NOTES FOR ORAL ARGUMENT 14/15 NOVEMBER 2019

1. We have heard many arguments today about the trauma of the loss of a pregnancy and the manner in which, according to the applicants, the right to bury a foetus before the age of viability would ease that trauma.

2. Absent from the debate so far is the importance of the distinction between a miscarriage, framed by the applicants as a loss of pregnancy due to natural causes, and abortion, or voluntary termination in terms of Choice on Termination of Pregnancy Act. This distinction is key: the termination of pregnancy through abortion, regardless of the reasons for the abortion, involves the exercise of certain fundamental rights of women entrenched in the Constitution:

   2.1. The first is the right in terms of section 12(2)(a) of the Constitution, which confers on everyone the right to bodily and psychological integrity, including the right to make decisions concerning reproduction.

   2.2. The second is the right to have access to healthcare services, including reproductive healthcare, contained in section 27(1)(a) of the Constitution.

   2.3. Closely related to these rights are the rights to dignity, privacy and equality.

3. My submissions today will hone in on the manner in which the relief that the applicants seek will limit these rights and is therefore not just and equitable relief as envisaged in section 172 of the Constitution. In making these submissions I intend to address three topics:

3.1. First, I will refer the court briefly to the international law obligations that bind the South African government relating to the right of women to have access to healthcare services, including reproductive services and to bodily integrity, including the right to make decisions concerning reproduction. I do so against the backdrop of section 39(1)(b) of the Constitution, which imposes a duty on this Court, when interpreting rights in the Bill of Rights, to consider international law.

3.2. Second, I will take the court through the manner in which the rights for which the applicants advocate will limit the constitutional rights of the majority of the population, as interpreted in line with these international law obligations.

3.3. Third, I address the question of relief. These considerations are necessary only in the event that the Court is minded to grant an order that would have the effect of creating the burial right sought by the applicant and the intervening party. My submissions will focus on the mechanisms that need to be put in place to ensure that this burial right does not unduly encroach on the rights entrenched in sections 12 and 27 of the Constitution.

4. Before I do so, I wish to address certain overarching issues.

5. The first is the extent to which the Court ought to accept that “many” parents who experience loss of pregnancy want to be able to elect to bury the foetus. There is no empirical evidence in support of this.

6. The first applicant relies on what it describes as expert evidence. I submit that there is no basis for the reliance on these expert opinions to establish the wishes of "many" women. The Court has been presented with evidence from three experts:

   6.1. Rev Klopper, who is a Minister in the service of a particular church;

   6.2. Dr Olivier, who is a clinical psychologist in private practice; and

   6.3. A specialist obstetrician and gynaecologist, Dr Botha, who consults with expecting parents within a very specific context and who expressly focuses his opinion insofar as it relates to abortion on abortion for medical reasons. The Court has already asked the question, "What about women who choose to have an abortion"?

7. So far we have heard nothing about poor black women in rural communities who are entirely reliant on the public health care system – as 83% of our population does. We have heard nothing about the rights of women who choose to abort their pregnancies, for whatever reason, or those compelled by their circumstances outside of "medical reasons" to do so.

8. This brings us to meaning of the concepts of coercion, choice and autonomy. We see this language used throughout the legal framework on which the parties rely. Section 12 of the Constitution confers the right to make decisions concerning reproduction; the Choice of Termination of Pregnancy Act contains numerous references to choices and decisions and provides a specific guarantee in section

5 of informed consent. At the level of international law, general comment 22 on the right to sexual and reproductive health provides that:

> *the right to sexual and reproductive health entails a set of freedoms and entitlements. The freedoms include the right to make free and responsible decisions and choices, free of violence, coercion and discrimination, regarding matters concerning one's body and sexual and reproductive health. The entitlements include unhindered access to a whole range of health facilities, goods, services and information, which ensure all people full enjoyment of the right to sexual and reproductive health and article 12 of the Covenant.*

9. Our own courts have explored the concept of "indirect coercion". In this regard I refer the court to a decision not mentioned in the heads of argument: *S v Lawrence; S v Negal; S v Solberg* 1997 (4) SA 1176 (CC). At paragraph 103 of this judgement, Justice Chaskalson discusses why calling something voluntary does not necessarily make it so. In the context of so-called voluntary school prayer, Justice Chaskalson identified some of the factors, including social pressures, that may result in the imposition of a system of beliefs on a person entitled to make decisions autonomously and free from such imposition.

