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IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2026-083561

1. Reportable: No
2. Of interest to other judges: No
3. Revised

WRIGHT J

14 April 2026

In the matter between:

M[...] J[...] N[...]

APPLICANT

and

THE MEC FOR HEALTH, GAUTENG

FIRST RESPONDENT

JUDGMENT – WRIGHT J

1. In this urgent case, it is necessary that I precede my order with my reasons. There is a sharp difference between the reasons for an order and reasoning, manufactured afterwards, to justify an earlier order. Producing reasoning after an order has been made leaves the judicial officer concerned at risk of forcing the reasoning to fit the order. That would be intolerable.
2. In the hurly burly of a busy urgent court, these are my terse reasons for my order.
3. The founding affidavit is short.
4. The applicant, Ms M[...] J[...] N[...], is a woman who was pregnant for about 6 months when her baby died in utero and was delivered on 10 April 2026 at the Bheki Mlangeni District Hospital.
5. Ms N[...] says that the statutory “*stillborn*” threshold had not been reached.
6. Ms N[...] wishes to bury her baby. Ms N[...] invokes her rights to dignity, religious freedom, psychological integrity and cultural burial practices.
7. The hospital won’t release the body unless a court order is granted.
8. The MEC for Health in Gauteng, the Minister of Home Affairs and the Director General of Home Affairs have been cited and served.
9. Ms N[...] says that the matter is urgent as there is an imminent danger that the baby’s body will be disposed of shortly as medical waste.
10. There is no opposition to the application.
11. A Guideline dated 24 July 2025 and issued by the Department of Health suggests that a compassionate approach be taken and that a court order be sought.
12. The Guideline was issued some years after the decision of the Constitutional Court in *The Voice of the Unborn Baby NPC*, CCT 120/21, decided on 15 June 2022.
13. The Constitutional Court, in paragraph 17, held that the Births and Deaths Registration Act 51 of 1992 does not prohibit the burial of a pre-viable foetus and, in paragraph 22, that the burial of a pre-viable foetus falls outside the scope of BADRA.
14. Paragraph 25 reads “ *In the absence of a clear prohibition of the interment or cremation of a pre-viable or terminated foetus, and in the face of the command in section 39(2) of the Constitution, [19] an interpretation of BADRA that commends itself is one that leaves untouched any right which parents may have to inter or cremate their pre-viable foetuses. While it may be true, as the applicants argued, that throughout the years the practice has been to deny parents this right in the apparent belief that this is what the law provides, this matters not. BADRA simply contains no such prohibition.*”
15. Paragraph 27 reads “ *The applicants are, among others, seeking declaratory relief to the effect that in the event of a loss of pregnancy other than still-birth or loss of pregnancy through human intervention, the bereaved parent or parents have the right to bury the dead foetus, if such bereaved parent or parents so elect. While there is no prohibition in BADRA on the burial or cremation of pre viable foetuses, this Court is not in a position to grant the declaratory relief*

sought, namely, that there is a right to bury such a foetus. Where the evacuation or removal of some or all of the foetal remains from the mother takes place in a healthcare facility, the implication of such a declaration for hospitals and other healthcare service providers becomes a challenging question. The question as to what medical staff at public hospitals must do if would-be parents express the wish to bury or cremate pre-viable foetal remains, is not clear. The burial or cremation of pre viable foetal remains would no doubt require the cooperation of healthcare professionals, and public hospitals would be expected to allocate the necessary resources. Because of the way the case was pleaded, we do not have the necessary evidence to evaluate the considerations relating to how hospitals would manage the burial or cremation of pre viable fetuses. This is not the case which the applicants pleaded, and we are in any event not in a position on the facts to adjudicate it. “

16. In my view, the apparent desire of the Dept of Health as reflected in its Guideline published after the judgment in *The Voice* meets the concerns of the Constitutional Court as set out in paragraph 27 of its judgment, as far as the Health authorities are concerned.
17. To the extent that Home Affairs might have suggested, as it did in *The Voice*, that the extra paperwork would be burdensome, I hold that the rights invoked by Ms N[...] take precedence.
18. The main relief sought by Ms N[...] is that she be allowed to bury her baby. Ms N[...] seeks ancillary relief in the form of orders that a medical practitioner issue a certificate that the child was born dead and that the DG of Home Affairs then issue a certificate under the surname of any parent concerned authorizing burial.
19. Section 18 of BADRA provides: *“Still-birth (1) A medical practitioner who was present at a still-birth, or who examined the corpse of a child and is satisfied that the child was still-born, shall issue a prescribed certificate to that effect. (2) If no medical practitioner was present at the still-birth, or if no medical practitioner examined the corpse of a still-born child, any person who was present at the still-birth shall make a prescribed declaration thereanent to any person contemplated in section 4. (3) The certificate mentioned in subsection (1) or the declaration mentioned in subsection (2) shall be deemed to be the notice of the still-birth, and a person contemplated in section 4 shall, on the basis of such notice and if he or she is satisfied that the child was still-born, issue under the surname of any parent concerned a prescribed burial order authorising burial. (4) If, before a prescribed burial order has been issued, a person contemplated in section 4 has reasonable doubt whether the child was still-born, he or she shall not issue a burial order and he or she shall inform a police officer as to such doubt. (5) If, after a prescribed burial order has been issued, a person contemplated in section 4 has reasonable doubt whether the child was still-born, he or she shall inform a police officer as to such doubt, and before the police officer acts in terms of the provisions of section 16, he or she shall, if the corpse has not yet been buried, withdraw and cancel the burial order.”*
20. Given that BADRA is not applicable in this case it follows that the regulations under BADRA are not applicable.
21. The ancillary relief sought by Ms N[...] mirrors the requirements of section 18(1) and (3) of BADRA but is not based in these sub-sections. I grant the ancillary relief sought, not because of the content of section 18, but by way of giving practical effect to the main relief.
22. Under section 39(2) of the Constitution *“ When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”*
23. In my view, section 39(2) of the Constitution impels me to hold that the rights of Ms N[...] require that the common law be developed by granting the ancillary relief in the limited form sought.
24. Counsel for Ms N[...], Adv M Makamu handed up a draft order which catered for the relief sought.

ORDER

1. X

WRIGHT J

HEARD : 14 April 2026

DELIVERED : 14 April 2026

APPEARANCES :

APPLICANT Adv M Makamu

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RESPONDENTS No appearance