitution of the Republic of South Africa, 1996 (the Constitution) provides that the Constitutional Court must confirm any declaration of invalidity made by a lower court relating to the constitutionality of legislation.

The court first considered whether BADRA prohibits the burial of previable foetal remains. This was due to a new argument placed before the Constitutional Court by the second respondent, namely that BADRA did not cover the deaths or burials of previable fetuses.<sup>40</sup> In addressing this question, the court considered the purpose of the Act, which is "to regulate the registration of births and deaths".<sup>41</sup> The court found that section 20(1), prohibiting burials without burial orders, was applicable only to corpses (human and viable foetal remains).<sup>42</sup> Therefore, the court found, BADRA did not cover the burial of previable foetal remains.<sup>43</sup> For this reason it found that BADRA neither

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<sup>31</sup> In terms of the Choice of Termination of Pregnancy Act 92 of 1996 (CTPA), see *Voice* (HC) at para 38.

<sup>32</sup> *Voice* (HC) at para 39.

<sup>33</sup> *Voice* (HC) at para 40.

<sup>34</sup> *Voice* (HC) at para 46–48.

<sup>35</sup> *Voice* (HC) at para 49.

<sup>36</sup> *Voice* (HC) at para 49.

<sup>37</sup> *Voice* (HC) at para 50.

<sup>38</sup> Para 2 of the High Court order.

<sup>39</sup> *Voice* (CC) at para 1.

<sup>40</sup> *Voice* (CC) Second Respondent's Heads of Argument at para 3.1–3.8.

<sup>41</sup> *Voice* (CC) at para 18. This is similar to the submission made by the Minister of Health, discussed in para 13.

<sup>42</sup> *Voice* (CC) at para 20.

<sup>43</sup> *Voice* (CC) at para 20.

allows nor prohibits the burial of previable foetal remains, but is simply silent on the matter.<sup>44</sup> The court related this to one of the purposes of the Act, which is to ensure that unnatural deaths are recorded and investigated, something that would not be necessary in case of the death of a previable foetus.<sup>45</sup>

The court substantiated its finding with reference to section 39(2) of the Constitution.<sup>46</sup> Section 39(2) requires courts to interpret legislation in a way that promotes the objects, spirit and purport of the Bill of Rights. This was interpreted by the Constitutional Court in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others In re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others*<sup>47</sup> to mean that “judicial officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section”.<sup>48</sup>

This suggests that the court was of the opinion that a different interpretation (one finding that BADRA prohibits the burial of previable fetuses) would violate the rights of the prospective parents. The court retreated from granting a declaratory order that there is a right to bury a previable foetus by finding that it could not make such an order with the limited information before it, since there might be municipal laws prohibiting this, which would have an effect on medical facilities.<sup>49</sup> The orders of the High Court were then set aside and dismissed.<sup>50</sup>

### 3 ACKNOWLEDGEMENT OF A RIGHTS VIOLATION?

As indicated above, the court’s reliance on section 39(2) of the Constitution to substantiate its finding seems to suggest that a denial of the burial of previable fetuses would infringe the rights of prospective parents. This is because the court prefers an interpretation that leaves the rights of prospective parents “untouched”.<sup>51</sup> This reminds one of the *Hyundai* principle in relation to section 39(2), quoted above, and suggests that the alternative interpretation would have amounted to an infringement of constitutional rights.

<sup>44</sup>*Voice* (CC) at para 22. This finding is similar to the submissions made by the Minister of Health, discussed in para 13.

<sup>45</sup>*Voice* (CC) at para 23.

<sup>46</sup>*Voice* (CC) at para 25.

<sup>47</sup>*Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others in re: Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* 2001 (1) SA 545 (CC) (*Hyundai*).

<sup>48</sup>See *Hyundai* (2001) at para 23, generally known as the *Hyundai* principle. The principle was discussed by the Constitutional Court in paras 24–25, despite their not referring to the *Hyundai* case.

<sup>49</sup>*Voice* (CC) at para 27.

<sup>50</sup>*Voice* (CC) at para 55.

<sup>51</sup>*Voice* (CC) at para 25.

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However, the court did not go on to test whether such an interpretation would, in fact, offend any constitutional rights. Instead, it merely stated that its interpretation should be preferred because it “leaves untouched any right which parents *may* have” to bury their previable foetuses.<sup>52</sup> This differs from the Constitutional Court’s usual approach in applying the *Hyundai* principle. In nine out of the past 10 cases applying that principle,<sup>53</sup> the court included a determination as to whether the alternative interpretation would infringe on the right.<sup>54</sup> In the remaining case, the court at the very least identified the relevant constitutional rights and pronounced that there was a “real risk” of such an infringement.<sup>55</sup> It would have been preferable for the court to follow its own approach and determine whether such a right exists or, put differently, whether the denial of such a right would infringe the prospective parents’ constitutional rights.

Instead of considering whether the rights of prospective parents would be limited by an alternative interpretation, the court seemed to focus on the potential justifications for such limitations. This included that a right to bury a previable foetus would have resource implications for public health-care facilities. The court found that it did not have sufficient information before it to decide on this. The court also referred to potential restrictions within municipal by-laws. This is confusing. A determination of whether or not something is included as a right in the Bill of Rights is entirely separate from a determination of whether any law limiting such right is justifiable.

This is evident in *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others*,<sup>56</sup> where the court found that the Constitution “does not warrant a

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<sup>52</sup>*Voice* (CC) at para 25, emphasis added.

<sup>53</sup>In which the court applied the principle and chose a constitutional interpretation above one that would be unconstitutional.