10. In other words, creating a right to bury a foetus aborted in terms of the Choice on Termination of Pregnancy Act may, and I submit will, have consequences that extend beyond the creation of a right; this includes restrictions on the very right to choose whether to terminate a pregnancy through abortion. There are the rights of

women – not as carriers of a foetus or grieving parents or hopeful mothers, but women.

11. Against this background I wish to address the court on the content of these rights. In the heads of argument filed on behalf of the second and third amici the international law instruments that entrench the right to health are addressed in some detail. I do not wish to repeat these, but only to emphasise certain aspects of these entrenchments.

12. The International Covenant on Economic, Social and Cultural rights provides in article 12 for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. In general comment 14, the committee on economic, social and cultural rights makes clear that this is not simply a right to be healthy. Paragraph 8 of general comment 14 states that *"the right to health contains both freedoms and entitlements. The freedoms include the right to control one's health and body, including sexual and reproductive freedom."* It includes, in terms of paragraph 14, a duty on member states to implement measures to improve access to family planning and sexual and reproductive health care services. The committee states at paragraph 21 that the realisation of women's right to health requires the removal of all barriers interfering with access to health services, education and information, including in the area of sexual and reproductive health.

13. Against this background, the committee provides a framework of four A's, being the conditions that must exist in order for the highest attainable standard of health to be achieved. These include:

13.1. Availability of functioning public health and health care facilities, goods and services as well as programs.

13.2. Accessibility to these health facilities, goods and services to everyone without discrimination.

13.3. Acceptability or respect for the individuals who rely on these health facilities, goods and services.

13.4. (although not an “A”) Quality of the healthcare services provided.

14. The considerations that the second and third amici have raised through the intervention relate to the elements of availability and accessibility. I will address shortly the consequences that the relief the applicants seek will have on these elements.

15. The South African government is also bound by the Convention on the Elimination of All Forms of Discrimination against Women, article 16(1)(e) of which entrenches the right to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights.

16. On a regional level, women’s health and reproductive rights are entrenched in the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa. Recognising the importance of non-discrimination against women and recognition of the principles of equality, peace, freedom, dignity, justice, solidarity and democracy, article 14 confers on women the right to control

their fertility, the right to decide whether to have children, the number of children and the spacing of children and the right to have family planning education. This protocol imposes a positive duty on state parties to take appropriate measures to protect the reproductive rights of women by authorising abortion in cases of sexual assault, rape, incest, and whether continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.

17. The general comment on article 14 recognises that these rights are part and parcel of the right to dignity, which enshrines the freedom to make personal decisions without interference from the state or non-state actors. It is a woman's personal decision whether or not to take into account any particular set of beliefs, traditions, values and cultural or religious practices, and she has a right to question or to ignore them. The general comment continues that the right to healthcare without discrimination requires state parties to remove impediments to the health services reserved for women, including ideology or belief-based barriers.

18. And so we can glean from these international law principles that bind the South African government that there is a right to sexual and reproductive health care services, including the right to safe abortion services, and that there exists a concomitant duty on state parties to remove any barriers limiting or inhibiting access to this right. These international law instruments make it clear that sexual and reproductive health care services are a core component of the right to health and that, to the extent that women are denied access to the services, this may amount to unfair discrimination against them.

19. It is against this background that the Court is to assess the impact of the relief that the applicants seek on the rights entrenched in sections 12 and 27 of the Constitution.

20. The second and third amici have relied on three bases which they argue that the existence of the burial right would impose an undue burden on the rights of women to sexual and reproductive health care services and to make decisions concerning the production as part of their right to freedom and security of the person.

21. The first relates to the impact that the burial right has on the confidentiality provisions of the Choice on Termination of Pregnancy Act. The applicants have conceded that this right would be implicated and concur with the second and third amici in this regard. The draft order that they propose accordingly subjects the burial right for which they advocate to an overriding requirement that a woman seeking a termination of pregnancy on a confidential basis will indeed have her confidentiality protected. They do not specify how this right will be protected. I submit that, as is discussed in detail in the heads of argument filed on behalf of the second and third amici, the only way to do this is to dispose of the right of the biological father to elect to bury a foetus. In other words, to the extent that the burial right accrues in the event of termination of pregnancy, this right may be exercised only by the pregnant woman concerned.

22. But there are two additional undue burdens that would accompany a burial right. These derive from the chasm between the constitutionally entrenched right of access to healthcare services including reproductive healthcare and the reality of very limited access to reproductive health care services in South Africa. In

assessing these burdens the focus is not on the minority of South Africans who have access to private healthcare services; an assessment of the impact of any burial right must necessarily take account of the realities faced by the majority of the population, reliant on the public healthcare system to meet their health care needs.

