



**UNIVERSITY of the  
WESTERN CAPE**

WOMEN'S RIGHT TO ABORTION VERSUS PATERNAL RIGHTS IN SOUTH  
AFRICA

BY

Bongumsa Zweni

4398187

UNIVERSITY of the  
WESTERN CAPE  
MINI DISSERTATION

Submitted in partial fulfilment of the requirements for the degree:  
Master of Laws (LLM)

SUPERVISOR: Prof. Anthony C. Diala

May 2024

## Declaration

I, Bongumsa Zweni, declare that '*Women's right to abortion versus paternal rights in South Africa*' is my work and that it has not been submitted before any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed:



Date: 27 May 2024

## Dedication

I dedicate this work to the memory of my late father, Pastor Mayford Mthuthuzeli Zweni. Thank you for believing in my potential from a young age. I wish you were here to celebrate this milestone with me and to witness my journey to becoming the great professor you've always envisioned. I miss you every day.

To the women in South Africa and the African continent, this research is for you. Use it to educate yourselves, your children, and future generations that abortion is a human right to which every woman is entitled.

## Acknowledgements

First and foremost, I would like to express my heartfelt gratitude to my supervisor, Prof. Anthony C. Diala. Prof., thank you for your unwavering support, patience, guidance, and expertise. Your timely feedback and detailed comments have been instrumental in the completion of this mini-thesis and have helped me become a better legal mind.

I would also like to thank the Center for Legal Integration in Africa (LLM Growth Bursary) and the Mastercard Foundation Scholar's Program for their financial support. Being in university is hard; but it is harder when you worry about where your next meal will come from. Thank you for unburdening me from the latter.

To my family – my mother, Zibele, Lindokuhle and Zukhanye, thank you for all your love and support. To my friends and colleagues who helped and supported me throughout, thank you. I appreciate you all so much.

Finally, to quote the famous artist, Snoop Dogg, *'Last but not least, I wanna thank me. I wanna thank me for believing in me. I wanna thank me for doing all this hard work. I wanna thank me for having no days off. I wanna thank me for, for never quitting.'*

## Contents

Declaration.....	ii
Dedication.....	iii
Acknowledgements.....	iv
Contents.....	v
Abstract.....	vii
CHAPTER 1.....	1
1.1. Background.....	1
1.2. Statement of Research Problem.....	3
1.3. Research Objective.....	4
1.4. Research Questions.....	4
1.5. Research Methodology.....	4
1.6. Literature Review.....	5
1.6.1. Introduction.....	5
1.6.2. Development of Abortion Laws.....	6
1.6.3. Paternal Rights.....	7
1.6.4. Conclusion.....	8
1.7. Chapter Outline.....	8
CHAPTER 2.....	10
2.1. Introduction.....	10
2.2. Reproductive rights in an apartheid regime.....	11
2.2.1. The epidemic of illegal abortions.....	13
2.2.2. The 1972 Trial.....	15
2.2.3. The Abortion and Sterilization Act 2 of 1975.....	16
2.2.4. The Repercussions of the 1975 Act on Women.....	19
2.3. Towards the Choice of Termination of Pregnancy Act 92 of 1996.....	21
2.3.1. The Abolishment of Apartheid.....	22
2.3.2. The Choice on Termination of Pregnancy Act 92 of 1996.....	24
2.4. Conclusion.....	27
CHAPTER 3.....	29
3.1 Introduction.....	29
3.2 Legal Requirements for Personhood.....	30
3.2.1 The beginning of legal personality.....	31
3.2.2 Exceptions.....	33
(a) Concealment of birth.....	33

(b) Nasciturus fiction.....	36
(i) Law of Succession .....	36
(ii) Law of Delict .....	38
3.3 Conclusion.....	42
CHAPTER 4.....	44
4.1 Introduction .....	44
4.2 Case law .....	45
(a) Christian Lawyers Association of SA v Minister of Health .....	45
(b) The Voice of the Unborn Baby NPC v Minister of Home Affairs.....	47
4.3 Conclusion .....	50
CHAPTER 5.....	52
5.1 Introduction .....	52
5.2 Mozambique .....	53
5.3 Benin Republic .....	56
5.4 Ghana.....	58
5.6 Conclusion and Recommendations.....	60
6. BIBLIOGRAPHY .....	62

## Abstract

The right to abortion is regulated by various sections of the Constitution, including section 12(2)(a), which provides that everyone has the right to make decisions regarding their reproductive health, as well as section 27. The aforementioned right is further provided for by the Choice on Termination of Pregnancy Act 92 of 1996. This Act was enacted for the sole purpose of regulating the termination of pregnancy in South Africa.

Despite the fact that the right to abortion is legally protected, there is great stigmatisation surrounding abortion, women are shunned and shamed for legally seeking an abortion. This unfortunately leads to unsafe abortions performed by unqualified persons at some backroom in Soweto, increasing the number of deaths arising from unsafe abortions. Almost thirty years after the enactment of the Termination of Pregnancy Act. An Act which sought to protect women's reproductive rights and affirm their right to freedom of choice.

As though to add salt to a wound, there is ongoing controversy that the right to abortion inversely affects and infringes upon paternal rights. Accordingly, this research seeks to investigate the veracity of this alleged infringement. To achieve this, a desktop research method is undertaken to review various literature in order to determine whether the right to a legal abortion contravenes paternal rights in South Africa.

**KEYWORDS:** Abortion, legalisation, paternal rights, women's rights, South Africa

## CHAPTER 1

---

### INTRODUCTION

---

#### 1.1. Background

Women in South Africa have been subjected to various forms of oppression and discrimination dating back to the apartheid regime when black people were treated in the most derogatory and inhumane ways. The apartheid government introduced systematic racism and put laws in place that prevented black people from accessing certain amenities. These laws included the Bantu Education Act<sup>1</sup>, which enforced racial segregation in education facilities, and the Immorality Act<sup>2</sup>, which banned extramarital sex between white people and people of other races.

In addition to racial segregation, black women were also oppressed by patriarchal standards that discriminated against them. Women were only considered good enough for bearing children and ensuring that the homestead was clean. They were not allowed to own bank accounts, were paid less than their male counterparts who were hired to do the same jobs as them and could not make decisions regarding their reproductive health. The Constitutional Court in the case of *Brink v Kitshoff NO*<sup>3</sup> described the apartheid and the long-standing patriarchal culture in South Africa as one that has ensured that women are at the bottom of the socio-economic scale:<sup>4</sup>

‘Although in our society, discrimination on grounds of sex has not been as visible, nor as widely condemned, as discrimination on grounds of race, it has nevertheless resulted in deep patterns of disadvantage. These patterns of disadvantage are particularly acute in black women, as race and discrimination overlap.’

The human rights history of South Africa is horrific, but it is indisputable that the government has worked tirelessly to transform the state of human rights and ensure that human dignity is

---

<sup>1</sup> Bantu Education Act 47 of 1953. The Bantu Education Act of 1953, formerly referred to as Act No. 47 of 1953 and afterwards known as the Black Education Act of 1953, was a South African segregation law that regulated several facets of the apartheid system. Its main clause mandated racial segregation in educational institutions.

<sup>2</sup> Immorality Act 5 of 1927. The legislation prohibited ‘illicit carnal intercourse’ (sex outside of wedlock) between ‘European’ (i.e., white) men and ‘native’ (i.e., black) women. For the man, it carried a sentence of up to five years in prison, and four years for the woman.

<sup>3</sup> *Brink v Kitshoff NO* 1996 ZACC 9. Married women who have life insurance policies granted to them or made in their favour by their husbands may be denied any or all of the benefits under Section 44 of the Insurance Act 27 of 1943. In accordance with section 102(1) of the Constitution, the Transvaal Provincial Division referred the question of the section's constitutionality to the Constitutional Court.

<sup>4</sup> *Brink v Kitshoff NO* para 44.

respected and protected by the law, specifically, by the Constitution of the Republic of South Africa, 1996. Notably, the Constitution's Preamble "recognises the injustices of our past", and 'adopts [the] Constitution as the supreme law of the Republic [which] lays the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law.'<sup>5</sup> Section 9 of the Constitution proceeds to state that everyone is entitled to equal protection and enjoyment of the law.<sup>6</sup>

However, there is an issue of the various forms of equality raised by Ian Currie<sup>7</sup> in his book, wherein he distinguishes between *substantive* and *formal* equality. *Formal* equality refers to the sameness of treatment. Under the law, individuals in similar situations must be treated equally. To establish *substantive* equality, the law must guarantee equality of outcome and must be prepared to accept unequal treatment, all people must simply be equal right-holders for there to be formal equality. According to this perspective, inequality is an aberration that can be abolished by giving everyone access to the same rights and privileges under the same 'neutral' standard of comparison. Actual social and economic inequalities between groups and individuals are not considered by *formal* equality. Contrariwise, substantive equality necessitates a review of the real social and economic circumstances of groups and individuals to ascertain whether equality is upheld as stated in the Constitution.<sup>8</sup> For example, on a formal conception of equality, equality is achieved if all apartheid laws are eradicated and everyone is treated the same, regardless of race. Conversely, substantive equality requires equality of outcome, meaning that even though everyone is treated equally regardless of race, in order for women to fully enjoy their right to equality, it is necessary to ensure that gender stereotypes are eradicated as well.

This research aims to analyse a human rights issue involving women's fundamental right to access reproductive healthcare,<sup>9</sup> the right to bodily integrity, and the right to make decisions concerning reproduction<sup>10</sup> as enshrined in Chapter 2 of the 1996 Constitution. The right to access reproductive healthcare services is given effect by the Choice on Termination of

---

<sup>5</sup> Preamble of the Constitution of the Republic of South Africa, 1996.

<sup>6</sup> Section 9(1) of the Republic of South Africa, 1996 states that everyone is equal before the law and has the right to equal protection and benefit of the law.

<sup>7</sup> Currie I & De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed JUTA (2013).

<sup>8</sup> Currie I & De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed JUTA (2013) 213-214.

<sup>9</sup> Section 27(1)(a) of the Constitution of the Republic of South Africa, 1996 provides that everyone has the right to have access to health care services, including reproductive health care.

<sup>10</sup> Section 12(2)(a) of the Constitution provides that everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.

Pregnancy Act<sup>11</sup> under South African law. In respect of abortions permitted under the Termination of Pregnancy Act of 1996, a foetus can be aborted before a particular stage of pregnancy. The latter Act provides for the circumstances under which a pregnancy may be legally terminated – under twelve weeks a termination is performed on request, but later on in the pregnancy certain conditions must be adhered to before a pregnancy can be terminated.<sup>12</sup>

Women's rights are at risk of violation as there are arguments that seek to dismantle the progress that has been made in ensuring equal protection and enjoyment of rights entrenched in the Bill of Rights. Gender stereotypes regarding abortion are still present to this day. Consequently, this study will analyse the development of women's rights, with a focus on the right to abortion.

## 1.2. Statement of Research Problem

Abortion in South Africa remains taboo, several years after its legalisation, and to oppose it, there have been claims that a woman deciding to have an abortion infringes upon a man's paternal rights. Insofar as paternal rights are concerned, this paper discusses at which point, from the moment of inception, they exist.

The Constitution of the Republic of South Africa is established on the principles of "human dignity, the achievement of equality, and the advancement of human rights and freedoms."<sup>13</sup> The enactment of the Termination of Pregnancy Act gave effect to these values in respect of women's rights and ascertained that women are able to undergo a legal and safe termination of pregnancy. Prior to the enactment of the aforementioned Termination of Pregnancy Act, abortions in South Africa were regulated by the Abortion and Sterilization Act which prohibited abortions unless the continued pregnancy would endanger the pregnant woman's health, the child would be born with serious defects, or the pregnancy came about as a result of incest or other prohibited sexual acts.<sup>14</sup>

The Abortion and Sterilization Act not only took away women's rights to make decisions regarding their reproductive health but also took away their dignity and stripped them of their constitutional rights. To correct this injustice, the Termination of Pregnancy Act was enacted.

---

<sup>11</sup> Choice on Termination of Pregnancy Act 92 of 1996.

<sup>12</sup> Section 2 of the Choice on Termination of Pregnancy Act, 1996.

<sup>13</sup> Section 1(a) of the Constitution of the Republic of South Africa, 1996.

<sup>14</sup> Sections 2 and 3 of the Abortion and Sterilization Act 2 of 1975.

However, that same Act<sup>15</sup> is now alleged to infringe upon paternal rights. Paternal rights may be described as the rights of the father over a child born and unborn. The allegation of infringement creates controversy and attempts to hinder the provision of access to safe abortions, undermining women's right to make decisions regarding their reproductive health.

### 1.3. Research Objective

The aim of this research is therefore to evaluate the right to abortion in South Africa and the interface of this right with paternal rights.

The objectives are to:

- Discuss the development of abortion laws in South Africa;
- Examine whether paternal rights can be claimed where the child has not yet been born; and,
- Evaluate how the right to abortion interfaces with paternal rights.

### 1.4. Research Questions

The central research question of this study is the following:

- In what ways does the Termination of Pregnancy Act infringe paternal rights?

The sub-questions are as follows:

- How do laws provide protection for paternal rights in cases where the foetus is still in utero?
- What effect will the legal protection for paternal rights of a foetus have on the mother?
- How have other countries dealt with the matter at hand – paternal rights and abortion?

### 1.5. Research Methodology

This study uses desktop research comprising of content analysis of case laws and legislation to investigate the development of the right to abortion and the extent to which paternal rights can be claimed over a foetus. Desktop research, also known as literature review, can broadly be defined as a more or less systematic way of collecting and synthesising previous research.<sup>16</sup> A

---

<sup>15</sup> Termination of Pregnancy Act.

<sup>16</sup> Snyder H 'Literature Review as a Research Methodology: An Overview and Guidelines' (2019) 104 *Journal of Business Research* 333 at 333.

literature review is capable of tackling research questions in a manner that no prior study has done by incorporating outcomes and perspectives from several empirical findings.<sup>17</sup>

In addition, primary and secondary sources will be reviewed in order to achieve the aims of the research. Among others, primary sources include case law and legislation, and secondary sources comprise textbooks and journal articles.

Furthermore, this research will employ a mini comparison of the South African legal system with the legal frameworks of Benin Republic and Mozambique. I chose these comparators because of their liberal abortion laws, which permit abortion at the request of a woman until twelve weeks of pregnancy, and later on in cases of incest and rape.<sup>18</sup> It is important to note that these countries have laws that are similar to South Africa's Choice on Termination of Pregnancy Act.

## 1.6. Literature Review

### 1.6.1. Introduction

Scholarly works reveal that for a long time, women in South Africa have had to endure and deal with numerous forms of oppression, discrimination, and segregation.<sup>19</sup> Upon the dismantling of the apartheid regime, there was hope that things might get better. However, discrimination against women was not only entrenched in laws set to racially segregate groups of people, it also existed long before the conquest of South Africa by the British and the Dutch. Nicely cushioned and camouflaged as cultural practices, societal norms, and moral values, cultural practices such as ukuthwala and male primogeniture fuelled discrimination and oppression against women.<sup>20</sup> For the purposes of this paper, the focus is on discrimination against women's right to bodily autonomy.

---

<sup>17</sup> Snyder H 'Literature Review as a Research Methodology: An Overview and Guidelines' (2019) 104 *Journal of Business Research* 333 at 333.

<sup>18</sup> Okonofua F 'Roe v Wade conundrum: Africa must Increase Commitment to Sexual and Reproductive Health and Rights.' (2022) 26(6) *African Journal of Reproductive Health*.

<sup>19</sup> See, for example, Favier M, Greenberg JMS, and Stevens M 'Safe abortion in South Africa: "We Have Wonderful Laws, But we Don't Have People to Implement Those Laws"' (2018) 143(4) *International Journal of Gynecology and Obstetrics* 38-44; Guttmacher S, Kapadia F, Naude J, and de Pinho H 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *International Family Planning Perspectives* 191-194.

<sup>20</sup> Devenish, A. 'Judicial Deconstruction of Customary Law for Gender Equality: Some Thoughts on Selected Case Law' (2016) 30(1) *Agenda* 26-35.