<sup>54</sup>See (1) *Van Zyl NO v Road Accident Fund* 2022 3 SA 45 (CC) at para 58; (2) *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg and Others v Minister of Police and Others* 2022 (1) BCLR 46 (CC) at para 60; (3) *Member of the Executive Council for Health, Gauteng Provincial Government v PN* 2021 (6) BCLR 584 (CC) at para 30; (4) *Chisuse and Others v Director-General, Department of Home Affairs and Another* 2020 (6) SA 14 (CC) at para 76–77 (finding that the alternative interpretation would “rub against” certain constitutional rights); (5) *Maswanganyi v Minister of Defence and Military Veterans and Others* 2020 (4) SA 1 (CC) at para 40; (6) *Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Standard Bank of South Africa Limited; Competition Commission of South Africa v Waco Africa (Pty) Limited and Others* 2020 (4) BCLR 429 (CC) at para 64; (7) *Independent Institute of Education (Pty) Limited v Kwazulu-Natal Law Society and Others* 2020 (2) SA 325 (CC) at para 47; (8) *Jordaan and Others v City of Tshwane Metropolitan Municipality and Others; City of Tshwane Metropolitan Municipality v New Ventures Consulting and Services (Pty) Limited and Others; Ekurhuleni Metropolitan Municipality v Livanos and Others* 2017 (6) SA 287 (CC) at para 58–68; (9) *Daniels v Scribante and Another* 2017 (4) SA 341 (CC) at para 34.

<sup>55</sup>*Helen Suzman Foundation v Judicial Service Commission* 2018 (4) SA 1 (CC) at para 59.

<sup>56</sup>*De Reuck v Director of Public Prosecutions (Witwatersrand Local Division) and Others* 2004 (1) SA 406 (CC) (*De Reuck*).

narrow reading” of rights, and that “limitations of rights are dealt with under section 36 of the Constitution and not at the threshold level”.<sup>57</sup> This means that rights must be interpreted widely, and that this interpretation should not include a consideration of the circumstances in which the limitation of the right would be justified. In *De Reuck*, even abhorrent behaviour such as the creation and distribution of child pornography was considered protected under the right to freedom of expression.<sup>58</sup>

This does not mean that the court did not believe that the prevention of these actions is justifiable. Instead, it meant that there is a right to such actions, and the prevention thereof must be done in terms of a law of general application, and be reasonable and justifiable. Similarly, whether or not the constitutional rights in question in the *Voice of the Unborn* case include the right to bury a deceased unviable foetus, this has nothing to do with whether the limitation of the right to prohibit such burials would be justifiable. The restrictions within by-laws cannot affect whether a right to bury a previable foetus is protected in the Bill of Rights. Rather, its justifiability must be considered should such a right be found to exist.

#### **4 DOES THE BILL OF RIGHTS PROTECT A RIGHT TO BURY A DECEASED PREVIABLE FOETUS?**

Neither of the courts went into any detail regarding whether or why the rights of the prospective parents would be limited by prohibiting the burial of deceased previable foetuses. This section briefly considers and comments on the possibility that such a prohibition would limit these rights. Should these rights be limited, it would mean that the Constitution does indeed protect a right to bury deceased previable foetuses. Any limitation would therefore have to pass a section 36 analysis. The analysis below follows the interpretive approach of the Constitutional Court, mentioned above, which requires rights to be interpreted generously.<sup>59</sup>

##### **4.1 The right to equality**

The first right relied on by the applicants is the right to equality. Section 9(1) of the Constitution states: “Everyone is equal before the law and has the right to equal protection and benefit of the law”. This section prohibits differentiation by law which is irrational.<sup>60</sup> The differentiation must serve a legitimate governmental purpose.<sup>61</sup> In the context of the burial of foetuses, the reason for not allowing the practice seems to be the

<sup>57</sup>*De Reuck* (2004) at para 48.

<sup>58</sup>*De Reuck* (2004) at para 50.

<sup>59</sup>*De Reuck* (2004) at para 48, 50; *S v Zuma and Others* 1995 (2) SA 642 (CC) at para 15; *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at para 9.

<sup>60</sup>De Vos P & Freedman W (eds) “Equality, human dignity, freedom and privacy rights” in *South African constitutional law in context* (2014) at 531, referring to *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) at para 25.

<sup>61</sup>De Vos & Freedman (2014) at 531, referring to *Prinsloo v Van der Linde and Another* 1997 (3) SA 1012 (CC) para 25; *AB and Another v Minister of Social Development* 2017 (3) SA 570 (CC) at para 285.



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resource implications affecting public health facilities.<sup>62</sup> While this might be a sound reason for not allowing the burial of foetuses in general, it does not justify allowing burial for viable foetuses but not for previable foetuses. The means of removal of a deceased foetus does not change based on viability. A differentiation based on this, or on ease of identifying the foetal matter, might have been sounder.

The state's expert testified that the reason for the differentiation was that the burial right accrued to the viable foetus itself because the viable foetus is a quasi-legal subject.<sup>63</sup> This is not based on law. As explained by the state, the purpose of requiring viable foetuses to be registered is not for the benefit of the foetus, but to prevent concealment of murder.<sup>64</sup> The state's interest in preserving the potential life is not relevant,<sup>65</sup> since deceased foetuses do not have potential life. In fact, viability is not the threshold for state interference in the interest of preserving potential life. As early as 13 weeks of gestation, the state places certain limits on terminating foetal life.<sup>66</sup> Moreover, there is no stricter limit or prohibition placed on terminating foetal life after 26 weeks of intrauterine existence. The strictest limits are applied from as early as 20 weeks.<sup>67</sup>

Interestingly, the differentiation is not based on personhood. In terms of South African law, personhood is bestowed only if a baby is born alive.<sup>68</sup> A differentiation based on personhood would have made more sense. What is concerning is that the respondent's council in the High Court submitted that "in the absence of viability there is no life".<sup>69</sup> This is a legally unsound statement. Not only is viability not considered the start of personhood in terms of South African law, but being born prior to 26 weeks does not guarantee that the baby would not be born alive.<sup>70</sup> Live birth does not require survival.