23. And so it is important to place the right to reproductive health care services in the following context:

    23.1. In 2017, and absent the existence of a burial right, only 264 public healthcare facilities out of the total of 3880 facilities offer abortion services. This equates to 6.8% of public healthcare facilities. (p 746)

    23.2. the situation is most dire for the 43.6% of South Africans living in rural areas. They are served by 12% of the country's doctors and 19% of the country's nurses, and in order to access these healthcare services they are required to travel long distances at high costs. (p 746)

24. And so access to healthcare services, and termination of pregnancy services in particular is severely limited. It must follow that there is already a strain on the resources of facilities offering these services.

25. Creating a burial right as argued for by the applicants would only add to this strain. It is not simply the cost of the actual burial that must be taken into account. The first applicant's attempts to argue that the existence of a burial right would in fact be more cost-effective ignores the resources required for the implementation of

such a right, including separation and storage, and the disincentive that this would create for facilities that may otherwise offer abortion services. This increase in the financial and administrative burden of offering abortion services can only limit the number of facilities that are willing and able to provide the services.

26. It is important in this regard for the Court to bear in mind the very specific principles that apply in cases of retrogressive measures in respect of access to health care services, in the light of the right of access to health care services being a progressively-realisable right.

    26.1. General Comment 22 on the right to sexual and reproductive health as provided for in the ICESCR, paragraph 38 of which requires that retrogressive measures be avoided and that where they must be applied, that their necessity must be established.

    26.2. Similarly, General Comment 14 on the right to the highest attainable standard of health in article 12 of the ICESCR reiterates the presumption that retrogressive measures taken in relation to the right to health are not permissible and that, if ay retrogressive measures are taken, that this follows the most careful consideration of all alternatives and that they are duly justified by the totality of rights provided for in the ICESCR in the context of the full use of the maximum available resources.

27. I submit that the evidence before the Court simply does not establish that the retrogressive measures proposed would be necessary.

28. In addition, the creation of the burial right would require the imposition of additional minimum conditions on health care facilities offering abortions in terms of section 3 of the Choice on Termination of Pregnancy Act. The applicants have not requested the court to prescribe any additional requirements to ensure that facilities offering abortions are equipped for the identification, separation and storage of foetal remains. They are also silent on the resources needed to comply with additional minimum requirements.

29. The third and final basis on which the second and third amici submit that the relief sought ought not to be granted is the social stigma that unquestionably attaches to women seeking abortion services. The first applicant contends that the argument that a burial right will contribute to stigma is speculative. I respectfully disagree.

30. The stigma that already attaches to abortion is recorded in the report by Health Economics and HIV AIDS research division, which appears at page 916 of the record. At page 918 is a recordal of knowledge and attitudes surrounding abortion:

> *A combination of widespread anti-abortion religious and cultural beliefs in South Africa fuels a strong stigma around abortion, affecting abortion-seeking behaviours and service provider attitudes. Service providers are known to chastise clients, particularly minors, for early sexual debut and irresponsibility for choosing to terminate the pregnancy. Abortion is associated with social ills such as drug abuse, moral deterioration, and promiscuity. The stigma associated with providing abortions can result in service provider resistance to be trained in providing termination of pregnancies., thereby limiting service provider capacity to meet the growing demand for abortions in the country.*

31. What the creation of a burial right would do is to add an extra layer of stigma, discouraging women from exposing themselves to the attitudes of service providers and encouraging them to rely rather on discreet, clandestine and unsafe abortions occurring outside of designated healthcare facilities.

32. For these reasons, the second and third amici submit that the relief sought by the applicants ought not to be granted. If, however, the court is minded to grant an order allowing for a burial right, then I submit that the following considerations ought to be taken into account.

32.1. I dealt earlier with the issue of confidentiality. I reiterate that the proposal of the second and third amici is that this be addressed through the disposal of the right of the biological father to elect to bury the foetus;

32.2. The second is on the issue of stigma. We cannot cure social stigma through a court order. But we can take steps to protect women from the adverse impact that this stigma would have on their constitutional rights. I submit that we can do so, if the Court is minded to allow the burial right, to enable and empower women to ask for the burial of a foetus rather than having it offered to – or more likely imposed on – them. This is consistent with the right to choose and to make decisions regarding reproductive health on which I made submissions earlier.

32.3. Insofar as the challenges relating to identification, separation and storage are concerned, I submit that the only effective mechanism would be to ensure that sufficient resources are made available to all facilities offering

abortion services. We cannot impose that expense on NGOs or on women exercising the right to abort. If the resources cannot be made available then the right to bury cannot exist.

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