### 1.6.2. Development of Abortion Laws

Both internationally and in South Africa, abortion is a common medical procedure. Despite the fact that abortion has a legal basis for its advantages to public health, many countries nevertheless view it as an act of immorality. An article by Hodes reveals the paradox of South Africa's abortion culture by showing how it is publicly criticised by political leaders, medical professionals, patients, and their families while being secretly condoned.<sup>21</sup> Because of this, it is rather difficult to quantify and contain illegal abortions, which are sometimes fatal to the pregnant woman.

Hodes provides a historical account of the development of abortion laws in South Africa.<sup>22</sup> In 1975, the Abortion and Sterilization Act was adopted as law. This was the first law that regulated abortion or somewhat ensured that no woman could freely procure one, unless under certain circumstances.<sup>23</sup> To apprehend “offenders” and punish them, the 1975 Act mandated increased surveillance and monitoring of unlawful abortions. However, it only had a temporary effect on how abortions were actually obtained.

Macleod and Hansjee note how the 1975 Act came into effect at a period when apartheid was at its peak.<sup>24</sup> The restrictive conditions under which a legal abortion could be obtained meant that only a handful of women were able to legally access one, most of them being white. As a result, the mortality rates amongst black women heightened as they sought alternative methods of terminating a pregnancy, methods which were unsafe and illegal.<sup>25</sup>

In 1994, the African National Congress (ANC) was voted into power, and on the 30<sup>th</sup> of May, a National Health Plan for South Africa was published as the guiding document for the restructuring of the public health sector in order to redress social and economic injustices, to eliminate poverty, reduce waste, increase efficiency and to promote greater control by communities and individuals over all aspects of their lives.<sup>26</sup> Under the Population Policy and

---

<sup>21</sup> Hodes R ‘The Culture of Illegal Abortions in South Africa’ (2016) 42(1) *Journal of Southern African Studies* at <http://dx.doi.org/10.1080/03057070.2016.1133086> (accessed 27 April 2023).

<sup>22</sup> Hodes R ‘The Culture of Illegal Abortions in South Africa’ (2016) 42(1) *Journal of Southern African Studies* at <http://dx.doi.org/10.1080/03057070.2016.1133086> (accessed 27 April 2023).

<sup>23</sup> Section 2 of the Act prohibits abortion.

<sup>24</sup> Macleod, C & Hansjee, J ‘Men and Talk About Legal Abortion in South Africa: Equality, Support and Rights Discourses Undermining Reproductive “Choice”’ (2013) 15(8) *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 997.

<sup>25</sup> Macleod, C & Hansjee, J ‘Men and Talk About Legal Abortion in South Africa: Equality, Support and Rights Discourses Undermining Reproductive “Choice”’ (2013) 15(8) *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 997.

<sup>26</sup> Policy Documents: A National Health Plan for South Africa (1994) <https://www.anc1912.org.za/policy-documents-1994-a-national-health-plan-for-south-africa/> (accessed 27 April 2023).

Health aspect, it was submitted that contraception is a required but insufficient component in encouraging fertility decrease. Furthermore, within a complete primary health care system, contraception should not be offered separately from more comprehensive reproductive health care. Women's autonomy over their bodies and reproductive independence should be supported by population policy. It should also acknowledge that people have the right to have the knowledge, education, and resources necessary to make their own decisions about how many, and how close between, to spacing out their children.<sup>27</sup>

Macleod and Hansjee showed how the country transitioned from constrained abortion legislation (the Abortion and Sterilization Act) to liberal abortion legislation that authorizes a female of any age to consent to safe medical termination of pregnancy.<sup>28</sup> For example, the Population Policy resulted in discussions that subsequently led to the adoption of the Choice on Termination of Pregnancy Act on the 11<sup>th</sup> of December in 1996. This law has considerable significance for paternal rights.

### 1.6.3. Paternal Rights

Paternal rights are the rights of the father. The Children's Act<sup>29</sup> confers full rights and responsibilities to a biological father of a child.<sup>30</sup> Both the Constitution of the Republic of South Africa, 1996,<sup>31</sup> and the Children's Act<sup>32</sup> define a child as anyone under the age of 18 years of age. According to the law in South Africa, the principles of viability, and the *nasciturus fiction*, one can be identified as a child upon being born and born alive. This will be discussed in detail later on in the research.

O'Sullivan argues that even though a father has rights over his child, there is no legal basis that permits a prospective father to prevent a woman from procuring a legal abortion.<sup>33</sup> She justifies this by submitting that reproductive rights are of fundamental importance to women, more than they are to men.<sup>34</sup> This justification is rooted in the biological reality that it is women who fall

---

<sup>27</sup> Policy Documents: A National Health Plan for South Africa (1994) <https://www.anc1912.org.za/policy-documents-1994-a-national-health-plan-for-south-africa/> (accessed 27 April 2023).

<sup>28</sup> Macleod, C & Hansjee, J 'Men and Talk about Legal Abortion in South Africa: Equality, Support and Rights Discourses Undermining Reproductive "Choice"' (2013) 15(8) *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 997.

<sup>29</sup> Children's Act 38 of 2005.

<sup>30</sup> In terms of sections 20 and 21 of the Children's Act, both married and unmarried biological fathers of children have full rights and responsibilities in respect of that child.

<sup>31</sup> Section 28.

<sup>32</sup> Section 1.

<sup>33</sup> O'Sullivan M 'Reproductive Rights' in Woolman S and Bishop M *Constitutional Law of South Africa* 2 ed (2014) 37-1.

<sup>34</sup> *Ibid.*

pregnant and ultimately undergo labour.<sup>35</sup> Men on the other hand may, at any time, refuse to be involved in the upbringing of the child. In addition to the physical and psychological strain brought upon by childbirth, women bear the exorbitant financial burden and responsibility of raising a child.<sup>36</sup> As a result of this burden, women are incapable of participating as citizens equal to men. In this case, the equality clause protects the marginalized group (women) overcome their inequalities by considering first a woman's right to substantive equality over a man's right to formal equality where a dispute over reproductive rights arises.<sup>37</sup>

D'Souza's study to assess the impact of abortion on men reveals that men felt that their consent should be sought before a pregnancy is terminated, while some rejected abortion in its entirety due to religious and cultural beliefs.<sup>38</sup> The author cautions that although people are entitled to their beliefs, such beliefs (religious and cultural) fuel the stigma against abortion, causing women to resort back to unsafe, illegal abortions, despite its legalization and provision in various sections of the Constitution and the Choice on Termination of Pregnancy Act.<sup>39</sup>

#### 1.6.4. Conclusion

This mini-thesis will investigate how the Termination of Pregnancy Act infringes paternal rights. The Termination of Pregnancy Act determines the circumstances and conditions under which the pregnancy of a woman may be terminated. It also provides for matters connected therewith. As noted above, paternal rights are the rights of a father, and by definition, a father is someone who has a child, the same child who is required to be born and breathe on its own outside the uterus of its mother in order to be legally recognized as a person.

As an attempt to destigmatize abortion, this research is centred around the question of how the 1996 Act affects the rights of a father over the unborn child.

#### 1.7. Chapter Outline

This mini-thesis will contain a total of five chapters.

---

<sup>35</sup> O'Sullivan M 'Reproductive Rights' in Woolman S and Bishop M *Constitutional Law of South Africa* 2 ed (2014) 37-13.

<sup>36</sup> O'Sullivan M 'Reproductive Rights' in Woolman S and Bishop M *Constitutional Law of South Africa* 2 ed (2014) 37-14.

<sup>37</sup> O'Sullivan M 'Reproductive Rights' in Woolman S and Bishop M *Constitutional Law of South Africa* 2 ed (2014) 37-14.

<sup>38</sup> D'Souza K 'Abortion and the Three Bodies: An Interpretive Understanding of Barriers to Abortion Access in South Africa' (2013) 3 *Journal for Undergraduate Anthropology* 8.

<sup>39</sup> D'Souza K 'Abortion and the Three bodies: An Interpretive Understanding of Barriers to Abortion Access in South Africa' (2013) 3 *Journal for Undergraduate Anthropology* 8.

Chapter one introduces the thesis. It provides a brief background of the history and development of women's rights in South Africa, particularly the right to abortion. The statement of the research problem points out how abortion still remains taboo, despite its legalisation. The aims and objectives of the research, as well as the central and sub-research questions are also outlined in this chapter. These are followed by the literature review and the research methodology which sets out the form of research method which will be employed in the research.

Chapter two will look at the history and development of abortion laws in South Africa. In this chapter, the right to abortion is reviewed in detail. Its history will be analysed starting from the apartheid regime, up until the enactment of the Termination of Pregnancy Act. This chapter further looks at case law and discussions, in the form of journal articles, relating to the development of abortion in South Africa.

Chapter three focuses on paternal rights. It looks at the definition of paternal rights and the manner in which the courts have interpreted their legality. To determine the commencement of paternal rights, it examines judicial decisions on when a foetus is recognised as a human being.

Chapter four examines whether there is an infringement of paternal rights brought about by the right to abortion. This is a crucial chapter of the research, as it determines an answer to the central research question, and ultimately its sub-questions.

Chapter five is the conclusion and recommendations. This chapter scrutinises the laws in other countries and regional and international instruments regarding abortion laws and the rights of the father when the mother has elected to procure an abortion. This is done in order to accurately provide recommendations for the way forward and to draw a sound conclusion.

## CHAPTER 2

---

### FROM TABOO TO FREEDOM: THE EVOLUTION OF REPRODUCTIVE RIGHTS IN SOUTH AFRICA

---

#### 2.1. Introduction

For a long time, reproductive rights in South Africa were what many may refer to as a pipe dream – out of reach, unattainable, and a fantasy. Abortion legislation was curated in such a way that it was impossible for women to access abortion services, particularly black women. This was the case until the enactment of the Constitution of the Republic of South Africa in 1996.<sup>1</sup> The drafting of the Constitution was a lengthy process that ended with its adoption in December 1996. The Interim Constitution, which mandated that the new draft be adopted by the Constitutional Assembly within two years and by a majority of at least two-thirds of its members, served as the foundation for the final text.<sup>2</sup> The wording also had to adhere to the constitutional standards outlined in Schedule 4 of the Interim Constitution.<sup>3</sup> Additionally, before the Constitutional Court confirmed that every clause conformed with the principles set out in Schedule 4, the text would not have any legal effect.<sup>4</sup>

During the certification process of the Constitution, section 12(2) of the ‘New Text’ (NT) concerning the right to bodily integrity was opposed on the basis that it opened a pathway to the right to abortion.<sup>5</sup> A right not previously provided for in the Interim Constitution, it was also alleged that the formulation of this right may well infringe upon section 33(1)(b) of the Interim Constitution.<sup>6</sup> Section 33(1)(b) provides that the rights in the Interim Constitution may be limited, provided that the limitation ‘shall not negate the essential content of the right in question.’ The alleged infringement of section 12(2) was grounded on the presumption that the right interpretation of Constitutional Principle II precluded the Constitutional Assembly from

---

<sup>1</sup> The Constitution of the Republic of South Africa, 1996.

<sup>2</sup> Preamble of the Interim Constitution of the Republic of South Africa Act 200 of 1993.

<sup>3</sup> The Constitutional Court of South Africa ‘The Certification Process’ <https://www.concourt.org.za/index.php/constitution/the-certification-process> (accessed 30 August 2023).

<sup>4</sup> The Constitutional Court of South Africa ‘The Certification Process’ <https://www.concourt.org.za/index.php/constitution/the-certification-process> (accessed 30 August 2023).

<sup>5</sup> Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26 para 59. The proposed sections of the Final Constitution were referred to as ‘New Text’ throughout the certification process. NT12(2) provided 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; and (c) not to be subjected to medical or scientific experiments without their informed consent.’

<sup>6</sup> Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26 para 59.

redefining rights in a way that would lessen the protection provided by the Interim Constitution.<sup>7</sup> The Constitutional Court dismissed the objection and stressed that it was not the duty of the court to ascertain whether the New Text allows abortion, but that its duty was to ascertain whether the New Text adhered to the Constitutional Principles.<sup>8</sup> The court further highlighted that the Constitutional Assembly had a ‘wide discretion’ to determine which rights should be included in the New Text.<sup>9</sup> Additionally, the court pointed out that several institutions had filed a response to the objection lodged against NT 12(2) in support of the same NT. These institutions had maintained that since the right to bodily integrity is a universally recognized fundamental right, the Constitutional Assembly was compelled to include it in the New Text in order to achieve gender equality and ensure that women’s ability to make informed decisions concerning reproduction is recognised.<sup>10</sup>

The confirmation of the Certification Judgement and subsequent adoption of the Constitution as the supreme law of the Republic signified what may well be referred to as the commencement of the protection and promotion of women’s reproductive rights. Accordingly, this chapter reviews the history and development of abortion laws in South Africa through the eyes of journal articles, case law and legislation.

## 2.2. Reproductive rights in an apartheid regime

South Africa was subjected to control by a regime of apartheid from 1948 up until 1994. This regime was made up of political, economic, and residential segregation on the basis of race.<sup>11</sup> The national government and vital economic institutions were under the management of white South Africans. All other South Africans, whether formally African, coloured, or Asian, were prohibited from voting and suffered mobility and employment restrictions.<sup>12</sup> The African population, which made up around three-quarters of the population, was particularly affected by this geographic separation.<sup>13</sup> Officially, each African was a resident of one of ten

---

<sup>7</sup> Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26 para 59. Constitutional Principle II of Schedule 4 of the Interim Constitution states that: ‘Everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties, which shall be provided for and protected by entrenched and justiciable provisions in the Constitution, which shall be drafted after having given due consideration to inter alia the fundamental rights contained in Chapter 3 of this Constitution.’

<sup>8</sup> Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26 para 60.

<sup>9</sup> Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26 para 60.

<sup>10</sup> Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26 para 61.

<sup>11</sup> Norling J ‘Family Planning and Fertility in South Africa under Apartheid’ (2019) 23(3) *European Review of Economic History* at <https://doi.org/10.1093/ereh/hey016> (accessed 01 September 2023).

<sup>12</sup> Norling J ‘Family Planning and Fertility in South Africa under Apartheid’ (2019) 23(3) *European Review of Economic History* at <https://doi.org/10.1093/ereh/hey016> (accessed 01 September 2023).

<sup>13</sup> Geographic segregation remains an issue for many Africans, almost thirty years after the Republic held its first democratic elections. This was evident in the recent taxi strike that took place in Cape Town towards the end of

homelands. By 1960, every African in South Africa was compelled to live in a homeland since the more lucrative ‘white areas’ were off-limits to those without permission to live and work there.<sup>14</sup> These mostly impoverished, rural homelands made up 13% of the country's total geographical area.<sup>15</sup> Most Africans resided in their homelands, with the remainder in townships in cities and on farms owned by white people in predominantly white areas. Therefore, apartheid not only segregated whites and non-whites but also resulted in division between Africans living in white areas and Africans living in their homelands.<sup>16</sup>

Unfortunately, this geographic separation meant that Africans could not access reproductive health services such as family planning, as these services were mainly available to white South Africans through their private physicians.<sup>17</sup> Consequently, the lowest birth rates were continuously recorded among white South Africans.<sup>18</sup>

In the early 1960s, national government personnel expressed concern over a shrinking white minority. The government responded by promoting immigration from Europe, encouraging white families to have more children, and expanding the immediate distribution of family planning services to Africans.<sup>19</sup> However, this expansion was accessible mostly to non-whites who resided in white areas and townships and Africans who lived in their homelands were once again excluded.<sup>20</sup> This prompted the government to set up mobile clinics in townships to enable access to women who did not reside in white areas. This was seen by many as a means of population control by the apartheid government whose primary objective was to halt an upsurge of the African population.<sup>21</sup> Then Prime Minister, B.J Vorster, is quoted in 1972 as stating the

---

August 2023. See for example Forde S ‘Cape Town Taxi Strike Exposes a Deeply Unequal City – and the Legacy of Apartheid’ (2023) at <https://theconversation.com/cape-town-taxi-strike-exposes-a-deeply-unequal-city-and-the-legacy-of-apartheid-211828> (accessed 01 September 2023).