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<sup>62</sup>*Voice* (CC) at para 27.

<sup>63</sup>*Voice* (CC) Soma-Pillay Affidavit para 67.

<sup>64</sup>*Voice* (CC) Second Respondent's Heads of Argument para 3.4.

<sup>65</sup>See *Voice* (CC) Soma-Pillay Affidavit para 56.

<sup>66</sup>Section 2(1)(b) CTPA.

<sup>67</sup>Section 2(1)(c) CTPA.

<sup>68</sup>Venter H *The difference between a stillborn baby and a medical waste foetus in light of the current South African law* (unpublished LLM thesis, University of Pretoria, 2018) at 51, referring to Cronjé DSP & Heaton J *The South African Law of Persons* 3<sup>rd</sup> ed (2003) at 7. See also *S v Mshumpa* 2008 (1) SACR 126 (E) at paras 55–56.

<sup>69</sup>*Voice* (HC) at para 30.

<sup>70</sup>BADRA speaks of 26 weeks of intrauterine existence. This equates to 28 weeks' gestational age. See Du Toit-Prinsloo L, Pickles C & Lombaard H "Evaluating current knowledge of legislation and practice of obstetricians and gynaecologists in the management of fetal remains in South Africa" (2016) 106(4) *South African Medical Journal* 403 at 404. This is a very "high" gestational age margin. Currently, the "lowest limit of intervention" is 24 weeks' gestation, that is, 22 weeks' intrauterine existence. This means that babies born prior to 22 weeks may be alive, but are not deemed mature enough to survive even with assistance.

Moreover, from as little as 22 weeks of intrauterine existence, babies may survive.<sup>71</sup> Furthermore, even if viability is an important threshold, the testimony of the state's own expert suggests 24 weeks' intrauterine existence (and not 26 weeks) as a mark of viability.<sup>72</sup>

The Second Respondent explained that the purpose of including stillborn children in the Act was due to a:

need for governments around the globe and their medical services to know through recording of statistics about the age, health and related aspects of mothers and the sex and weight of still-born children to undertake health management and research and to detect crimes such as infanticide.<sup>73</sup>

However, this does not explain why the Act allows for the issuance of a burial order for stillborn children. It is unclear why one would have to bury a stillborn child, which is not considered a person, and not have the choice to treat it as medical waste. The other possible reason for differentiation is the additional administrative burden that this would place on the Department of Home Affairs in having to register the additional deaths and burials of previable foetuses.<sup>74</sup> The idea seems to be that burial orders are required for burying any human or foetal remains, and that to be able to bury any foetal matter, the death would have to be formally registered.

However, in view of the purpose given for registering still-births, this argument does not hold water. The respondents do not consider it necessary to register the deaths of previable foetuses because their deaths are unlikely to have been due to human intervention post live birth.<sup>75</sup> The assumption that a right to bury the deceased previable foetuses would require the registration of their births and the issuance of a burial order is misplaced; it is also a telltale sign of the state's own interpretation of BADRA that a burial order is indeed required to bury foetal remains. The applicant correctly points out that, for a previable foetus to be buried, registration of death and issuance of a burial order need not be required. Instead, a different process could be created, "such as simply filling out a register at the clinic or hospital".<sup>76</sup>

From the above, the differentiation seems to limit section 9(1). This is because there does not seem to be a legitimate reason for differentiating between viable and previable foetuses in allowing their burial. Nevertheless, a finding that a differentiation between a viable and previable foetus is against the right to equality does not in itself create a right to bury a previable foetus. It only means that any law that differentiates on this ground would be unconstitutional. For such a right to be established, the right itself must

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<sup>71</sup>See above footnote.

<sup>72</sup>*Voice* (CC) Soma-Pillay Affidavit paras 73–74.

<sup>73</sup>*Voice* (CC) Second Respondent's Heads of Argument 3.4.

<sup>74</sup>*Voice* (CC) First Respondent's Heads of Argument para 22.

<sup>75</sup>*Voice* (CC) Second Respondent's Heads of Argument para 3.4.

<sup>76</sup>*Voice* (CC) Applicant's Supplementary Heads of Argument para 75.

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include the ability to bury a previable foetus. The following sections consider whether other constitutional rights include such elements.

### 4.2 The right to have one's dignity respected and protected

The first right to be considered in this regard is the right to have one's dignity respected and protected.<sup>77</sup> This was one of the rights relied on by the applicants. The right to human dignity has two core elements. It recognises the equal inherent worth of each person, and it recognises their autonomy.<sup>78</sup> Recognising someone's inherent worth, therefore, arguably includes acknowledging their loss and suffering. It can be argued that denying prospective parents the right to bury their deceased previable foetuses disregards their loss and suffering, thereby limiting their right to have their dignity respected. Slabbert also argues that the element of autonomy is limited through such a denial.<sup>79</sup> Autonomy means that people are free to live according to their own ideas of what is important.<sup>80</sup> They must be able to make choices over their own lives, bodies and other personal matters.<sup>81</sup> When a prospective parent is denied the choice to bury their deceased previable foetus, they are denied the ability to make decisions about their lives and what is important to them.<sup>82</sup> This means that dignity protects the right to bury deceased previable foetuses, and is limited when this is denied.