<sup>14</sup> Norling J ‘Family Planning and Fertility in South Africa under Apartheid’ (2019) 23(3) *European Review of Economic History* at <https://doi.org/10.1093/ereh/hey016> (accessed 01 September 2023).

<sup>15</sup> Norling J ‘Family Planning and Fertility in South Africa under Apartheid’ (2019) 23(3) *European Review of Economic History* at <https://doi.org/10.1093/ereh/hey016> (accessed 01 September 2023).

<sup>16</sup> Norling J ‘Family Planning and Fertility in South Africa under Apartheid’ (2019) 23(3) *European Review of Economic History* at <https://doi.org/10.1093/ereh/hey016> (accessed 01 September 2023).

<sup>17</sup> Brown B.B ‘Facing the “Black Peril”: The Politics of Population Control in South Africa’ (1987) 13(2) *Journal of Southern African Studies* 269.

<sup>18</sup> Brown B.B ‘Facing the “Black Peril”: The Politics of Population Control in South Africa’ (1987) 13(2) *Journal of Southern African Studies* 269.

<sup>19</sup> Brown B.B ‘Facing the “Black Peril”: The Politics of Population Control in South Africa’ (1987) 13(2) *Journal of Southern African Studies* 270.

<sup>20</sup> Brown B.B ‘Facing the “Black Peril”: The Politics of Population Control in South Africa’ (1987) 13(2) *Journal of Southern African Studies* 271.

<sup>21</sup> Hodes R ‘The Medical History of Abortion in South Africa, c.1970 – 2000’ (2013) 29(3) *Journal of Southern African Studies* 530.

following about black South Africans, ‘We would like to reduce them, and we are doing our best to do so...’<sup>22</sup>

White women had access to doctors who facilitated their family planning injections in order to avoid unwanted pregnancies, but the government’s primary objective was increasing the white population. Therefore, white women were often encouraged to have more children. In a way, white women were also subjected to some form of oppression by their male counterparts.

### 2.2.1. The epidemic of illegal abortions

Abortion used to be rigidly regulated. Towards the end of the year 1913, a matter was brought before the courts for deliberation.<sup>23</sup> The accused, Freestone, was charged with eight counts of procuring abortion. On seven of those counts, it was alleged that he had procured abortion using an instrument and on the remaining one, by way of an abortion drug.<sup>24</sup> The court held that when a person is accused of attempting to procure an abortion, they will be found guilty.<sup>25</sup> It is unnecessary to prove that that person is indeed pregnant.<sup>26</sup> However, when a person is accused of attempting or procuring abortion using drugs, it is essential to prove that such drugs can induce an abortion.<sup>27</sup>

To substantiate the assertion that pregnancy is immaterial when a person is charged with an attempt to procure abortion, the court referred to the 1890 case of *R v Whitchurch*.<sup>28</sup> In this case, it was decided that a woman who, despite not actually being pregnant, conspires with someone else to use a device on herself with the intention of procuring abortion is guilty of conspiracy to procure abortion.<sup>29</sup> Although the woman was not pregnant, it was determined that while the actual crime could not have been done, she may still have been found guilty of conspiring to commit it.<sup>30</sup> These two cases provide a glimpse into how strict and rigid the law was when dealing with matters relating to abortion. The cases also show how women’s fundamental human rights were grossly violated.

---

<sup>22</sup> Hodes R ‘The Medical History of Abortion in South Africa, c.1970 – 2000’ (2013) 29(3) *Journal of Southern African Studies* 530.

<sup>23</sup> *Rex v Freestone* 1913 TPD 758.

<sup>24</sup> *Rex v Freestone* 1913 TPD 758 pg. 2.

<sup>25</sup> *Rex v Freestone* 1913 TPD 758 pg. 1.

<sup>26</sup> *Rex v Freestone* 1913 TPD 758 pg. 1.

<sup>27</sup> *Rex v Freestone* 1913 TPD 758 pg. 1.

<sup>28</sup> *Rex v Whitchurch* 1890 24 Q.B.D 420.

<sup>29</sup> *Rex v Whitchurch* 1890 24 Q.B.D 420.

<sup>30</sup> *Rex v Whitchurch* 1890 24 Q.B.D 420.

During the 1970s, abortion laws and policies in numerous Western countries such as Australia and Canada became more liberal.<sup>31</sup> However, the situation in South Africa was different. Apartheid was pervasive, and at its peak, there were severe laws and regulations that placed limitations on access to abortion services in the public healthcare system.<sup>32</sup> The few abortion procedures that were legally authorised were met with heightened supervision.<sup>33</sup>

Although the apartheid government was adamant about reducing the black population using reproductive control (free access to family planning), that same government was not ‘flexible’ enough to allow women the right to legally terminate unwanted pregnancies. Because apartheid was deeply rooted in religious and racial ideologies, the conceptual challenge posed by legalised abortion proved to be too daunting for Calvinist morality.<sup>34</sup> This, however, does not mean the government attempted to prevent women from procuring abortions illegally, particularly black women. The National Party knowingly permitted the social epidemic of unsafe abortion to continue unregulated in black communities for various reasons. Some of these included: racist perceptions of black women as inherently ‘promiscuous’; a refusal to pay the cost of medical abortions for black subjects; a desire to offload medical care for ‘surplus’ black women onto newly created Bantustans; and concern for upsetting African nationalists who were patriarchal.<sup>35</sup>

By the 1960s, it was believed that 200,000 women a year, the vast majority of whom were black, had sought illegal abortions, making the practice what can only be described as an epidemic.<sup>36</sup> In 1970, over 4000 Indian, 15,000 Coloured, 18,000 White, and 123,000 African women had clandestine abortions, and towards the end of the year, it was believed that one in every nine pregnant South African had an illegal abortion.<sup>37</sup> Racial and socioeconomic factors affected the methods of abortion the women used. White women with finances sought out

---

<sup>31</sup> Harsch D ‘Society, the State, and Abortion in East Germany 1950-1972’ 102(1) *The American Historical Review* 3.

<sup>32</sup> Hodes R ‘The Medical History of Abortion in South Africa, c.1970 – 2000’ (2013) 29(3) *Journal of Southern African Studies* 528.

<sup>33</sup> Hodes R ‘The Medical History of Abortion in South Africa, c.1970 – 2000’ (2013) 29(3) *Journal of Southern African Studies* 528-529.

<sup>34</sup> Hodes R ‘The Medical History of Abortion in South Africa, c.1970 – 2000’ (2013) 29(3) *Journal of Southern African Studies* 531. Calvinist morality or reformed Christianity affirms the sovereignty of god and the authority of the bible.

<sup>35</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women’s Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 177.

<sup>36</sup> Bradford H ‘Herbs, Knives, and Plastic: 150 Years of Abortions in South Africa’ in Meade T and Walker M (eds) *Science, Medicine, and Cultural Imperialism* London: MacMillan (1991) 136-139.

<sup>37</sup> Bradford H ‘Herbs, Knives, and Plastic: 150 Years of Abortions in South Africa’ in Meade T and Walker M (eds) *Science, Medicine, and Cultural Imperialism* London: MacMillan (1991) 136-139.

private physicians and, from 1967, went to Britain for medical abortions.<sup>38</sup> Black and low-income white women either sought to initiate miscarriages on themselves through numerous unsafe techniques or hired untrained abortionists who injected liquids (such as soapy water or disinfectants like Dettol), inserted objects, or both.<sup>39</sup> Additionally, among the bulk of Africans, many women continued to use the services of traditional herbalists, particularly in rural regions.<sup>40</sup>

### 2.2.2. The 1972 Trial

The government overlooked the rate at which black women were dying from illegal abortions, and the focus of constant, strict surveillance by multiple state branches, including the courts and the police, turned to illegal abortions procured by white women.<sup>41</sup> In 1972, Derk Crichton, a renowned doctor, and James Watts, a self-taught abortionist, appeared before the Durban Supreme Court on allegations of conspiring to perform illegal abortions on white teenagers and unmarried women.<sup>42</sup> The trial arose at a time when the nation was awaiting a new government-proposed abortion legislation and attracted enormous attention.<sup>43</sup> The trial not only served as astounding confirmation to (white) South Africa that white girls and young women were alarmingly disregarding patriarchal values and engaging in premarital sex but it also served as another test of the attitude of the judiciary toward the common law on abortion.<sup>44</sup> This proved what the dictatorship previously believed: that liberal Western values from the corrupt West were infiltrating apartheid morality, undermining it.<sup>45</sup>

The two accused were said to have ‘acted in concert’, the prosecution further alleged that a common purpose could be established from their conduct as Crichton usually referred clients

---

<sup>38</sup> Bradford H ‘Herbs, Knives, and Plastic: 150 Years of Abortions in South Africa’ in Meade T and Walker M (eds) *Science, Medicine, and Cultural Imperialism* London: MacMillan (1991) 136-139.

<sup>39</sup> Bradford H ‘Herbs, Knives, and Plastic: 150 Years of Abortions in South Africa’ in Meade T and Walker M (eds) *Science, Medicine, and Cultural Imperialism* London: MacMillan (1991) 136-139.

<sup>40</sup> Bradford H ‘Herbs, Knives, and Plastic: 150 Years of Abortions in South Africa’ in Meade T and Walker M (eds) *Science, Medicine, and Cultural Imperialism* London: MacMillan (1991) 136-139.

<sup>41</sup> Hodes R ‘The Medical History of Abortion in South Africa, c.1970 – 2000’ (2013) 29(3) *Journal of Southern African Studies* 531.

<sup>42</sup> Klausen, S. M. “‘The Trial the World is Watching’: The 1972 Prosecution of Derk Crichton and James Watts, Abortion, and the Regulation of the Medical Profession in Apartheid South Africa.’ (2014) 58(2) *Medical History* at <https://doi.org/10.1017/mdh.2014.6> (accessed 02 September 2023).

<sup>43</sup> The Abortion and Sterilization Bill.

<sup>44</sup> Klausen, S. M. “‘The Trial the World is Watching’: The 1972 Prosecution of Derk Crichton and James Watts, Abortion, and the Regulation of the Medical Profession in Apartheid South Africa.’ (2014) 58(2) *Medical History* at <https://doi.org/10.1017/mdh.2014.6> (accessed 02 September 2023).

<sup>45</sup> Klausen, S. M. “‘The Trial the World is Watching’: The 1972 Prosecution of Derk Crichton and James Watts, Abortion, and the Regulation of the Medical Profession in Apartheid South Africa.’ (2014) 58(2) *Medical History* at <https://doi.org/10.1017/mdh.2014.6> (accessed 02 September 2023).

to Watts.<sup>46</sup> The teenagers and women who procured abortions were listed as accomplices to the crimes alongside their boyfriends and family members who accompanied them, they were then coerced into testifying for the prosecution and promised immunity.<sup>47</sup> The presiding judge found Crichton guilty on sixteen charges, while Watts was found guilty on 24 charges. The judge found it to be a devastatingly challenging task to sentence the men. Because, while the law must be upheld, the Court must also consider the enormous pressures put on medical professionals and those with less training by desperate women who believe their entire social and financial future depends on terminating unwanted pregnancies.<sup>48</sup>

### 2.2.3. The Abortion and Sterilization Act 2 of 1975

The Abortion and Sterilization Bill, which the Cabinet had presented the year before (1973), was the subject of a Commission of Enquiry appointed by the apartheid government in 1974. There were ten nationalist legislators on the Commission.<sup>49</sup> In its final report, the Commission concluded that the concept of abortion is irreconcilable with the religious, moral, and ethical beliefs of the vast majority of South Africans, and is wholly unacceptable to the country.<sup>50</sup> The objective of the proposed Act was to lower the rate of abortions among white people; the impact it would have on other racial groups was disregarded.<sup>51</sup> In actuality, discrimination based on race and gender had been a prominent aspect of South African legislation since the 1960s, as demonstrated above, when policies favoured the dominant minority, men over women, and whites over blacks.<sup>52</sup> The way that abortion restrictions were implemented reflected this patriarchal and racial prejudice.<sup>53</sup>

---

<sup>46</sup> Klausen, S. M. ““The Trial the World is Watching”: The 1972 Prosecution of Derk Crichton and James Watts, Abortion, and the Regulation of the Medical Profession in Apartheid South Africa.’ (2014) 58(2) *Medical History* at <https://doi.org/10.1017/mdh.2014.6> (accessed 02 September 2023).

<sup>47</sup> Klausen, S. M. ““The Trial the World is Watching”: The 1972 Prosecution of Derk Crichton and James Watts, Abortion, and the Regulation of the Medical Profession in Apartheid South Africa.’ (2014) 58(2) *Medical History* at <https://doi.org/10.1017/mdh.2014.6> (accessed 02 September 2023).

<sup>48</sup> Klausen, S. M. ““The Trial the World is Watching”: The 1972 Prosecution of Derk Crichton and James Watts, Abortion, and the Regulation of the Medical Profession in Apartheid South Africa.’ (2014) 58(2) *Medical History* at <https://doi.org/10.1017/mdh.2014.6> (accessed 02 September 2023).

<sup>49</sup> Hodes R ‘The Medical History of Abortion in South Africa, c.1970 – 2000’ (2013) 29(3) *Journal of Southern African Studies* 531.

<sup>50</sup> Hodes R ‘The Medical History of Abortion in South Africa, c.1970 – 2000’ (2013) 29(3) *Journal of Southern African Studies* 531.

<sup>51</sup> Sarkin J ‘Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law’ (1998) 4(9) *Buffalo Human Rights Law Review* 142.

<sup>52</sup> Sarkin J ‘Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law’ (1998) 4(9) *Buffalo Human Rights Law Review* 142.

<sup>53</sup> Sarkin J ‘Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law’ (1998) 4(9) *Buffalo Human Rights Law Review* 142.

The impact of this legislation on black women was not taken into consideration, neither was the impact it could have on white women per se. The primary aim of the drafters was to ascertain that white women fulfilled their duties of reproduction, ensuring that the ‘superior’ race prospers. Additionally, the discussions concerning the drafting of the proposed Abortion and Sterilization Act were spearheaded by racist white, patriarchal men. In his article, Jeremy Sarkin quoted Emily Moore who spoke on the issue of men pioneering abortion-related legislation:<sup>54</sup>

‘We have a celibate male religious hierarchy which is in the forefront of opposition to the full recognition of women as persons, a male-dominated legislature and a male-dominated medical profession loathe to relinquish their role as decision-makers in this arena.’<sup>55</sup>

Graham McIntosh, a member of parliament for the United Party from Pinetown, Natal, stated during the abortion debate that ‘for the first trimester of a woman's pregnancy she is, medically speaking, hormonally drugged. Her hormone level is so high that it makes it difficult for her to come to a rational and sensible decision.’<sup>56</sup> This statement reflects the attitude of some male politicians in Parliament towards women and their capacity to make decisions regarding themselves throughout pregnancy.<sup>57</sup> At the second reading of the Bill, the Minister of Health at the time, made the following statement, ‘respect for the unborn child (foetus), recognition of the Christian views and moral norms which characterise our country... and the fact that drastic action will be taken against abortions performed outside the legal provisions... should be clearly reflected in the legislation.’<sup>58</sup> These statements both signify how little disregard men had for women, it is, therefore, impractical to expect such men to uphold women’s rights when drafting a legislation that will directly affect **only** women (own emphasis). Men who should not have drafted such legislation in the first place.

The Bill was eventually passed and came into effect on the 31<sup>st</sup> of March in 1976. Section 2 of the Act prohibited abortion that was procured in circumstances not provided for in the Act.<sup>59</sup>

---

<sup>54</sup> Sarkin J ‘Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law’ (1998) 4(9) *Buffalo Human Rights Law Review* 147.

<sup>55</sup> Sarkin J ‘Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law’ (1998) 4(9) *Buffalo Human Rights Law Review* 147.

<sup>56</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993) 84 as cited in Sarkin J ‘Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law’ (1998) 4(9) *Buffalo Human Rights Law Review* 149.

<sup>57</sup> Sarkin J ‘Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law’ (1998) 4(9) *Buffalo Human Rights Law Review* 149.

<sup>58</sup> Sarkin J ‘Patriarchy and Discrimination in Apartheid South Africa’s Abortion Law’ (1998) 4(9) *Buffalo Human Rights Law Review* 150.

<sup>59</sup> Section 2 of the Abortion and Sterilization Act 2 of 1975 states, ‘No person shall procure an abortion otherwise than in accordance with the provisions of this Act.’

That is, according to section 3 of the Act, abortion could only be procured by a medical practitioner only where: the woman's continued pregnancy poses a substantial threat to her physical health or endangers her life.<sup>60</sup> Secondly, if the pregnant woman's mental health is seriously endangered by her continued pregnancy.<sup>61</sup> In addition, if there is a significant chance that the unborn child may have a physical or mental disability that will leave him permanently and severely handicapped.<sup>62</sup> Lastly, an abortion could be procured when allegations of unlawful carnal intercourse that led to the conception of the foetus have been successfully proved in a court of law.<sup>63</sup> Unlawful carnal intercourse may include but is not limited to, rape and incest. Section 3 further requires that two additional medical practitioners certify in writing that the abortion is indeed necessary.<sup>64</sup> In order for such abortion to be procured lawfully, section 5(1) requires that it be done at a state-controlled institution, or any institution specified by the Minister in writing. Lastly, a medical practitioner in charge of the state-controlled institution, or a medical practitioner in charge of the institution specified by the Minister must provide written authority prior to the procurement of an abortion.<sup>65</sup> A medical doctor who procures an abortion without the required certification from two medical practitioners shall be guilty of an offence and subject on conviction to a fine not exceeding five thousand rands.<sup>66</sup> Alternatively, the doctor(s) shall be imprisoned for a period not exceeding five years or sentenced to both a fine and imprisonment.<sup>67</sup>

As anticipated by some medical professionals and women's rights activists, the Abortion and Sterilization Act was not received positively.<sup>68</sup> Armstrong was among those who criticized the then Bill.<sup>69</sup> He argued that it is inquisitive and because of this, it fails to recognise the social need for secrecy and privacy, and that it has failed to address the serious issue of back-street abortion.<sup>70</sup> Armstrong further contended that some of the factors that urge women to procure back-street abortions include financial and domestic circumstances, the need to protect their dignity (reputation), and health risks.<sup>71</sup> And, until these factors are addressed, it is futile to pass

---

<sup>60</sup> Section 3(1)(a).

<sup>61</sup> Section 3(1)(b).

<sup>62</sup>Section 3(1)(c).

<sup>63</sup> Section 3(1)(d).

<sup>64</sup> Section 3(1)(a)-(d).

<sup>65</sup> Section 6.

<sup>66</sup> Section 10.

<sup>67</sup> Section 10.

<sup>68</sup> Sarkin J 'Patriarchy and Discrimination in Apartheid South Africa's Abortion Law' (1998) 4(9) *Buffalo Human Rights Law Review* 152.

<sup>69</sup> Armstrong N.W 'The New Abortion Bill – Medicine and Society' (1973) 2(5) *Responsa Meridiana*.

<sup>70</sup> Armstrong N.W 'The New Abortion Bill – Medicine and Society' (1973) 2(5) *Responsa Meridiana* 254.

<sup>71</sup> Armstrong N.W 'The New Abortion Bill – Medicine and Society' (1973) 2(5) *Responsa Meridiana* 254.

the proposed abortion legislation.<sup>72</sup> Although Armstrong's criticism was made before the passing of the Abortion and Sterilization Act, Sarkin was of the opinion that many people shared the same sentiments as Armstrong post the enactment of the Act.<sup>73</sup> Van Marle has also argued that one of the primary arguments for repealing the legislation is that it imposes excessive restrictions on women and prompts them to turn to the back street for assistance.<sup>74</sup> Women's well-being and lives were at imminent risk.<sup>75</sup>

The Act has also come under scrutiny for being somewhat ambiguous regarding what constitutes an abortion.<sup>76</sup> Section 1 defines abortion as 'abortion of a live foetus of a woman with intent to kill such foetus.' The Afrikaans version of the Act defines abortion as '*vrugafdrywing is: die afdrywing van 'n lewende vrug van 'n vrou met die opset om dit te dood.*' This definition of abortion is made a little clearer by using the word "*afdrywing*" (expulsion).<sup>77</sup> In the case of *S v Collop*,<sup>78</sup> the Afrikaans version was used to clarify the English text although the English text was the one approved by the President and was thus the text to be employed in interpretation.<sup>79</sup> Therefore, the following conditions must be satisfied in order for an abortion to be deemed a crime: (a) the expulsion from a woman; (b) of a live foetus; (c) doing so unlawfully; and (d) with the intention to kill the foetus.<sup>80</sup>

#### 2.2.4. The Repercussions of the 1975 Act on Women

In 1993, June Cope, a women's rights activist and founder of the Abortion Reform Action Group (ARAG), published a book wherein she documented women's experiences (and hers) and called for legislative reform in South Africa.<sup>81</sup> The ARAG was formulated as a response to the country's abortion law and as a lobby for the enactment of legislation that protected and promoted women's rights.<sup>82</sup> In Chapter 12, Cope documents the effects of the 1975 Act on women, she begins with the story of a 28-year-old white woman, Edda Strauss. Edda qualified

---

<sup>72</sup> Armstrong N.W 'The New Abortion Bill – Medicine and Society' (1973) 2(5) *Responsa Meridiana* 254.

<sup>73</sup> Sarkin J 'Patriarchy and Discrimination in Apartheid South Africa's Abortion Law' (1998) 4(9) *Buffalo Human Rights Law Review*.

<sup>74</sup> Van Marle K 'Rights as Relationships – Abortion' (1995) 10(1) *South African Public Law* 168.

<sup>75</sup> Van Marle K 'Rights as Relationships – Abortion' (1995) 10(1) *South African Public Law* 168.

<sup>76</sup> Sarkin J 'Patriarchy and Discrimination in Apartheid South Africa's Abortion Law' (1998) 4(9) *Buffalo Human Rights Law Review* 157.

<sup>77</sup> Sarkin J 'Patriarchy and Discrimination in Apartheid South Africa's Abortion Law' (1998) 4(9) *Buffalo Human Rights Law Review* 157.

<sup>78</sup> *S v Collop* 1981 1 SA 150 (A).

<sup>79</sup> *S v Collop* 1981 1 SA 150 (A).

<sup>80</sup> Sarkin J 'Patriarchy and Discrimination in Apartheid South Africa's Abortion Law' (1998) 4(9) *Buffalo Human Rights Law Review* 158.

<sup>81</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993).

<sup>82</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993).

for an abortion in terms of section 3 but because of the bureaucratic delays and the emotional abuse she experienced at the hospital, she had to travel to Britain to procure an abortion.<sup>83</sup> Another young woman whose experiences with the 1975 Act were documented is 13-year-old Maria who lived with her family at a black township.<sup>84</sup> Unfortunately, when Maria fell pregnant, she could not receive assistance from doctors because they feared for their jobs and their freedom.<sup>85</sup> As a result, she opted for a backstreet abortion where she caught an infection and her uterus had to be removed, denying her the opportunity of ever having children of her own.<sup>86</sup>

The Abortion and Sterilization Act was not working for medical practitioners and certainly not for women.<sup>87</sup> The previous prosecutions of medical personnel, including the famous 1972 trial of Crichton and Watts, frightened doctors so much that hospital superintendents would often refuse abortions by lying to women that they did not meet the requirements.<sup>88</sup> Medical authorities meticulously examined women who were bold or foolish enough to request abortions, which frequently led to significant delays in their surgery and ill-treatment by hospital staff.<sup>89</sup> Edda was unfortunately a victim of such brutal treatment. Luckily, she had the means to travel abroad.

In 1976, another middle-class woman was given authorisation for an abortion on the grounds that the foetus had a known hereditary abnormality and had to wait until she was sixteen weeks pregnant.<sup>90</sup> Section 3(1)(c) of the Act permits an abortion where a child may be born with a mental or physical defect. The nursing staff kept her awake during the procedure and tortured her emotionally and mentally.<sup>91</sup> She also suffered from severe haemorrhaging, which required that she receive postoperative care while still inside the hospital—clearly a hostile situation.<sup>92</sup>

---

<sup>83</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993) 96-98.

<sup>84</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993) 98-101.

<sup>85</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993) 98-101.

<sup>86</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993) 98-101.

<sup>87</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 202.

<sup>88</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 202.

<sup>89</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 203.

<sup>90</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 203.

<sup>91</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 203.

<sup>92</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 203.

There were other instances where hospital administrators and doctors were fully conscious of the law but disregarded it as a result of religious belief or patriarchal disdain.<sup>93</sup> A young woman who had fallen pregnant after being raped was denied an abortion in 1980 on the grounds of bureaucratic technicalities.<sup>94</sup> Her abortion had been applied for and approved under section 3(1)(a) of the Act which allows for abortion when the continued pregnancy poses a serious threat to the woman's physical health. The superintendent alleged that it should have been approved under section 3(1)(b) instead which allows abortion when the continued pregnancy poses a serious threat to the woman's mental health. The superintendent however noted that, if the abortion was to be approved under section 3(1)(b) it would open a leeway for 'free abortions' where every other woman would threaten to harm themselves in order to be approved for an abortion.<sup>95</sup> The father of the young woman succeeded in court but the doctors refused to comply with the order, referring to section 9 of the Act which states that participation in the procurement of abortion is voluntary.<sup>96</sup>

The stories of these women may sound different, but they are all similar in the fact that the Abortion and Sterilization Act failed them, again and again.

### 2.3. Towards the Choice of Termination of Pregnancy Act 92 of 1996

The absence of progressive legislation that regulated reproductive rights and abortion access in South Africa meant that women were in extreme danger, physically and otherwise. The number of deaths resulting from backstreet abortions was alarmingly high. Because the apartheid government was heavily influenced by Christian beliefs, and Christianity views abortion as a murderous sin, this belief was imposed on everyone, particularly women. Post the enactment of the Interim Constitution, this would be viewed as an infringement of the right to religion, among other rights violations.<sup>97</sup>

---

<sup>93</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 203.

<sup>94</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 204.

<sup>95</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 204.

<sup>96</sup> Section 9 of the Abortion and Sterilization Act states that 'A medical practitioner (other than a medical practitioner referred to in section 6(1)), a nurse or any person employed in any other capacity at an institution referred to in section 5(1) shall, notwithstanding any contract or the provisions of any other law, not be obliged to participate in or assist with any abortion contemplated in section 3 or any sterilization contemplated in section 4.'

<sup>97</sup> Section 14(1) of the Interim Constitution provides that, 'Every person shall have the right to freedom of conscience, religion, thought, belief, and opinion, which shall include academic freedom in institutions of higher learning.'

During the apartheid era, South Africa was recorded as one of the countries with the highest maternal mortality rates caused mostly by illegal and unsanitary abortions.<sup>98</sup> Septic abortions claimed the lives of about 400 women in public health facilities in 1994, while estimates reported the number of illegal abortions between 1975 and 1996 fluctuated between 120,000 to 250,000 annually.<sup>99</sup> Additionally, abortion was the second-highest cause of maternal mortality between 1975 and 1982 and the most frequent reason for admission to the gynaecological ward of the King Edward VIII Hospital.<sup>100</sup> 2881 black women were admitted to Baragwanath Hospital in 1978 alone due to complications from unsuccessful abortions.<sup>101</sup> Furthermore, in 1989, estimates showed that 43,000 abortions were procured, 42,000 of them were illegal.<sup>102</sup> It was quite clear that this system of segregation, authoritarianism, and discrimination was not working, especially for black people. Change needed to happen, and it came with the end of apartheid.

### 2.3.1. The Abolishment of Apartheid

The negotiations between the African National Congress (ANC) and the National Party (NP) began in 1985 and lasted until 1993.<sup>103</sup> These negotiations were to lead to the end of a lifetime of racial segregation, and inhumane and derogatory treatment of non-whites under the apartheid regime. It was in that same year when the ANC held its first strategy conference, urging its supporters and non-whites in their entirety to refrain from violently protesting in black townships and homelands.<sup>104</sup> The motive behind this was to take the protests to predominantly white suburbs in order to force the apartheid government to come to the negotiation table. ANC leader and activist, Oliver Tambo threatened unprecedented levels of unrest and disorder in white schools, supermarkets, and the military.<sup>105</sup> However, despite these calls for violence, the ANC leaders would later recant their statements. Tambo especially would caution against

---

<sup>98</sup> Guttmacher, Kapadia, Te Water Naude, et. al 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *Guttmacher Institute* 191-194.

<sup>99</sup> Guttmacher, Kapadia, Te Water Naude, et. al 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *Guttmacher Institute* 191-194.

<sup>100</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 213.

<sup>101</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 213.

<sup>102</sup> Sigcau N *Public Discourses on Choice of Termination of Pregnancy in a Rural Area of the Eastern Cape Province in South Africa*. (Master's thesis, Rhodes University, 2009).

<sup>103</sup> Waldmeir P *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* Rutgers University Press (1998) 65.

<sup>104</sup> Waldmeir P *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* Rutgers University Press (1998) 65.

<sup>105</sup> Waldmeir P *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* Rutgers University Press (1998) 65.

needless and indiscriminate assassination of white people.<sup>106</sup> The ANC was divided between leaders who wanted to terrorise white people, such as Chris Hani and Seretse Chaobe, and those who wanted to charm whites to defeat, like Oliver Tambo and Thabo Mbeki.<sup>107</sup>

While political uprisings and negotiations were on, women were still unable to lawfully procure abortions. Although abortion was regulated by the Abortion and Sterilization Act, its stringent provisions made it nearly impossible for women to qualify for one. As a result, women were rapidly losing their lives, and little was done to reduce maternal mortality or at the very least address the needs and issues women were facing.<sup>108</sup> Many organizations such as the Abortion Reform Action Group protested the Abortion and Sterilization Act and called for legislative reform. In her book, Cope recalls the daily increase in phone calls the ARAG received from women seeking assistance with terminating a pregnancy, but they could not provide any.<sup>109</sup> The government had closed all clinics near its borders and flight prices had drastically increased, removing the alternative of taking women abroad for medical assistance.<sup>110</sup> Women inevitably continued to follow the two-step procedure, which involved having an illegal abortion and then visiting a hospital to receive legal treatment for an infection, haemorrhaging, or other issues, or to ensure no such issues occurred.<sup>111</sup>

Starting with the general election in 1981, the apartheid regime started to lose white support, and as the decade went on, the country became more unruly.<sup>112</sup> The government of P. W. Botha started outlining a reform agenda in 1979 with the goal of gaining black support at home and backing for his government abroad.<sup>113</sup> Botha hinted that the programme might include the formation of black trade unions and the modification of various sections of the Immorality Act that were discriminatory.<sup>114</sup> However, neither were completely outlined or implemented yet but

---

<sup>106</sup> Waldmeir P *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* Rutgers University Press (1998) 65.

<sup>107</sup> Waldmeir P *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* Rutgers University Press (1998) 65.

<sup>108</sup> D'Souza KD 'Abortion and the Three Bodies: An Interpretative Understanding of Barriers to Abortion Access in South Africa' 2013 3 *Journal of Undergraduate Anthropology* 9.

<sup>109</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993) 165.

<sup>110</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993) 165.

<sup>111</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 213.

<sup>112</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 213.

<sup>113</sup> Charney C.R 'Towards Rupture or Stasis? An Analysis of the 1981 South African General Election' (1982) 81(325) *Oxford Journals, Oxford University Press* 527.