Importantly, human dignity is both a value and a right in the Constitution.<sup>83</sup> As a right, dignity can be relied on directly. As a value, dignity is, amongst other things, used to interpret the other rights in the Bill of Rights.<sup>84</sup> Often in Bill-of-Rights litigation, dignity

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<sup>77</sup>Section 10 of the Constitution.

<sup>78</sup>Fick S *Consenting to objectifying treatment? Human dignity and individual freedom* (unpublished LLM thesis, Stellenbosch University, 2012) at 31–38; Davis D “Equality: The majesty of Legoland Jurisprudence” (1999) *SALJ* 398; Liebenberg S “The value of human dignity in interpreting socio-economic rights” (2005) *SAJHR* 1 at 5. See also McCrudden C “Human dignity and judicial interpretation of human rights” (2008) *The European Journal of International Law* 655 at 659–660, 685–686; Botha H “Human dignity in comparative perspective” (2009) *Stell LR* 171 at 183.

<sup>79</sup>Slabbert M “Pregnancy loss: A burial or medical waste” (2017) 80 *Journal of Contemporary Roman-Dutch Law* 102 at 110.

<sup>80</sup>Fick (2012) at 37; Barrett J “*Dignatio* and the human body” (2005) *South African Journal on Human Rights* 525 at 530; McCrudden (2008) at 689. See also Klein E “Human dignity in German Law” in Kretzmer D & Klein E (eds) *The concept of human dignity in human rights discourse* (2002) at 149.

<sup>81</sup>See Fick (2012) at 37–38; McCrudden (2008) at 688–689. It seems from McCrudden's writings and references to American case law that intimate and personal decisions are more readily allowed. Botha discusses the view that dignity is concerned not only with private autonomy but also with public autonomy: in Botha (2009) at 193.

<sup>82</sup>See Slabbert (2017) at 110.

<sup>83</sup>Dignity as a value is found in sections 7(1), 39 and 36 of the Constitution. De Vos & Freedman “Equality, human dignity, freedom and privacy rights” (2014) at 515.

<sup>84</sup>Section 39(1)(a) of the Constitution; see also De Vos (2014) at 514.

might not be the primary right that is infringed.<sup>85</sup> In these matters, dignity would not be relied on as a right but rather as a value to interpret the primary right affected. When considering the other rights that may be limited by a prohibition on the burial of fetuses, it is evident that the value of dignity would come into play in their interpretation.<sup>86</sup>

### 4.3 The right to privacy

As the applicants did, Slabbert argues that a prohibition on burying deceased pre-viable fetuses would limit the right to privacy.<sup>87</sup> This is because the decisions to bury a deceased pre-viable foetus arguably falls within a person's "inner sanctum",<sup>88</sup> a term used in *Bernstein and Others v Bester NO and Others*.<sup>89</sup> The court described this inner sanctum as a "truly personal realm" that includes a person's "family life, sexual preferences and home environment" and which should be "shielded from erosion by conflicting rights of the community".<sup>90</sup> The court further explained that "as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly".<sup>91</sup>

While the decision to bury a pre-viable foetus definitely relates to one's family life, the fact that the foetal remains are often removed at a medical institution might affect the power of this right when arguing that the decision is completely private. This is because such a decision would affect other persons and resources.

### 4.4 The right to freedom of conscience, religion, thought, belief and opinion

Another relevant right relied on by the applicants is the right to freedom of conscience, religion, thought, belief and opinion.<sup>92</sup> Section 15(1) of the Constitution states that "[e]veryone has the right to freedom of conscience, religion, thought, belief and opinion". It has been said that "the freedom to hold views about religious and other moral issues and the freedom to practice those beliefs goes to the heart of what it means

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<sup>85</sup>*Dawood and Another v Minister of Home Affairs and Others; Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) at para 35.

<sup>86</sup>The fact that people have *equal* inherent worth is relevant to the right to equality. The autonomy element of dignity is relevant to the rights to privacy and bodily integrity and the freedom of religion, thought and belief.

<sup>87</sup>Slabbert (2017) at 110.

<sup>88</sup>Slabbert (2017) at 110.

<sup>89</sup>*Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) para 67.

<sup>90</sup>*Bernstein* (1996) at para 67.

<sup>91</sup>*Bernstein* (1996) at para 67.

<sup>92</sup>*Voice* (HC) at para 25.

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to be human in a modern democracy”.<sup>93</sup> The Constitutional Court in *Minister of Home Affairs v Fourie*,<sup>94</sup> explains as follows:<sup>95</sup>

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awaken concepts of self-worth and human dignity which form the cornerstone of human rights. Such belief affects the believer’s view of society and founds a distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries. For believers, then, what is at stake is not merely a question of convenience or comfort, but an intensely held sense about what constitutes the good and proper life and their place in creation.

As a right which allows for diversity of views and beliefs, this right is strongly associated with accommodating and respecting people’s views and beliefs (as opposed to enforcing them on others).<sup>96</sup> As indicated, many people (religious or otherwise) believe that life begins prior to birth, and many hold religious beliefs that require the burial of any deceased foetus. These views and beliefs should be accommodated, and such people should be allowed to practise their beliefs. In other words, they should not only be allowed to hold such beliefs, but to act in accordance therewith (this is linked to their human dignity).<sup>97</sup> For this reason, the right is likely to include the right to bury a deceased previable foetus, and a prohibition is likely to limit this right. The strong focus on accommodating beliefs also correlates with the idea of allowing prospective parents to decide whether or not to bury the previable foetus, instead of forcing burial on all such prospective parents, as is the case with stillborn children.