<sup>114</sup> Charney C.R 'Towards Rupture or Stasis? An Analysis of the 1981 South African General Election' (1982) 81(325) *Oxford Journals, Oxford University Press* 527.

the National Party under the leadership of Botha was already losing its white members.<sup>115</sup> His reformist proposals encountered unexpectedly vehement opposition within all the major Afrikaans institutions, including the civil service, the churches, and the Broederbond.<sup>116</sup>

As a result, the prime minister made the decision to call off Parliament's 1981 elections.<sup>117</sup> Trying to quell unrest, the government proclaimed another State of Emergency in 1985, and police regularly patrolled townships to scare residents and apprehend their leaders.<sup>118</sup> The apartheid police frequently used torture and murder as methods of enforcement.<sup>119</sup> Yet, the National Party persisted in portraying itself as the defender of Christian principles in the face of political anarchy and upholding a stringent abortion law was part of that fiction.<sup>120</sup>

When it became clear that apartheid was coming to an end in the late 1980s, feminists in the ANC Women's League and civil society gathered to fight for women's rights in emerging South Africa.<sup>121</sup> As shown below, they moved quickly and strategically to ensure the recognition of women's reproductive rights.<sup>122</sup>

### 2.3.2. The Choice on Termination of Pregnancy Act 92 of 1996

In 1994, South Africa gained its political independence, and for the first time, held its first democratic elections. Following these events, it became critical that legislation begin to reflect the needs of the majority. Women were among those who needed their human rights to be acknowledged, protected, and promoted.<sup>123</sup> The newly elected South African government then began addressing one of the most controversial issues—abortion—in order to meet the

---

<sup>115</sup> Charney C.R 'Towards Rupture or Stasis? An Analysis of the 1981 South African General Election' (1982) 81(325) *Oxford Journals, Oxford University Press* 527.

<sup>116</sup> Charney C.R 'Towards Rupture or Stasis? An Analysis of the 1981 South African General Election' (1982) 81(325) *Oxford Journals, Oxford University Press* 528.

<sup>117</sup> Charney C.R 'Towards Rupture or Stasis? An Analysis of the 1981 South African General Election' (1982) 81(325) *Oxford Journals, Oxford University Press* 529.

<sup>118</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 213. The first State of Emergency had been declared in 1976 when the country sunk into a terrible recession and a 'deteriorating economic and political situation'.

<sup>119</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 213.

<sup>120</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 213.

<sup>121</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 214.

<sup>122</sup> Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015) 214.

<sup>123</sup> Mhlanga R.E 'Abortion: Development and Impacts in South Africa' (2003) 67 *British Medical Bulletin* 117.

requirements of women in terms of reproductive health.<sup>124</sup> These discussions ultimately led to the enactment of the Choice on Termination of Pregnancy Act.<sup>125</sup>

The 1996 Termination of Pregnancy Act (Termination Act) signifies a change from previous legislation that treated women as minors regardless of their age or marital status.<sup>126</sup> The assumption that the doctor is constantly aware of what is best and makes a choice based on his or her judgement was also refuted by the Termination Act.<sup>127</sup>

The transition from the 1975 Act to the Termination Act was not a very smooth one.<sup>128</sup> The Christian and Muslim religions, as well as business organizations like Doctors for Life, were among the groups who opposed the reform.<sup>129</sup> Almost two dozen anti-abortion organizations united to form the National Alliance for Life, and they organized protests prior to the parliamentary vote on the Termination Act.<sup>130</sup> The Women's Health Project, the Reproductive Rights Alliance, Planned Parenthood of South Africa, and ARAG were among the organizations that supported the ANC's pro-choice stance and stood in solidarity with abortion access as a way to advance women's rights and gender equality.<sup>131</sup> The debate between pro-choice and anti-abortion activists and advocates was further fuelled by the impact of apartheid on the country. Many anti-abortionists rejected legislative reform because their religion views abortion as a sin, while others believed that abortion is a form of population control that restricts the growth of black and coloured people.<sup>132</sup> This, unfortunately, is still the case. Years after the enactment of the Termination Act, some people still reject the right to abortion.

The Termination Act transformed the legislative framework for abortion from one that restricted access and regulated it through medical necessity and criminal law to one that is based on rights and permits abortion on request until twenty weeks of pregnancy.<sup>133</sup> The Termination Act is founded on several constitutional rights, including the right to equal

---

<sup>124</sup> Mhlanga R.E 'Abortion: Development and Impacts in South Africa' (2003) 67 *British Medical Bulletin* 117.

<sup>125</sup> Choice on Termination of Pregnancy Act 92 of 1996, hereafter referred as the Termination Act.

<sup>126</sup> Mhlanga R.E 'Abortion: Development and Impacts in South Africa' (2003) 67 *British Medical Bulletin* 115.

<sup>127</sup> Mhlanga R.E 'Abortion: Development and Impacts in South Africa' (2003) 67 *British Medical Bulletin* 115.

<sup>128</sup> Guttmacher, Kapadia, Te Water Naude, et. al 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *Guttmacher Institute* 193.

<sup>129</sup> Guttmacher, Kapadia, Te Water Naude, et. al 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *Guttmacher Institute* 193.

<sup>130</sup> Guttmacher, Kapadia, Te Water Naude, et. al 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *Guttmacher Institute* 193.

<sup>131</sup> Guttmacher, Kapadia, Te Water Naude, et. al 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *Guttmacher Institute* 193.

<sup>132</sup> Guttmacher, Kapadia, Te Water Naude, et. al 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *Guttmacher Institute* 193.

<sup>133</sup> Albertyn C 'Claiming and Defending Abortion Rights in South Africa' (2015) 11(2) *Revista Direito GV* 430.

treatment and non-discrimination; dignity; privacy; bodily and psychological integrity of a person; as well as the right to access reproductive health care services.<sup>134</sup> Unlike the 1975 Act, the 1996 Act refers to ‘termination of pregnancy’ not ‘abortion’ and defines it as ‘the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman.’<sup>135</sup> Section 2(1)(a) of the Termination Act lists the circumstances under which a pregnancy may be terminated. According to it, a pregnancy may be terminated up to 12 weeks by a medical practitioner or a midwife who has completed the relevant course as stipulated in section 2(2). For the pregnancy to be terminated from 13 weeks up to 20 weeks, the medical practitioner must believe the continued pregnancy poses a risk to the woman’s physical and mental health.<sup>136</sup> Secondly, there is a possibility that the foetus may be born with a physical or mental defect or, the pregnancy resulted from rape or incest.<sup>137</sup> Lastly, there must be a possibility that the pregnancy would severely impact the woman’s social or economic status.<sup>138</sup> After 20 weeks of pregnancy, the termination of a pregnancy is allowed in special circumstances and upon consultation with two medical practitioners who are both of the opinion that the pregnancy would endanger the woman’s life, result in the foetus having severe defects, or that the pregnancy would jeopardize the wellbeing of the foetus.<sup>139</sup>

Section 3 of the Termination Act states that the surgical termination of pregnancy may only take place at a facility designated by the Minister. Such a facility should have, among others, medical and nursing practitioners, an operating theatre and surgical equipment.<sup>140</sup> The Act further indicates that prior to and following a termination of pregnancy, the State shall encourage non-mandatory and non-directive counselling.<sup>141</sup> In terms of consent, the Act only requires consent from the pregnant woman unless the pregnant woman is a minor.<sup>142</sup> In that case, a medical professional or a registered midwife, as the case may be, shall advise a minor who is pregnant to consult with her parents, guardian, family, or friends before the pregnancy is terminated, provided however, that the termination of the pregnancy shall not be denied simply because the minor chooses not to consult them.<sup>143</sup> The consent of the legal or natural

---

<sup>134</sup> Sections 9, 10, 12(2), 14, and 27(1)(a) of the Constitution of the Republic of South Africa, 1996 respectively.

<sup>135</sup> Section 1(x).

<sup>136</sup> Section 2(1)(b)(i).

<sup>137</sup> Section 2(1)(b)(ii)-(iii).

<sup>138</sup> Section 2(1)(b)(i)-(iv).

<sup>139</sup> Section 2(1)(c)(i)-(iii).

<sup>140</sup> Kaswa R and Yogeswaran P ‘Abortion reforms in South Africa: An overview of the Choice on Termination of Pregnancy Act.’ (2020) 62(1) *South African Family Practice*. <https://doi.org/10.4102/safp.v62i1.5240> (accessed 13 September 2023).

<sup>141</sup> Section 4.

<sup>142</sup> Section 5(1) and (2).

<sup>143</sup> Section 5(3).

guardian is only required when the pregnant woman is severely mentally disturbed to the extent that they cannot understand the consequences of a termination of pregnancy, or if the pregnant woman is unconscious and the medical practitioners are of the opinion that she may not wake up in time to request a termination of pregnancy.<sup>144</sup>

The 1996 Choice on Termination of Pregnancy Act declares that every woman has the fundamental right to choose whether to terminate her pregnancy early, safely, and legally.<sup>145</sup> Abortion services are viewed as essential components of universally accessible reproductive health services, which the state is required to provide in a setting that respects and acknowledges women's right to make their own choices.<sup>146</sup>

## 2.4. Conclusion

This chapter provided insight into the country's history and development of abortion rights, starting from the apartheid regime that favoured and protected the interests of white people, to the first abortion legislation (the 1975 Act) and ultimately the Termination of Pregnancy Act. During the apartheid era, non-white women had limited access to facilities such as clinics and as a result found themselves carrying unwanted pregnancies. This led to an increase in maternal deaths resulting from backstreet abortions, especially among black communities. The government ignored several pleas by women to decriminalise abortion and instead passed legislation that was so stringent, it was impossible for women to legally procure an abortion. White women travelled abroad to terminate unwanted pregnancies while many black women died from complications and infections arising from illegal abortions. Things started improving in the early nineties when South Africa was transitioning to a democratic state – feminists and women's rights activists in the ANC campaigned for the recognition of women's rights. The elimination of the numerous social, economic, and cultural injustices that perpetuated the subjugation of women was considered fundamentally integral to the liberation of women.<sup>147</sup>

After the end of apartheid in South Africa, a final Constitution which recognised women's rights to bodily integrity and the right to access reproductive health care services was adopted. The final Constitution is an advancement of the 1993 Interim Constitution, as the Interim Constitution did not provide for the right to bodily integrity and healthcare. The Termination of Pregnancy Act was subsequently signed into law in 1996 and came into effect on the 1<sup>st</sup> of

---

<sup>144</sup> Section 5(4).

<sup>145</sup> Albertyn C 'Claiming and Defending Abortion Rights in South Africa' (2015) 11(2) *Revista Direito GV* 435.

<sup>146</sup> Albertyn C 'Claiming and Defending Abortion Rights in South Africa' (2015) 11(2) *Revista Direito GV* 435.

<sup>147</sup> Albertyn C 'Claiming and Defending Abortion Rights in South Africa' (2015) 11(2) *Revista Direito GV* 437.

February in 1997. With its passage, the right to abortion went from being taboo to being a fundamental freedom accessible to all women and young girls.

This mini thesis is centred around the following question: ‘In what ways does the Termination Act infringe upon paternal rights.’ To answer this question, the next chapter examines the concept of paternal rights and whether they are recognised by the law in cases of unborn children.

## CHAPTER 3

---

### PATERNAL RIGHTS: WHEN DOES PERSONHOOD BEGIN?

---

#### 3.1 Introduction

The Children's Act confers full parental rights and responsibilities on the parents of a child. These include the duty to care for, maintain contact, provide guardianship, and help in the maintenance of the child.<sup>1</sup> A crucial aspect of the Children's Act, however, is that rights and responsibilities are only afforded to parents – a parent is someone who gives birth to or assumes the responsibility of caring for a child. This means that through reproductive technological improvements such as in-vitro fertilisation, a person need not be biologically related to a child to be their parent.<sup>2</sup> In the same light, a person who does not wish to be a parent has the freedom to give the child up for adoption. In doing so, they relinquish their legal rights and responsibilities towards the child. Louw, a renowned legal scholar and child law professor, defined adoption as a process through which adoptive parents acquire full parental rights and obligations in respect of their adopted child through a legal process that terminates the parental obligations of the biological parents.<sup>3</sup>

While the country's progressive approach to parental rights and adoption was largely celebrated, it also elicited some unwarranted criticism from conservative groups.<sup>4</sup> Scholars such as Kabir and Banu argued that reproductive improvements blur the lines between traditional parenthood and other forms of parenthood.<sup>5</sup> They also cited religious arguments as the basis for rejecting any other form of parenthood that is not biological.<sup>6</sup> Fortunately, religious arguments do not triumph when there are concerns about the well-being of a child. The law is clear on such matters – 'the child's best interests are of paramount importance in

---

<sup>1</sup> Section 18 of the Children's Act 38 of 2005.

<sup>2</sup> Kabir M & Banu A 'Who Is a Parent? Parenthood in Islamic Ethics' (2007) 33(10) *Journal of Medical Ethics* 605–609.

<sup>3</sup> Louw A 'Adoption of Children' in Boezaart T *Child Law in South Africa* (2009) 165.

<sup>4</sup> In the below cited article, Kabir and Banu criticise Western (UK) reproductive innovations, claiming that assisted pregnancies are unnatural, go against Islamic religious beliefs, and violate the sacredness of traditional parenthood. I interpret the authors' critique of UK legislation as having implications for South Africa's similar legislation.

<sup>5</sup> Kabir M & Banu A 'Who Is a Parent? Parenthood in Islamic Ethics' (2007) 33(10) *Journal of Medical Ethics* 605–609.

<sup>6</sup> Kabir M & Banu A 'Who Is a Parent? Parenthood in Islamic Ethics' (2007) 33(10) *Journal of Medical Ethics* 605–609.

every matter concerning the child.’<sup>7</sup> The Constitutional Court in *S v M* pointed out that from the wording of section 28(2), it is apparent that the law must be interpreted and developed, without exception, in a child-sensitive manner that prioritises the protection and promotion of the interests of the children.<sup>8</sup> While the Children’s Act sets out factors which must be considered when deciding on the best interests of the child, the court must consider each case on its own merits.<sup>9</sup>

The crux of this mini thesis is based on the alleged infringement of paternal rights prenatally. Therefore, it is fitting that this chapter begins with an overview of South Africa’s legal position in terms of safeguarding the rights of the child. In other words, it will begin with how the law ensures that the child is taken care of and provided the appropriate parental care as stipulated in section 28(1)(b) of the Constitution. However, the child is only entitled to these rights postpartum. Thus, to claim paternal rights, one must have either a biological or legal child. This chapter accordingly explores the legal nature of personhood to understand whether there is a legal basis for an alleged infringement of parental rights.

### 3.2 Legal Requirements for Personhood

Legal persons or subjects are defined by their capacity to have legal rights and obligations.<sup>10</sup> This definition includes two kinds of legal persons – natural and juristic persons. Natural persons are human beings and juristic persons are entities such as businesses, institutions of learning and banks. The capacity to bear legal rights and obligations is one of the key elements that distinguish a legal subject (person) from a legal object (thing).<sup>11</sup> In contrast to legal subjects, legal objects are things that legal subjects possess.

While every person has the general capacity to be the bearer of legal rights and obligations, the exact scope of their rights and obligations varies depending on their legal status and capacity to act.<sup>12</sup> A person’s legal status and capacity to act may be impeded by factors such as their jurisdictional ability to litigate, insolvency, age, minority, nationality, and mental illness.<sup>13</sup> The law has set strict requirements on the minimum age at which a person acquires the capacity to

---

<sup>7</sup> Section 28(2) of the Constitution; Section 2 of the Children’s Act; Article 3 of the Convention on the Rights of the Child, 1989, United Nations, Treaty Series 1577/3.

<sup>8</sup> *S v M* 2008 (3) SA 232 (CC) para 15.

<sup>9</sup> Section 7 of the Children’s Act; *S v M* 2008 para 24; *Brandt v S* [2005] 2 All SA 1 (SCA) para 47.

<sup>10</sup> Barratt A ‘Through the Looking Glass’ in Barratt A, Domingo W, Amien W et al *Law of Persons and the Family* 2 ed. (2017) 7.

<sup>11</sup> Barratt A ‘Through the Looking Glass’ in Barratt A, Domingo W, Amien W et al *Law of Persons and the Family* 2 ed. (2017) 7-8.

<sup>12</sup> Cockrell A, Keightley R and Van Heerden B (eds) *Boberg’s Law of Persons and the Family* (1999) 4.

<sup>13</sup> Cockrell A, Keightley R and Van Heerden B (eds) *Boberg’s Law of Persons and the Family* (1999) 75-78.

litigate and participate in legal proceedings. The Child Justice Act in particular, is one of the legislations that were enacted to establish the minimum age at which a child may be held liable for a criminal offence.<sup>14</sup>

Legal personality is therefore the general capacity a person has to bear legal rights and obligations. Unlike status and capacity, legal personality is not affected by any external factor. Its existence is unconditional – owing to the fact that one is born alive, as discussed below.