### 4.5 The right to freedom and bodily integrity

A right not relied on by the applicants is that of freedom and bodily integrity. Section 12(2) of the Constitution provides that “everyone has the right to bodily and psychological integrity, which includes the right — (a) to make decisions concerning reproduction; (b) to security in and control over their body”. The court, in *AB v Minister of Social Development*,<sup>98</sup> found that section 12(2)(a) is “specifically geared to protecting

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<sup>93</sup>De Vos P & Freedman W (eds) “Diversity rights” in *South African constitutional law in context* (2014) at 614.

<sup>94</sup>2006 (1) SA 524 (CC).

<sup>95</sup>*Minister of Home Affairs and Another v Fourie and Another* 2006 (1) SA 524 (CC) para 89.

<sup>96</sup>De Vos (2014) at 614.

<sup>97</sup>*Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) at para 36. See also *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) at para 92; *Prince v President of the Law Society of the Cape of Good Hope* 2002 (2) SA 794 (CC) para 38. Cases referred to in De Vos “Diversity rights” (2014) at 615, 619–620.

<sup>98</sup>*AB v Minister of Social Development* 2017 (3) SA 570 (CC).

*all aspects of reproduction*".<sup>99</sup> This arguably would include what happens to a deceased foetus after removal. Furthermore, in applying section 12(2)(b), a foetus is considered to be part of the pregnant woman's body.<sup>100</sup> Hence, she should be able to control what happens to her body and arguably whatever is taken from it.<sup>101</sup> This is similar to organs that are removed and donated, as well as gametes.<sup>102</sup> Moreover, this right is broader than the right to privacy, which is limited to decisions regarding private matters and could not similarly be reduced because removal happens at a public institution.<sup>103</sup>

Authors have highlighted that respecting women's "autonomy and self-determination over their bodies" is particularly important given the history of disrespect of women's bodies and the remaining "patriarchal structures and attitudes [that] facilitate the control of women's bodies by men".<sup>104</sup> The fact that section 12(2) also protects psychological integrity might further support the right of prospective parents to decide whether to bury their deceased pre-viable foetus. This is because section 12(2) includes a right "to make free and informed choices about ... one's psychological well-being".<sup>105</sup> A choice to bury a deceased foetus might fall within this right, since it would be aimed at helping to restore the psychological well-being of the grieving prospective parent. For the above reasons, it can be argued that the right to freedom and bodily integrity includes the right to decide what to do with one's deceased pre-viable foetus, including burial. This right would be limited if this is denied.

#### 4.6 Conclusion

The analysis shows that it is very likely that most (if not all) of these rights would be limited by a prohibition on the burial of deceased pre-viable fetuses. This would mean that the right to bury a pre-viable foetus is protected by the Constitution. The state has a duty to respect, protect, promote and fulfil the rights in the Bill of Rights. This means that not only should the state refrain from limiting this right by enacting laws that prohibit such burials, but that the state also has a duty to promote the right. Promoting the right arguably includes ensuring that all legislation favours the right. It entails the duty of ensuring that people are able to exercise their rights.<sup>106</sup> In interpreting this duty,

<sup>99</sup>See *AB* (2017) at para 79 (emphasis added).

<sup>100</sup>This is confirmed by the Roman-Dutch maxim, *partus enim antequam edatur, mulieris portio est vel viscerum*. See Robinson R "The legal nature of the embryo: Legal subject or legal object?" (2018) 21 *Potchefstroom Electronic Law Journal* 1 at 18, quoting Voet. See also Venter (2018) at 40–41; Cronjé & Heaton (2008) at 7. *S v Mshumpa* 2008 (1) SACR 126 (E) at para 63 confirms this in that the killing of the unborn child was considered an assault to the mother.

<sup>101</sup> See Venter (2018) at 19.

<sup>102</sup>See section 18 of the Regulations Relating to Artificial Fertilisation of Persons, 2012.

<sup>103</sup>De Vos (2014) at 583.

<sup>104</sup>De Vos (2014) at 583–584.

<sup>105</sup>De Vos (2014) at 584.

<sup>106</sup>De Vos P & Freedman W (eds) "South African constitutional law in context" in *South African constitutional law in context* (2014) 3 at 29.

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the Constitutional Court in *Glenister v President of the Republic of South Africa and Others*<sup>107</sup> found that:

[t]his obligation [to respect, protect, promote and fulfil rights] goes beyond a mere negative obligation not to act in a manner that would infringe or restrict a right. Rather, it entails positive duties on the state to take deliberate, reasonable measures to give effect to all of the fundamental rights contained in the Bill of Rights.<sup>108</sup>

This means the state cannot merely *not* expressly prohibit the right. It must adopt legislation to give effect to the right, instead of allowing for a lacuna in the law that leaves a person unable to exercise the right.

### 5 THE MUNICIPAL BY-LAWS ON CEMETERIES AND CREMATORIA

The second respondent raised the argument that the burial of previable fetuses is governed not by BADRA but by municipal by-laws. This is due to the municipal function in Schedule 5B of the Constitution, which places the duty on municipalities to “administer cemeteries, funeral parlours and crematoria”. Based on this duty, many municipalities have their own by-laws relating to this function.

The relevant by-laws of 16 municipalities were scrutinised to determine what it is that they provide regarding the burial of previable fetuses.<sup>109</sup> This includes the eight metropolitan municipalities. The municipalities include Buffalo City,<sup>110</sup> Cape Town,<sup>111</sup> Drakenstein,<sup>112</sup> Ekurhuleni,<sup>113</sup> eThekweni,<sup>114</sup> George,<sup>115</sup> Johannesburg,<sup>116</sup> Mangaung,<sup>117</sup> Mbombela,<sup>118</sup> Midvaal,<sup>119</sup> Mogale City,<sup>120</sup> Nelson Mandela Bay,<sup>121</sup> Oudtshoorn,<sup>122</sup> Polokwane,<sup>123</sup> Sol Plaatje<sup>124</sup> and Tshwane.<sup>125</sup> Thirteen out of the 16 municipalities have

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<sup>107</sup>*Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC).