### 3.2.1 The beginning of legal personality

Legal personality is an attribute of personhood conferred on both natural and juristic persons. For juristic persons, legal personality begins with registration and ends with the winding up or sequestration of a company, while for natural persons, it begins at birth and ends with death.<sup>15</sup> Accordingly, before birth, the foetus is not legally recognised as a person and exists merely as an extension of its mother. However, this changes after the completion of birth, provided that two requirements are met. Birth is considered complete once the child has been separated from the mother. Therefore, the first requirement for legal personhood is the complete separation of the mother and child.<sup>16</sup> Secondly, the child must survive, even if momentarily, after separation.<sup>17</sup> Subsequently, if a foetus does not survive, either because of birth complications or stillbirth, it cannot be legally recognised as a person.<sup>18</sup>

Several scholars have suggested viability as an additional requirement when determining legal personality.<sup>19</sup> The viability requirement would mean that complete separation from the mother after birth is not enough to guarantee the foetus's legal personality. Instead, it should be able to survive outside the womb, with or without medical assistance.<sup>20</sup> For example, a foetus that has little chance of surviving independently from the mother owing to birth complications, underlying sicknesses or inevitable death, would not be recognised as a legal subject.<sup>21</sup> Another scholar who discussed viability was Georgia Alida du Plessis, a legal researcher.<sup>22</sup> In her article,

---

<sup>14</sup> Child Justice Act 75 of 2008. According to section 7 of the Act, a child below ten years lacks criminal capacity and cannot litigate; a child older than ten years but younger than 14 years is presumed to lack criminal capacity, unless the state proves otherwise.

<sup>15</sup> Mahler-Coetzee J 'The Beginning of Legal Personality' in Barratt A, Domingo W, Amien W et al *Law of Persons and the Family* 2 ed. (2017) 24.

<sup>16</sup> Heaton J *The South African Law of Persons* 4 ed (2012) 29. The severing of the umbilical cord is not necessary for the birth to be complete.

<sup>17</sup> Heaton J *The South African Law of Persons* 4 ed (2012) 29.

<sup>18</sup> Heaton J *The South African Law of Persons* 4 ed (2012) 29.

<sup>19</sup> Heaton J *The South African Law of Persons* 4 ed (2012) 29; Boezaart T *Child Law in South Africa* (2009) 12.

<sup>20</sup> Heaton J *The South African Law of Persons* 4 ed (2012) 30.

<sup>21</sup> Heaton J *The South African Law of Persons* 4 ed (2012) 30.

<sup>22</sup> Du Plessis G.A 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *STELL LR* 72-92.

Du Plessis acknowledges the lack of precedence on viability in the South African judiciary and attributes this lack to the United States approach to viability in the *Roe v Wade* case.<sup>23</sup> The *Roe v Wade* is a landmark case where the Supreme Court protected the right to have an abortion as provided in the US Constitution.<sup>24</sup> To properly provide for the protection of the right to an abortion and to address the issue of viability, the court dealt with the pregnancy term in trimesters:<sup>25</sup>

- In the first trimester (one to twelve weeks of pregnancy), the woman has the freedom to decide on whether to keep the pregnancy, without any interference from the state;
- In the second trimester (thirteen to twenty-six weeks of pregnancy), restrictions on the woman's right to decide should only be imposed where it is medically necessary to safeguard and protect the health and safety of the expectant mother;
- In the third trimester (twenty-seven weeks till birth), the foetus is viable enough to exist outside of the mother's womb. Therefore, at this stage of the pregnancy, the state's interest to preserve foetal life becomes apparent and if deemed fit, the state could invoke its right to deny the woman's abortion.

Du Plessis criticises the concept of viability from the creation of a statutory crime standpoint.<sup>26</sup> Her contention is that viability lacks a crucial aspect of rational standard which is the identification of a conceptually clear division point.<sup>27</sup> Secondly, Du Plessis argues that viability is frequently cited as the 'compelling' factor in an unborn child's progression.<sup>28</sup> However, when one considers various situations, like whether we mean viability in a contemporary neonatal intensive care unit or viability in an impoverished area with inadequate medical facilities, viability becomes a vague and relative term.<sup>29</sup>

While Du Plessis' basis of argument stems from advocating for the protection of a foetus from fertilization (contrary to what this paper argues), her argument on viability is still relevant to the arguments made and cited in this paper. Additionally, viability in the sense outlined by *Heaton* above is ambiguous and has been rejected as a third requirement for legal personality because it brings more legal problems than solutions. Questions include how long a foetus

---

<sup>23</sup> Du Plessis G.A 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *STELL LR* 72-92.

<sup>24</sup> *Roe v Wade* 410 U.S. 113 (1973) 37-72.

<sup>25</sup> Beckwith F.J 'Roe v Wade: Its Logic and Its Legacy' 1(1) *The Southern Baptist Journal of Theology* (2003).

<sup>26</sup> Du Plessis G.A 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *STELL LR* 72-92.

<sup>27</sup> Du Plessis G.A 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *STELL LR* 72-92.

<sup>28</sup> Du Plessis G.A 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *STELL LR* 72-92.

<sup>29</sup> Du Plessis G.A 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *STELL LR* 72-92.

ought to last outside the mother's body for his or her death to be deemed inevitable and the legal standpoint of a child who has been declared inviable suddenly becomes viable.<sup>30</sup> Adopting viability as a third requirement to qualify as a legal person and gain legal personality is therefore unnecessary and could prove detrimental to the interests of the child.

### 3.2.2 Exceptions

While the law is clear on the non-recognition of an unborn child as a person unless legal personality is attained, there have been several exceptions to this rule, some of which are discussed below.

#### (a) Concealment of birth

Concealment of birth or infanticide is a crime prohibited by South African law in terms of the Criminal Procedure Act and the General Law Amendment Act. Concealment of birth has often been exempted from the requirement that, in order to gain personhood, the child must be completely separated from its mother.<sup>31</sup> Section 239(1) of the Criminal Procedure Act states that: 'At criminal proceedings at which an accused is charged with the killing of a newly born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.'

The law also pays no regard to the state of the child postpartum. That is, it is immaterial whether or not the child was born alive.<sup>32</sup> Section 113(1) of the General Law Amendment Act states that: 'Any person who disposes of the body of any child with intent to conceal the fact of its birth, whether **the child died before, during or after birth**, shall be guilty of an offence and liable on conviction to a fine not exceeding 100 pounds or to imprisonment for a period not exceeding three years.' Additionally, section 239(2) of the Criminal Procedure Act states that: 'At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether **the child died before or at or after birth.**' (own emphasis)

---

<sup>30</sup> Heaton J *The South African Law of Persons* 4 ed (2012) 30.

<sup>31</sup> Section 239 of the Criminal Procedure Act 51 of 1977: Evidence on the charge of infanticide or concealment of birth.

<sup>32</sup> Section 113 of the General Law Amendment Act 46 of 1935: Concealment of birth of a child; section 239(2) of the Criminal Procedure Act.

A case that dealt with the crime of concealment of birth is *S v Molefe*, where the accused was charged with contravening section 113(1), (2) and (3) of the General Law Amendment Act.<sup>33</sup> The accused had intentionally and unlawfully concealed the birth of her child and attempted to dispose of its body.<sup>34</sup> Upon her visitation to the clinic, Molefe denied that she had given birth to a premature stillborn when questioned by a nurse.<sup>35</sup> At this point, she had not yet disposed of the body and when confronted by the police, she led them to the body.<sup>36</sup>

She was found guilty as charged. Upon review of whether her prosecution was lawful, since the prosecutor had no prior written authorisation from the Director of Public Prosecutions to proceed with the prosecution,<sup>37</sup> the defence emphasised the fact that the accused had not yet disposed of the body.<sup>38</sup> The defence argued that the ethos of the crime of concealment of birth was the ‘disposal’ or the ‘attempted disposal’ of the body of a newly-born child.<sup>39</sup> Therefore, since, by her own admission, the accused had not yet disposed of, or attempted to dispose of the body, it was improbable for her (accused) to have contravened section 113.<sup>40</sup> To substantiate their argument that there was no crime committed as not all the elements required for one to be charged on concealment of the birth of a child had been met, the defence referred to the *R v Dema* case.<sup>41</sup> The court in *R v Dema*, on disposal, or intent to dispose, held that per legal requirements, the disposal must include a permanent component.<sup>42</sup> According to Pittman JP, the evidence did not indicate that the accused intended for the body of the stillborn to be kept in the box for an extended period. Hence, placing the body in a box in a room accessible to others was not considered ‘disposing’ of the body for the purposes of section 113(1).<sup>43</sup>

The court concurred with this line of argument and further stated that the admission by the accused constituted the only piece of evidence submitted to the court. However, the evidence failed to prove beyond a reasonable doubt that the body was disposed of or that an attempt was made to do so.<sup>44</sup> Although the accused may have had the desire to dispose of the child's body,

---

<sup>33</sup> *S v Molefe* 2012 ZAGPPHC 52.

<sup>34</sup> *S v Molefe*, para 2.

<sup>35</sup> *S v Molefe*, para 2.

<sup>36</sup> *S v Molefe*, para 2.

<sup>37</sup> Section 113(3) of the General Law Amendment Act, as cited in para 3.2 of the Molefe case: ‘The institution of a prosecution under this section must be authorized in writing by the Director of Public Prosecutions having jurisdiction.’

<sup>38</sup> *S v Molefe*, para 6.

<sup>39</sup> *S v Molefe*, para 7.

<sup>40</sup> *S v Molefe*, para 7.

<sup>41</sup> *R v Dema* 1947 1 S A 599 (E).

<sup>42</sup> *R v Dema*, para 12.

<sup>43</sup> *R v Dema*, para 14.

<sup>44</sup> *S v Molefe*, para 9.

nothing she did up until that moment indicated that she was trying to do so or had disposed of the body.<sup>45</sup> She did not attempt to dispose of the body or dispose of it in any way by herself, and it cannot be inferred from the lie she told the sister at the clinic that she had or was attempting to do so.<sup>46</sup>

The conviction could not stand on the basis that not all the elements of the crime had been satisfied. The elements of the crime are (i) disposal; (ii) the dead body; (iii) a newly-born child; and (iv) to conceal the birth of.<sup>47</sup> The second requirement is that there must be a dead body, thus, in situations where the abandoned child is located and saved, prosecutions under section 113 of the Act will not succeed.<sup>48</sup> If the victim does not pass away, the prosecution cannot proceed unless there is a plausible chance of success for a charge of attempted birth concealment, depending on the specifics of the case.<sup>49</sup> In relation to this requirement, the court in *Rex v Oliphant* held that:<sup>50</sup>

‘The meaning of the section under which the accused was charged, however, to my mind quite clearly envisages the disposal of a dead body and this is an essential element of the crime, which should have been alleged. The words “whether the child died before, during or after birth” further stress the fact that it must have been dead at the time of concealment’.<sup>51</sup>

Section 113(2) of the Act absolves the prosecution of the burden of proving that the child was deceased at the time of the disposal, although disposing of a dead body is a requirement of the crime.<sup>52</sup> Nevertheless, this need needs to be included in the accusation.<sup>53</sup> However, as stated in *S v Maleka*, an accused person cannot be found guilty of the crime of concealing their birth where there is evidence that the child was alive at the time of disposal.<sup>54</sup>

The third element of the crime of concealment is that the alleged concealment must be of the death of a *newly born child*. It was implied in *S v Jasi* that, while the courts do not concern themselves with the status of the child at the time of its birth, it is expected that they reach the

---

<sup>45</sup> *S v Molefe*, para 9.

<sup>46</sup> *S v Molefe*, para 9.

<sup>47</sup> Bluris L.R ‘Determining the crime for concealment of birth’ (2019). Accessed at <https://www.derebus.org.za/determining-the-crime-for-concealment-of-birth/> (06 March 2024).

<sup>48</sup> Bluris L.R ‘Determining the crime for concealment of birth’ (2019). Accessed at <https://www.derebus.org.za/determining-the-crime-for-concealment-of-birth/> (06 March 2024).

<sup>49</sup> Bluris L.R ‘Determining the crime for concealment of birth’ (2019). Accessed at <https://www.derebus.org.za/determining-the-crime-for-concealment-of-birth/> (06 March 2024).

<sup>50</sup> *Rex v Oliphant* 1950 1 SA 48 (O).

<sup>51</sup> *Rex v Oliphant*, para 51.

<sup>52</sup> *Rex v Oliphant*, para 63.

<sup>53</sup> *Rex v Oliphant*, para 63.

<sup>54</sup> *S v Maleka* 1965 2 SA 774 (T).

stage of viability.<sup>55</sup> Viability is from twenty-seven weeks of pregnancy as per the ruling in *Roe v Wade*.

Another case that addressed this element is the case of *S v Manngo*.<sup>56</sup> In this case, the accused testified that she had given birth at three months. The court found that at this stage, the child could not have survived as it had not reached the level of development required to live independently from the mother.<sup>57</sup> The conviction was thus overturned, and the matter was set aside due to the fact that the foetus did not qualify as a child under the provisions of the General Law Amendment Act.<sup>58</sup>

The fourth and final element of the crime of concealment that must be proved before a conviction can be made is that there was an attempt to conceal the birth thereof. In the *Molefe* case, it was held, as noted above, that there was no sufficient evidence to prove that the accused had intended to conceal the birth.<sup>59</sup>

#### (b) Nasciturus fiction

The nasciturus fiction has origins in Roman Law and can be expressed using the following maxim '*Nasciturus pro iam nato habetur quotiens de commodo eius agitur*.'<sup>60</sup> This maxim loosely translates to 'an unborn child is considered born when his interests are taken into account'.<sup>61</sup> As noted above, in order to be able to bear rights and enjoy the legal benefits of personhood, there are certain requirements that must be complied with.<sup>62</sup> A child in utero has no legal protection and is not able to claim and enjoy any benefits. The fiction is therefore an exception to the rules of personhood and affords legal rights and protection to a foetus who, in normal circumstances, could not be entitled to any.

#### (i) Law of Succession

The application of the nasciturus fiction by the courts was depicted in the 1962 *Ex Parte Boedel Steenkamp* case.<sup>63</sup> In this case, the court dealt with whether a nasciturus (unborn child) has the capacity to inherit. The testator bequeathed, inter alia, his daughter and her first-generation

---

<sup>55</sup> *S v Jasi* 1994 1 SACR 568 (ZH).

<sup>56</sup> *S v Manngo* 1980 (3) SA 1041 (V).

<sup>57</sup> *S v Manngo* 1980 (3) SA 1041 (V).

<sup>58</sup> *S v Manngo* 1980 (3) SA 1041 (V).

<sup>59</sup> *S v Molefe*, para 9.

<sup>60</sup> Mahler-Coetzee J 'The Beginning of Legal Personality' in Barratt A, Domingo W, Amien W et al *Law of Persons and the Family* 2 ed. (2017) 25.

<sup>61</sup> Fellmeth A.X and Horwitz M *Guide to Latin in International Law* Oxford University Press (2009).

<sup>62</sup> Footnotes 16-18 above.