<sup>108</sup>See *Glenister* (2011) at para 105.

<sup>109</sup>These municipalities were selected based on the availability of their by-laws.

<sup>110</sup>Municipality of Buffalo City By-Law on the Disposal of Human Remains, 2005.

<sup>111</sup>City of Cape Town Cemeteries, Crematoria and Funeral Undertakers By-Law, 2011.

<sup>112</sup>Drakenstein Municipality Cemeteries and Crematoria By-Laws, 2007.

<sup>113</sup>Ekurhuleni Metropolitan Municipality Cemetery and Crematorium Bylaws, 2003.

<sup>114</sup>eThekweni Cemetery Bylaws, 1956.

<sup>115</sup>George Municipality: Cemeteries and Crematoria By-Laws, 2020.

<sup>116</sup>City of Johannesburg Metropolitan Municipality Cemeteries and Crematoria By-Laws, 2004.

<sup>117</sup>Mangaung Local Municipality By-Laws Relating to Municipal Cemeteries, 2008.

<sup>118</sup>City of Mbombela Cemetery Bylaws, 2020.

<sup>119</sup>Midvaal Cemetery and Crematoria By-Laws, 2009.

<sup>120</sup>Mogale City Local Municipality: Cemetery By-Laws, 2005.

<sup>121</sup>Nelson Mandela Bay Metropolitan Municipality: Cemeteries and Crematoria By-Laws, 2010.

<sup>122</sup>Oudtshoorn Municipality: Cemeteries and Crematoria By-Laws, 2009.

<sup>123</sup>Pietersburg Municipality: Cemetery By-Laws, 1974.

<sup>124</sup>Sol Plaatje Municipality Cemeteries By-Law, 2006.

definitions for either “corpse” or “body”.<sup>126</sup> Of the 13 definitions, all except one include a “stillborn child”.<sup>127</sup> Most by-laws with this definition do not define stillborn child. Of the four that do, three define it in a similar way to BADRA, and limit it to foetuses that have had “at least 26 weeks of intra-uterine existence”.<sup>128</sup> One municipality defines a stillborn child as “viable but having showed no sign of life at birth”.<sup>129</sup> Of the 13 municipalities that define corpse or body, only four include “foetus” in the definition, in addition to a stillborn child.<sup>130</sup>

Based on the definitions section alone, such an insertion into the definition goes beyond BADRA and seems to suggest the authorisation of the burial of previable foetuses; but further reading of the by-laws discounts this interpretation. All 16 municipalities require municipal consent for the interment of bodies/corpses.<sup>131</sup> They all require a burial order in terms of BADRA<sup>132</sup> (except for one where the by-law is so outdated that BADRA’s predecessor is referred to).<sup>133</sup> This indicates that all the municipalities base their decisions on what types of remains they allow to be buried on national legislation. Moreover, none of them actually allows the burial of a previable foetus, not even those that include “foetus” in the definition of body/corpse, since no burial order can be granted for such remains.

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<sup>125</sup>City of Tshwane Metropolitan Municipality Cemetery and Crematorium By-Laws, 2005.

<sup>126</sup>In their definitional sections (section 1 of each by-law). Only eThekweni, Polokwane and Mogale City have no such definitions.

<sup>127</sup>The Mbombela by-law only defines body as “the remains or any portion thereof of any deceased person”.

<sup>128</sup>The by-laws of Mangaung, Midvaal, Sol Plaatje.

<sup>129</sup>The Tshwane by-law.

<sup>130</sup>The by-laws of the City of Cape Town, George, Nelson Mandela Bay and Oudtshoorn.

<sup>131</sup>Section 2 of the Buffalo City by-law, section 3(2) of the City of Cape Town by-law, section 5(2)(a) of the Drakenstein by-law, section 4(1) of the Ekurhuleni by-law, section 9 of the eThekweni by-law, section 10(1) of the George by-law, section 2(2)(a) of the City of Johannesburg by-law, section 9(1) of the Mangaung by-law, section 4(1) of the Mbombela by-law, section 22(1) of the Midvaal by-law, section 5(1) of the Mogale City by-law, section 10(2) of the Nelson Mandela Bay by-law, section 10(2) of the Oudtshoorn by-law, section 4 of the Polokwane by-law, section 9(1) of the Sol Plaatje by-law, and section 8 of the Tshwane by-law.

<sup>132</sup>Section 3(5) of the Buffalo City by-law, section 3(2)(c) of the City of Cape Town by-law, section 5(2)(b) of the Drakenstein by-law read with the definition of “burial order”, section 5(1)(b) of the Ekurhuleni by-law, section 10(2)(c) of the George by-law, section 3(2)(a) of the City of Johannesburg by-law, section 9(1) of the Mangaung by-law read with the definition of “burial order”, section 4(2) of the Mbombela by-law, section 22(1) of the Midvaal by-law read with the definition of “burial order”, section 5(2) of the Mogale City by-law, section 10(2)(c) of the Nelson Mandela Bay by-law, section 10(2)(c) of the Oudtshoorn by-law, section 4 of the Polokwane by-law (speaks only of “written order signed by the Registrar of Deaths”), section 9(1)(a) of the Sol Plaatje by-law read with the definition of “burial order”, and section 9 of the Tshwane by-law read with the definition of “burial order”.

<sup>133</sup>Section 9 of the eThekweni by-law requires a burial order in terms of “the Births, Marriages and Death’s Registration Act 1923”.



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This is in keeping with the argument of the first applicant in their supplementary heads of argument. They state that the municipalities' functions in terms of schedule 5B is limited to administering burial and related *places* (cemeteries, funeral parlours and crematoria), and does not extend to determining which remains may be buried. In this regard they argue as follows:

Schedule 5 Part B of the Constitution does not list 'burial' generally; instead, it lists the places where bodies are prepared for burial (funeral parlours) and where bodies are buried (cemeteries and crematoria). ... This implies that burial generally is not within the exclusive functional areas listed in Schedule 5 Part B of the Constitution. Rather, only a specific aspect of burial is within the exclusive functional areas, namely the administration of the places where bodies are prepared for burial and where bodies are buried. ... Accordingly, any municipal by-law that purports to determine whether fetal remains may be buried would be beyond its powers. This power vests in Parliament.

This argument is convincing. It seems to be reflected in the fact that the by-laws all defer to national legislation on which remains can be buried. They are only responsible for the places of burial, not the rules regarding whether specific remains may be buried. Consequently, contrary to the court's finding, their by-laws on cemeteries should not (and do not) in themselves limit any right to bury a previable foetus. Instead, the by-laws should be, and are, based on national legislation, and change according to national legislation. While they do currently prohibit the burial of previable foetuses, it is only because they rely on BADRA. The second respondent criticised the applicants for not focusing on municipal by-laws because of the Schedule 5B-duty of municipalities to administer cemeteries, but failed to acknowledge that the by-laws themselves defer to BADRA.<sup>134</sup> They further stated: "The applicants and the High Court approached the entire matter as if the BADRA is on the statute book to regulate or prevent the burial of foetal remains. That is simply not so."<sup>135</sup> This statement ignores the fact that in practice BADRA is the statute that regulates or prevents the burial of foetal remains and to which all of these by-laws look for authority.

The second respondent further argued that BADRA's purpose is limited to "the formal registration of births and deaths in South Africa and to maintain a population register in terms of the identification Act".<sup>136</sup> However, this is not the purpose stated in the Act. Instead, the purpose of the Act stated in the long title is "to regulate the registration of births and deaths; *and to provide for matters connected therewith*".<sup>137</sup> This purpose is wide enough to cover burials. The fact that burial orders are provided in terms of the Act (and that these orders are relied upon in municipal by-laws relating to cemeteries)

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<sup>134</sup>*Voice* (CC) Second Respondent's Heads of Argument para 2.8–2.13.

<sup>135</sup>*Voice* (CC) Second Respondent's Heads of Argument para 3.2.

<sup>136</sup>*Voice* (CC) Second Respondent's Heads of Argument para 3.1.

<sup>137</sup>Emphasis added.

confirms this. Evident from these by-laws is that the court's decision left a significant lacuna in the law regarding the burial of previable foetuses.

Prior to this case, everyone, including the national and municipal government, believed BADRA governed which remains could be buried. This is clear from the arguments before the court as well as the by-laws. It was only in their Heads of Argument to the Constitutional Court that the second respondent introduced the argument that BADRA does not cover previable foetuses. Based on the interpretation of the court, most of these by-laws do not cover the burial of previable foetuses at all (despite any intention that municipalities might have had to the contrary). In other words, had the court applied its same reasoning to these by-laws, it would have concluded that, since the definition of body/corpse of most of these by-laws does not include previable foetuses, they are not covered by the by-laws. Hence, in most municipalities, there is no law governing the burial of previable foetuses.

Contrary to the apparent assumption of the court, this likely does not mean that previable foetuses can be buried without limitation. The most likely understanding of the by-laws is that cemeteries are for the burial of bodies, and consent must be granted for this. There are no provisions relating to the burial of anything other than bodies/corpses, which would surely also require the consent of the municipality; otherwise an absurd situation might arise in which people would be able to bury their deceased pets in cemeteries without the consent of the relevant municipality.

This interpretation is confirmed by the definitional sections of many of the by-laws, which define crematoria as places for the cremation of bodies/corpses<sup>138</sup> and cemeteries as places for the burial of bodies/corpses.<sup>139</sup> At most, this interpretation would mean that people would be able to bury previable foetuses outside of cemeteries or cremate them somewhere other than crematoria. This is probably not what most persons wishing to bury their deceased previable foetuses have in mind – burying them in the garden like a deceased pet. This suggests that the state (national and municipal) is limiting the constitutional rights, discussed above, of the prospective parents. The state is failing in its duty to promote and protect parents' rights, since the lacuna means that they are effectively unable to exercise their rights.

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<sup>138</sup>Read together with the definition of "body"/"corpse" in the by-laws. See by-laws of Buffalo City, City of Cape Town ("crematorium" is defined as "a building where deceased persons are cremated"), Ekurhuleni ("crematorium" is defined as "a place for incinerating human bodies"); George, City of Johannesburg (together with definition of "cremation"), Mbombela, Midvaal (read together with definition of "cremation"), Nelson Mandela Bay, Oudtshoorn, Tshwane.

<sup>139</sup>Read together with the definition of "body"/"corpse". See by-laws of City of Cape Town (read together with the definition of "graves"), Drakenstein, George, Mangaung (read together with definition of "burial"), Midvaal, Oudtshoorn, Sol Plaatje (read with definition of "burial"), Tshwane (read with definition of "interment").