<sup>63</sup> *Ex Parte Boedel Steenkamp* 1962 3 SA 954 (O).

children ‘who are alive at the time of my death’ equal parts of the remaining portion of his estate.<sup>64</sup> The daughter was pregnant with her third child at the time of her father’s passing and it was unclear whether the unborn child was included in the bequest.<sup>65</sup> In deciding whether the unborn child was to be included in the will, the court interpreted the will in accordance with what the testator had intended when he drafted the will.<sup>66</sup> It was held that the testator could not have reasonably foreseen that his daughter would be pregnant at the time of his passing.<sup>67</sup> The nasciturus fiction was applied and the unborn child was accordingly treated as though he had already been born at the time of the death of the testator.<sup>68</sup>

In the *Ex Parte Van Zyl NO* case, the presiding officer held that, unless the contrary is stated, it is generally safe to accept that the assumption that a testator who left a bequest to a class of descendants did not intend to limit the succession to descendants born before his death.<sup>69</sup> Therefore, in the *Ex Parte Boedel Steenkamp* case, it is reasonably acceptable to deduce that the testator had all but the intention to exclude his third grandchild from inheriting. Where confusion arises, understanding the intention of the testator is of paramount importance to interpreting the will.<sup>70</sup> In an earlier case of *Re Estate Van Velden*, the testator left two-thirds of his estate to ‘children born of our marriages.’<sup>71</sup> The court held that the testator's children born before his death, as well as any offspring of his marriage in *ventre matris* at the time of his death, were entitled to inherit.<sup>72</sup> The presumption that the testator did not intend to restrict any children entitled to inherit from doing so was upheld by the court despite the phrase ‘born.’<sup>73</sup>

Section 2D(1)(c) of the Wills Act provides that any benefit allocated to the children of a person, or to the members of a class of persons, mentioned in the will shall vest in the children of that person or those members of the class of persons who are alive at the time of the devolution of the benefit, or who have already been conceived at that time and who are later born alive.<sup>74</sup>

---

<sup>64</sup> Heaton J *Casebook on the South African Law of Persons* 4 ed. Lexis Nexis (2012) 20.

<sup>65</sup> Heaton J *Casebook on the South African Law of Persons* 4 ed. Lexis Nexis (2012) 20.

<sup>66</sup> Heaton J *Casebook on the South African Law of Persons* 4 ed. Lexis Nexis (2012) 24.

<sup>67</sup> Heaton J *Casebook on the South African Law of Persons* 4 ed. Lexis Nexis (2012) 24.

<sup>68</sup> Heaton J *Casebook on the South African Law of Persons* 4 ed. Lexis Nexis (2012) 24.

<sup>69</sup> *Ex Parte Van Zyl NO* 1938 OPD 144 at 152.

<sup>70</sup> *Cuming v Cuming* 1945 AD 201.

<sup>71</sup> *Re Estate Van Helden* 1901 18 SC 31.

<sup>72</sup> *Re Estate Van Helden* 1901 18 SC 31.

<sup>73</sup> *Re Estate Van Helden* 1901 18 SC 31.

<sup>74</sup> Wills Act 7 of 1953.

## (ii) Law of Delict

In 1963, a year after the *Ex Parte Boedel Steenkamp* ruling, a case was brought before the Witwatersrand Local Division of the High Court.<sup>75</sup> The matter was brought to the court in terms of a contravention of section 11 of the Motor Vehicle Insurance Act.<sup>76</sup> Two issues arose in this case – one legal and the other medical; first, the legal issue is whether prenatal damage on a foetus warrants legal recourse.<sup>77</sup> Secondly, the medical issue pertains to whether there is a causal link between the injuries sustained by the pregnant woman and the fact that the child now suffers from cerebral palsy.<sup>78</sup> Hiemstra J held that in terms of our legal system, a child has an action to claim damages for injuries sustained prenatally.<sup>79</sup> Hiemstra J. used the so-called nasciturus fiction, that is derived from Roman law, to demonstrate that a child has a right to bring an action for injuries sustained while still a foetus.<sup>80</sup> The result states that an unborn child is deemed to have existed from the time of its birth and is applicable to matters of status and succession, but it is additionally applicable to delictual claims.<sup>81</sup>

In reaching this conclusion, the learned judge relied heavily on a Canadian Supreme Court decision in the *Montreal Tramways Co v Leveille* case.<sup>82</sup> According to the judge, a child can file a claim for damages related to prenatal injury.<sup>83</sup> The rule is based on the Roman Law's nasciturus fiction, which states that an unborn child has all the rights of a born child if it is later born alive and this is advantageous to it.<sup>84</sup> The court further stated that it does not seem reasonable to apply this criterion only to property law and not to delict law.<sup>85</sup>

Furthermore, Hiemstra J stated that, if the nasciturus fiction can be applied to treat the foetus as though it has already been born whenever it is advantageous to the foetus, it is irrelevant whether the foetus is a person or not.<sup>86</sup> The plaintiff's minor son therefore has a claim under section 11 of the Motor Vehicle Insurance Act 29 of 1942, the judge held.<sup>87</sup> However, the

---

<sup>75</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W).

<sup>76</sup> Section 11 of the Motor Vehicle Insurance Act 24 of 1942 states that, 'any person whatsoever (in this section called the third party) for any loss or damage which the third party has suffered as a result of (a) any bodily injury to himself; (b) the death of or any bodily injury to any person, in either case caused by or arising out of the driving of the insured vehicle...'

<sup>77</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W) at 1.

<sup>78</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W) at 1.

<sup>79</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W) at 2.

<sup>80</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W) at 2.

<sup>81</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W) at 3.

<sup>82</sup> *Montreal Tramways Co v Leveille* (1933) 4 DLR 337 (SCC).

<sup>83</sup> *Montreal Tramways Co v Leveille* (1933) 4 DLR 337 (SCC) 260 A-C.

<sup>84</sup> *Montreal Tramways Co v Leveille* (1933) 4 DLR 337 (SCC) 260 A-C.

<sup>85</sup> *Montreal Tramways Co v Leveille* (1933) 4 DLR 337 (SCC) 260 A-C.

<sup>86</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W) at 4.

<sup>87</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W) at 4.

plaintiff in this case was unable to establish that the injuries sustained in the accident that gave rise to the complaint caused cerebral palsy, which the child who was born following the accident was suffering.<sup>88</sup>

Contrary to the *Pinchin* judgement, which extended the application of the nasciturus fiction to delictual claims, is the *RAF v Mtati* case which overturned the precedent set over 50 years ago.<sup>89</sup> The court in *Mtati* held that it is unnecessary to extend the nasciturus fiction to delictual proceedings.<sup>90</sup> In the *RAF v Mtati* case, the respondent (Mtati) claimed damages from the appellant for a motor vehicle accident that happened in 1989.<sup>91</sup> At the time of the collision, the respondent's wife was pregnant with their daughter, Zukhanye Mtati, who was later born with physical and neurological challenges.<sup>92</sup> The claim for damages was rooted in the Roman law maxim, the nasciturus fiction. The court held that there were two questions to be determined in this matter:

- (a) First, whether Zukhanye Mtati has a claim for damages against the appellant. This question, however, could not be answered until the question of whether in our legal system, there exists an action for prenatal injuries;<sup>93</sup>
- (b) Secondly, whether our legal system should allow prenatal claims for damages using the nasciturus fiction or the ordinary principles of delict.<sup>94</sup> This, the court held, was the most complex question.<sup>95</sup>

In determining the first question, the court referred to the *Montreal Tramways Co v Leveille* case where the judge held that it would be unbearable if the law did not provide an action for prenatal injuries.<sup>96</sup> The honourable judge further made the following submission: 'If a child after birth has no right of action for prenatal injuries, we have a wrong inflicted for which there is no remedy, for, although the father may be entitled to compensation for the loss he has incurred and the mother for what she has suffered, yet there is a residuum of injury for which compensation cannot be had save at the suit of the child. If a right of action be denied to the

---

<sup>88</sup> *Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W) at 5.

<sup>89</sup> Mahler-Coetzee J 'The Beginning of Legal Personality' in Barratt A, Domingo W, Amien W et al *Law of Persons and the Family* 2 ed. (2017) 29.

<sup>90</sup> Mahler-Coetzee J 'The Beginning of Legal Personality' in Barratt A, Domingo W, Amien W et al *Law of Persons and the Family* 2 ed. (2017) 29.

<sup>91</sup> *Road Accident Fund v Mtati* 2005 ZASCA 65, para 2.

<sup>92</sup> *RAF v Mtati* para 2.

<sup>93</sup> *RAF v Mtati* para 22-23.

<sup>94</sup> *RAF v Mtati* para 27.

<sup>95</sup> *RAF v Mtati* para 27.

<sup>96</sup> *Montreal Tramways Co v Leveille* at 345.

child it will be compelled, without any fault on its part, to go through life carrying the seal of another's fault and bearing a heavy burden of infirmity and inconvenience without any compensation therefor. To my mind, it is but natural justice that a child, if born alive and viable, should be allowed to maintain an action in the courts for injuries wrongfully committed upon its person while in the womb of its mother.<sup>97</sup>

The respondent contended that the claim be dismissed on the basis that, at the time of the collision, Zukhanye Mtati was still a foetus in utero and therefore not owed duty of care by the driver.<sup>98</sup> The court discarded this line of argument and held that when appropriate, a foetus must be regarded as a person in cases that may be advantageous to it upon its birth.<sup>99</sup>

In determining the second question of whether the law should permit a claim for damages under the nasciturus rules or the ordinary principles of delict, the court held that, as noted above, the claim was delictual in nature. In reaching this conclusion, the court again referred to the *Montreal Tramways Co v Leveille* case where the judges were also somewhat conflicted on the legal principles that ought to be applied in deciding whether a child could claim, after birth, for injuries sustained prenatally.<sup>100</sup> The court held that, according to the nasciturus fiction, it is unnecessary to deliberate whether or not the foetus had rights while in *ventre matris*.<sup>101</sup>

Another case referred to *in casu* was that of *Watt v Rama* in which the judge held that the wrongdoing was not done when the cause of action began, but rather when the damage was incurred.<sup>102</sup> One of the three fundamental components of accountability was injury, since an action would not be possible without one, thereby making the claim of Zukhanye Mtati legitimate.<sup>103</sup> In his opinion, the plaintiff's (Zukhanye Mtati) entitlement to compensation was established at birth, when she was diagnosed with the physical impairment she was suffering from.<sup>104</sup> She did not become injured until after delivery, at which point her rights were violated and she started to have rights.<sup>105</sup> She could be considered to have had her rights from the

---

<sup>97</sup> *Montreal Tramways Co v Leveille* at 345.

<sup>98</sup> *RAF v Mtati* para 5. Duty of care is explained in the case of *Union Government v National Bank of South Africa Ltd* 1921 AD 121 at 128 as the duty to exercise reasonable care and the right everyone has not to have themselves or their property injured because of the actions of another.

<sup>99</sup> *RAF v Mtati* para 11. Nasciturus fiction.

<sup>100</sup> *RAF v Mtati* para 28.

<sup>101</sup> *Montreal Tramways Co v Leveille* at 358.

<sup>102</sup> *Watt v Rama* 1972 V.R. 353 at 357.

<sup>103</sup> *Watt v Rama* at 357.

<sup>104</sup> *Watt v Rama* at 357.

<sup>105</sup> *Watt v Rama* at 357.

moment she was born.<sup>106</sup> Therefore, as soon as she was born, she could have taken legal action and tried to prove that the defendant caused her harm before she was born.<sup>107</sup>

To emphasise the contention that this matter is delictual in nature, the court a quo further quoted the court in *Watt v Rama* which held that damages by themselves do not give rise to delictual liability; rather, damage is only a result of a violation of someone else's legal rights or an act of wrongful conduct.<sup>108</sup> The injuries that are currently involved can only be linked to an act that occurred prior to the child's birth.<sup>109</sup> Therefore it was only normal that the question of 'who the act wronged, and why' should arise – the foetus or the child?<sup>110</sup>

Furthermore, in the case of *de Martell v Metron and Sutton Health Authority*, it was held that both legally and logically, the plaintiff could not have suffered damage prior to the plaintiff's birth.<sup>111</sup> The plaintiff incurred damages at the time that, according to the law, she acquired personality and inherited the injured body, both of which the defendants (based on the presumptive facts) were accountable for.<sup>112</sup> The prenatal incidents just served as connecting points in the causal chain that resulted in the plaintiff's damages and the defendants' alleged lack of competence and care.<sup>113</sup> The court in *Mtati* further held that it is important to distinguish between damages and unlawfulness according to standard delict law rules.<sup>114</sup> Additionally, Counsel for the appellant made no statement to the court about the claim made in the special plea that the insured driver owed Zukhanye no duty of care.<sup>115</sup> According to our legal system, a legal duty must be broken for the element of wrongfulness to exist.<sup>116</sup> Therefore, the court held, given the circumstances and with the application of the nasciturus fiction in delict, it is obvious that the driver did not owe Zukhanye a legal responsibility because she was not yet born.<sup>117</sup>

In the case of *Ontario re Duval v Seguin*, it was ruled as followed: 'Ann's mother [Ann was the child *en ventre sa mère* at the time of the collision] was plainly one of a class within the area of foreseeable risk and on to whom the defendants therefore owed a duty. Was Ann any

---

<sup>106</sup> *Watt v Rama* at 357.

<sup>107</sup> *Watt v Rama* at 357.

<sup>108</sup> *Watt v Rama* at 218.

<sup>109</sup> *Watt v Rama* at 218.

<sup>110</sup> *Watt v Rama* at 218.

<sup>111</sup> *de Martell v Metron and Sutton Health Authority* 1992 3 All ER 820 (QBD) at 832a-b.

<sup>112</sup> *de Martell v Metron and Sutton Health Authority* at 832a-b.

<sup>113</sup> *de Martell v Metron and Sutton Health Authority* at 832a-b.

<sup>114</sup> *RAF v Mtati* para 35.

<sup>115</sup> *RAF v Mtati* para 36.

<sup>116</sup> *RAF v Mtati* para 36.

<sup>117</sup> *RAF v Mtati* para 37.

the less so? I think not. Procreation is normal and necessary for the preservation of the race. If a driver drives on a highway without due care for other users, it is foreseeable that some of the other users of the highway will be pregnant women and that a child *en ventre sa mère* may be injured. Such a child therefore falls well within the area of potential danger which the driver is required to foresee and take reasonable care to avoid.’<sup>118</sup>

Therefore, the court concluded with the following: First off, the court's recognition of a child's capacity to sue for prenatal damage is clearly based on the assertion that the child's right of action did not fully materialise until the child was born alive.<sup>119</sup> Second, unless action has been initiated and the procedures have advanced to the point of *litis contestatio* in the instance of the *actio injuriarum* and the action for pain and suffering, a claim of a prenatally wounded child who passes away soon after delivery expires.<sup>120</sup> Thirdly, the child will not have a claim for lost income during the ‘lost years’ and any claim for loss of expectation of life will lapse upon the child's death. Instead, the claim will be considered a component of the child's claim for loss of amenities.<sup>121</sup>

Therefore, the court found that the appellant's claim being delictual in nature, the requirement of a causal connection between the alleged wrongful conduct and the appellant's harm was decisive.

### 3.3 Conclusion

Since chapter 2 of this mini thesis provided a detailed background of the right to abortion in the context of South African law, this chapter has provided an introductory context of paternal rights. The aim was to show that no matter the circumstances, the courts and the law will always uphold the best interests of the child. This has frequently been recognised in many cases brought before the courts. Thus, the best interests of the child are of paramount importance. Therefore, if, at any moment, the courts believed that the interests of the child were not upheld, they would have sought to correct that wrong. This chapter has shown how the courts promote the rights and interests of children and handle the question of when personhood begins.

The next chapter examines whether there is an infringement of paternal rights brought about by the right to abortion. Secondly, it will demonstrate that if the right to abortion, as provided for in sections 12 and 27 of the Constitution, is contradictory to the rights of the child in section

---

<sup>118</sup> *Ontario re Duval v Seguin* 1972 26 DLR (3d) 418 at 842c-d.

<sup>119</sup> *RAF v Mtati* para 39.

<sup>120</sup> *RAF v Mtati* para 39.

<sup>121</sup> *RAF v Mtati* para 39.

29 of the Constitution, the courts would have no hesitation to declare the right to reproductive freedom invalid.

---

### JUDICIAL ANALYSIS OF THE RIGHT TO ABORTION

---

#### 4.1 Introduction

Chapters 2 and 3 provided insight into the legal position of South Africa in respect of abortion and paternal rights. Chapter 2 gave insight into the development of the right to abortion – dating back to the stringent legislation that only allowed a termination of pregnancy in the most dire of circumstances.<sup>1</sup> During this time, women often complained that, even if they complied with the provisions of the Act, they were still denied access to abortion services in most healthcare institutions.<sup>2</sup> Following the democratic elections in 1994, several legislations were adopted, including the Choice on Termination of Pregnancy Act.<sup>3</sup> The Termination Act allows the termination of pregnancy at the request of the expectant mother up until 12 weeks of pregnancy. From 13 to 20 weeks, an abortion may be procured if the medical practitioner is of the opinion that the continued pregnancy poses a risk to the physical and mental health of either the mother or foetus. From 20 weeks, an abortion is only permitted if two medical practitioners are of the opinion that the continued pregnancy will endanger either the mother or the foetus or will result in severe malformation of the foetus.<sup>4</sup>

The country's evolution from conservative to liberal legislation in respect of abortion rights is commendable and exemplary.