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As for the minority of municipalities that do include previable foetuses in their definition of body/corpse, application of the court's interpretation would mean that, in these municipalities, the burial of previable foetuses is strictly forbidden (even in a back garden). The second respondent referred to these by-laws, and made it sound as if these by-laws allow the burial of previable foetuses (and also that they represent the practice of the majority of municipalities).<sup>140</sup> In fact, the respondent expressly stated that the by-laws of the City of Cape Town allow for such burials.<sup>141</sup> As explained, they do not, because a burial order is still required in terms of BADRA. The argument was therefore completely misleading. Application of the court's interpretation suggests that these municipalities intentionally forbid the burial of previable foetuses. Instead, it is more likely that we see the intention of these municipalities to cover previable foetuses, but also their understanding that they must be led by national legislation regarding whether these foetuses can be buried. Moreover, according to the analysis above, this would mean that these municipalities are limiting most (if not all) of the constitutional rights, discussed above, of the prospective parents of deceased previable foetuses.

It is unfortunate that the Constitutional Court produced more questions than answers. This goes against the principle of legality, which requires certainty of the law.<sup>142</sup> It has created a situation where no municipality allows for the burial of previable foetuses in cemeteries or for their cremation in crematoria. However, in most municipalities, one may argue, the matter is unregulated and previable foetuses may be buried or cremated elsewhere.

Clarity is needed. Persons assisting with the removal of deceased previable foetuses must know whether they are required (or even allowed) to hand over the remains for burial or cremation. A study, aimed at determining obstetricians' and gynaecologists' current practice regarding the method of disposal of foetal material, revealed that 54 per cent of clinicians had facilitated burials for deceased previable foetuses when requested.<sup>143</sup> Their motivation for this was "hospital policy" or "ethical guidelines", and was not based on the law. Interestingly, no hospital policy or ethical guideline permits this.<sup>144</sup> This is evidence of the consequences of the uncertainty created by the current legal framework. It means that whether a prospective parent would be able to bury a deceased previable foetus is dependent on the disposition of the relevant clinician. It also indicates that some prospective parents have been burying previable foetal

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<sup>140</sup>*Voice* (CC) Second Respondent's Heads of Argument para 2.8–2.10.

<sup>141</sup>*Voice* (CC) Second Respondent's Heads of Argument para 2.10.

<sup>142</sup>De Vos P & Freedman W (eds) "Basic concepts of constitutional law" in *South African constitutional law in context* (2014) 41 at 83; Mostert H "Landlessness, housing and the rule of law" in Mostert H & De Waal MJ (eds) *Essays in honour of CG van der Merwe* (2011) 73 at 77; Waldron J "The Hamlyn lectures: The rule of law and the measure of property" (2012) *New York University School of Law Public Law and Legal Theory Research Paper Series* 11 at 16.

<sup>143</sup>Du Toit-Prinsloo, Pickles & Lombaard (2016) at 405.

<sup>144</sup>Du Toit-Prinsloo, Pickles & Lombaard (2016) at 405.

remains. One may ask where these burials or cremations took place, and whether municipalities are following their own by-laws.

The second respondent stated that there are 268 municipalities in South Africa, and seemed to argue that all of their by-laws should have been placed before the court.<sup>145</sup> This sounds like an unnecessary exercise. Had the court explained that any other interpretation of BADRA would lead to unconstitutionality, any by-law that prohibits the burial of previable fetuses would have had to change. Moreover, the court should have found that it is a function of the national government to determine which remains may be buried. This would have highlighted the problem with the argument and the finding that neither BADRA nor any other national legislation covers the burial of previable fetuses. This might have prompted the court to look into the potential rights violations of such a situation, and led to a finding that national legislation must be adopted to fill this lacuna.

## 6 CONCLUSION

This article considered the impact of the *Voice of the Unborn Baby* case on the laws relating to the burial of deceased previable fetuses. The court found that BADRA does not cover deceased previable fetuses at all. Instead, the court seemed to suggest that the matter is covered through municipal by-laws. Moreover, the court found that this interpretation is to be preferred, because it avoids the violation of constitutional rights. These findings had major effects on the law relating to the burial of previable fetuses.

First, it suggests that a prohibition of such burials would violate constitutional rights. While the court did not discuss these rights, the article found that many constitutional rights would be limited if such burials are denied. This means that a right exists, and that any limitation would have to comply with section 36.

Moreover, the finding that BADRA does not cover previable fetuses has left a lacuna in the law regarding the burial of these fetuses. This is because the by-laws all defer to BADRA concerning which remains (foetal or human) may be buried. Following the interpretation of the court in *Voice*, most by-laws do not cover these burials at all, whereas a minority strictly forbid them. For those that do not cover such burials, this likely does not mean that the burials are allowed in cemeteries or crematoria. At best, it means they can take place outside of cemeteries or crematoria. Practically, the lacuna created is problematic, because it means that whether or not a previable foetus may be buried is dependent on the disposition of the clinician involved. Legally, it means that the state is limiting the rights of prospective parents wishing to bury their previable fetuses. This is because the state is failing in its duty to promote and protect these rights by not allowing for the ability to exercise them. Similarly, the municipalities that effectively ban the burial of previable fetuses limit the rights of prospective parents by not respecting these rights. These rights limitations would have to comply with section 36 of the Constitution. In the municipalities creating the lacuna, the limitation cannot be justified in terms of section 36, because the limitation is not in terms of a law of general application.

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<sup>145</sup>*Voice* (CC) Second Respondent's Heads of Argument at para 2.8 and 2.12.

## DO PROSPECTIVE PARENTS HAVE THE RIGHT TO BURY THEIR DECEASED PREVIABLE FOETUSES?

Finally, it was argued that the court should have found that it is the function of the national government to determine which remains may be buried. Ideally, it should have continued to analyse whether any rights do protect the ability to bury a previable foetus. This should have prompted the court to order the state to address the lacuna created by its decision, by adopting legislation that expressly sets out whether previable foetal remains may be buried.

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