This mini thesis has provided an overview of paternal rights and the genesis of legal personality in South Africa. This overview includes the requirements that must be satisfied in order for a foetus to be recognised as a legal person entitled to rights and privileges – that is, it must be born alive and survive independently outside the body of its mother.<sup>5</sup> Further, the thesis demonstrated the legal protection granted to a child and the constitutional provisions that require that, in matters involving a child, its best interest must be upheld.<sup>6</sup> While it can be

---

<sup>1</sup> Section 3 of the Abortion and Sterilization Act 2 of 1975 permits a termination of pregnancy in cases where the pregnancy poses a danger to the physical or mental health of the mother; the foetus is at risk of being born with physical and mental defects; or where the pregnancy is a result of rape or incest. It must be noted that abortion is only procured one two other medical practitioners have certified their concurrence in writing.

<sup>2</sup> Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Hadeda Books (1993).

<sup>3</sup> Choice on Termination of Pregnancy Act 92 of 1996. Referred to as the Termination Act from hereon.

<sup>4</sup> Section 2.

<sup>5</sup> Heaton J *The South African Law of Persons* 4 ed (2012); Boezaart T *Child Law in South Africa* (2009).

<sup>6</sup> Section 29 of the Constitution.

legally fathomed that there is no claim to parental/paternal rights before the live birth of a child, there are continuing debates on whether the ‘father’ has a say in a woman’s right to terminate a pregnancy. Accordingly, this chapter reviews judicial rulings on how the right to abortion affects paternal rights, as well as published journal articles on the matter. This chapter will also provide some answers to the research question and sub-questions in Chapter 1.<sup>7</sup> However, the last sub question will be answered in the concluding chapter.<sup>8</sup>

## 4.2 Case law

### (a) Christian Lawyers Association of SA v Minister of Health:<sup>9</sup>

The plaintiffs (Christian Lawyers Association of SA) instituted an application for an order declaring the Termination Act unconstitutional and striking it down in its entirety.<sup>10</sup> The application was founded on the basis that everyone has the right to life.<sup>11</sup> The plaintiffs extended the interpretation of ‘everyone’ to include unborn children from the moment of conception.<sup>12</sup> Secondly, the plaintiffs contended that the Termination Act is in contravention of the constitutional right to life since it allows for the termination of ‘human life at any stage after conception and at any stage prior to the child’s birth.’<sup>13</sup>

The defendants filed a notice of exception and averred that the plaintiffs had no cause of action in the matter because a foetus is not included in the term ‘everyone’ under section 11, or any provision of the Constitution.<sup>14</sup> In addition, under the conditions and methods outlined in the Act, termination of pregnancy is not prohibited under section 11 of the Constitution.<sup>15</sup> Furthermore, the defendants submitted that sections 9, 10, 11, 12, 14, 15(1), and 27(1)(a) of the Constitution safeguard a woman’s freedom to decide whether to terminate their pregnancy under the conditions and in the manner stipulated in the Termination Act.<sup>16</sup>

---

<sup>7</sup> As explained in chapter one, the central research question of this study is the following: In what ways does the Termination of Pregnancy Act infringe paternal rights?

<sup>8</sup> The sub-question asks: ‘How have other countries dealt with the matter at hand – paternal rights and abortion?’

<sup>9</sup> *Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 11 BCLR 1434 (T).

<sup>10</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 1.

<sup>11</sup> Section 11 of the Constitution.

<sup>12</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 4.

<sup>13</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 4.

<sup>14</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 4.

<sup>15</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 4.

<sup>16</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 5. Section 9 of the Constitution protects the right to equality; section 10 protects the right to dignity; section 12 protects the freedom and security of a person; section 14 protects the right to privacy; section 15 protects the right to religion, belief, and opinion; section 27(1)(a) protects the right to access health care services including reproductive health.

The plaintiffs contended that an exception is inappropriate at this stage because the plaintiffs intended to lead expert evidence on the beginning of human life and foetal development in utero.<sup>17</sup> However, the court held that the plaintiff's cause of action was founded solely on the basis that 'everyone' applies to a foetus from the moment of its conception.<sup>18</sup> Therefore, the validity of the plaintiff's cause of action was dependent on the legal interpretation of 'everyone', not scientific or expert evidence.<sup>19</sup> To substantiate, the court referred to the *Tremblay v Daigle* case where it was held that:<sup>20</sup>

The respondent's argument is that a foetus is an '*être humain*', in English 'human being', and therefore has a right to life and a right to assistance when its life is in peril. In examining this argument, it should be emphasised at the outset that the argument must be viewed in the context of the legislation in question. The court is not required to enter the philosophical and theological debates about whether a foetus is a person but, rather, to answer the legal question of whether the Quebec legislature has accorded the foetus personhood. Metaphysical arguments may be relevant, but they are not the primary focus of enquiry. Nor are scientific arguments about the biological status of a foetus determinative in our enquiry. The task of properly classifying a foetus in law and in science are different pursuits. Ascribing personhood to a foetus in law is a fundamentally normative task. It results in the recognition of rights and duties, a matter which falls outside the concerns of scientific classification. In short, this court's task is a legal one.

Additionally, the court quoted a line from an article published by Professor Glanville Williams, an English legal scholar, 'the question is not whether the *conceptus* is human but whether it should be given the same legal protection as you and me'<sup>21</sup> The court submitted that, under common law, the status of the unborn child is uncertain in so far as it relates to the *nasciturus* fiction rules.<sup>22</sup> In terms of the Constitution, the court held that:<sup>23</sup>

There is no express provision affording the foetus (or embryo) legal personality or protection. It is improbable, in my view, that the drafters of the Constitution would not have made express provision therefor had it intended to enshrine the rights of the unborn child in the Bill of Rights, in order to cure any uncertainty in the common law and in the light of case law denying the

---

<sup>17</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 5.

<sup>18</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 7.

<sup>19</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 7.

<sup>20</sup> *Tremblay v Daigle* (1989) 62 DLR (4th) 634 (SC) at 650a-c.

<sup>21</sup> Williams G 'The Foetus and the Right to Life' (1994) 33 *Cambridge Law Journal* 71 at 78; *Christian Lawyers Association of SA v Minister of Health* pg. 14.

<sup>22</sup> *Van Heerden and another v Joubert NO and Others* 1994 (4) SA 793 (A) 797H-798B; *Christian Lawyers Association of SA v Minister of Health* pg. 14-15.

<sup>23</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 15.

foetus legal personality. One of the requirements of the protection afforded by the *nasciturus* rule is that the foetus be born alive. There is no provision in the Constitution to protect the foetus pending the fulfilment of that condition.

The court further held that section 12 of the Constitution protects a woman's right to decide on their reproductive matters and nowhere in the Constitution is the foetus afforded protection for same rights.<sup>24</sup> The court further held that if the drafters of the Constitution had intended to protect the interests of the foetus, they would have included it in the definition and protection afforded to a child under section 28.<sup>25</sup> Furthermore, the legislature could invoke the limitation clause in section 36 in order to provide protection to the foetus.<sup>26</sup>

Accordingly, the exception was upheld, and the plaintiff's claims were dismissed.<sup>27</sup>

The *Christian Lawyers* case is a landmark case which attempted to have the Termination Act struck down for reasons of constitutional invalidity. This case is important in demonstrating the frivolous and baseless argument which is frequently raised – that procuring an abortion is in contravention of the right to life of the foetus. It was instrumental in proclaiming that the notion of personhood is one that is decided legally, as biology has no bearing on it.

#### (b) *The Voice of the Unborn Baby NPC v Minister of Home Affairs*:<sup>28</sup>

The applicants submitted an application to the Constitutional Court for a confirmatory order following the invalidation of various provisions by the High Court.<sup>29</sup> The High Court had issued an order declaring sections 18 and 20 of the Births and Deaths Registration Act, as well as regulation 1 of the Regulations Relating to the Management of Human Remains, as invalid insofar as they prohibited the burial of foetal remains unless it was a stillbirth.<sup>30</sup> The alleged

---

<sup>24</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 16.

<sup>25</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 16-18.

<sup>26</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 16-18.

<sup>27</sup> *Christian Lawyers Association of SA v Minister of Health* pg. 26.

<sup>28</sup> *The Voice of the Unborn Baby NPC and Another v Minister of Home Affairs and Others* (CCT 120/21) 2022 ZACC 20.

<sup>29</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* [2021] ZAGPPHC 161; 2021 (4) SA 307 (GP).

<sup>30</sup> **Section 18** of the Births and Deaths Registration Act 51 of 1992 states that, '(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 is satisfied that the child was still-born, issue under the surname of any parent concerned a prescribed burial order authorizing burial.' **Section 20** states that, '(1) No burial shall take place unless notice of the death or still-birth has been given to a person contemplated in section 4 and he has issued a prescribed burial order; (2) The burial order mentioned in

constitutional invalidity was founded on the basis that the impugned provisions infringed upon the constitutional rights to equality, dignity, privacy, and religion of ‘prospective parents’ who have lost a pregnancy either through miscarriage or abortion.<sup>31</sup>

The applicants submitted that there is no rationale in establishing a distinction between a pregnancy loss resulting from stillbirth and a pregnancy loss caused by miscarriage or medically induced termination of pregnancy.<sup>32</sup> They further submitted that depriving these ‘prospective parents’ the opportunity to bury their foetal remains serves no justifiable government purpose.<sup>33</sup> The respondents disputed these submissions and averred that there is no legal rationale in allowing the burial of a foetus younger than 26 weeks; in other words, the emotional attachment and trauma of the prospective parents does not equate to constitutional rights infringements.<sup>34</sup> Most importantly, the Women’s Legal Centre Trust and Wish Associates (*amici curiae*) contended that, should the High Court decide to grant a declaratory order conferring rights on the bereaved prospective parents, the order should exclude individuals who voluntarily terminate pregnancy in accordance with the Termination Act.<sup>35</sup> The *amici curiae* argued that granting all foetal burial rights would put undue strain on the approved institutions, jeopardise the confidentiality clauses of the Termination Act, and ultimately render it difficult to access facilities that provide services permitted by the Act.<sup>36</sup> Additionally, they argued that in order for the declaratory order to be applicable to individuals wishing to terminate their pregnancy voluntarily under the Termination Act, it must contain safeguards against the right interfering unduly with pregnant women’s ability to access procedures for a termination of pregnancy.<sup>37</sup>

The High Court ruled in favour of the applicants, stating that not extending the impugned provisions would infringe upon the prospective parents’ right to equality and dignity, and would

---

subsection (1) shall be delivered by the person who has charge of the burial to the person who has control of the burial place concerned; (3) If the burial of a corpse is to take place outside the magisterial district within which the death occurred, the corpse may only be removed by virtue of a burial order to a place outside the said magisterial district.’ **Regulation 1** of the Regulations Relating to the Management of Human Remains, Government Gazette Notice No. R 363 dated 22 May 2013 (made in terms of the National Health Act 61 of 2003) defines a “corpse” to mean “a dead human body” and “human remains” to mean a dead human body, or the remains of a dead human body whether decomposed or otherwise’.

<sup>31</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 4.

<sup>32</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 5.

<sup>33</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 5.

<sup>34</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 6.

<sup>35</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 7.

<sup>36</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 7.

<sup>37</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 7.

be an unjustifiable limitation in terms of section 36 of the Constitution.<sup>38</sup> However, the declaration did not extend to cases of pregnancy loss through termination of pregnancy.<sup>39</sup>

In the court a quo, the second applicants, the Catholic Archdiocese, submitted that, because of their religious convictions, the order should be extended to apply to pregnancy loss by way of human intervention/termination of pregnancy.<sup>40</sup> They added that their religion beliefs are that human life begins at conception, and where a pregnancy is terminated, the foetal remains should be buried.<sup>41</sup> The first and second respondents, the Minister of Home Affairs and the Department of Health, submitted that the registration of deaths and burial of foetuses under 26 weeks would be burdensome on their departments and that the burial and registration of stillbirths is done for legal purposes, not to soothe the pain of grieving prospective parents.<sup>42</sup>

The amici curiae submitted that abortion is a constitutionally protected right and that extending the right to foetal burial would have a significant effect on women's constitutional right to access abortion services.<sup>43</sup> They argued that the extra costs would result in fewer facilities providing services for pregnancy termination and a corresponding reduction in the related sexual and reproductive rights.<sup>44</sup>

The application to confirm the invalidity declaration of the impugned provisions by the High Court was dismissed.<sup>45</sup> Accordingly, the cross appeal to extend the burial of foetal remains to a loss of pregnancy through termination of pregnancy was also unsuccessful.

While the *Christian Lawyers Association* case confirmed that the argument regarding the beginning of 'life' is one that is to be answered legally, the *Voice of the Unborn NPC* case substantiated the argument raised in Chapter 3 that paternal rights can only be claimed upon the live birth of the foetus. No one is entitled to claim parental / paternal rights until the foetus has been born alive and has existed independently outside the body of its mother.

---

<sup>38</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 8-9.

<sup>39</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 9.

<sup>40</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 11.

<sup>41</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 11.

<sup>42</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 12-13.

<sup>43</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 14.

<sup>44</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 14.

<sup>45</sup> *The Voice of the Unborn Baby NPC v Minister of Home Affairs* para 36.

### 4.3 Conclusion

This chapter examined the judicial approach to abortion and paternal rights through case analysis of selected judgments. The first case, *Christian Lawyers Association of SA v Minister of Health*, dealt with an argument that has been raised constantly – that the termination of a pregnancy is an infringement of the right to life of a foetus. This argument is baseless, and the case was rightfully dismissed because the South African legal system does not extend legal protection to a foetus until it is born alive.

The second case deals with the extension of the terminology of certain sections to include the burial of a foetus less than twenty-six weeks old in the definition of ‘corpse’. The application instituted by the applicants sought to protect ‘prospective parents’ and allow them the opportunity to bury their ‘children’. However, as stipulated in Chapter 3 of this mini-thesis, parental rights cannot be claimed until after the birth of the child. Therefore, it follows that the law cannot accommodate ‘prospective parents’ because there is no legal definition for them. The *Voice of the Unborn Child NPC v Minister of Home Affairs* case strengthens the arguments raised in Chapter 3 that paternal rights do not exist until after the birth of the foetus.

The central question of this mini thesis is centred on how the Choice on Termination of Pregnancy Act infringes paternal rights.’ The answer is that the Termination of Pregnancy Act does not in any way violate paternal rights because at the time a woman decides to terminate a pregnancy, the foetus is not yet a child and is therefore not entitled to legal protection. Secondly, the Termination Act gives effect to a woman’s constitutional rights to privacy, dignity, freedom and security of the person, as well as the right to access health care and abortion services. As submitted in the two cases discussed above, the foetus is not entitled to any of these rights.

Subsequently, it follows that answering the central research question indirectly answers the two research sub questions: (a) How do laws provide protection for paternal rights in cases where the foetus is still in utero? (b) What effect will the legal protection for paternal rights of a foetus have on the mother? The law does not provide any protection for paternal rights until after the child is born and the protection of said paternal rights would mean that the woman’s rights are contravened. Fortunately, that is not the case in our legal system.

Now that this chapter has provided an answer to the central research question and two of the three research questions, the next chapter will provide an answer to the last research sub question: ‘How have other countries dealt with paternal rights and abortion?’ Secondly, it will scrutinise the laws in other countries, as well as regional and international instruments

regarding abortion laws and the rights of the father when the mother has elected to procure an abortion. This is done in order to accurately provide recommendations for the way forward and to draw a sound conclusion.

## CHAPTER 5

---

### COMPARATIVE ANALYSIS AND RECOMMENDATIONS

---

#### 5.1 Introduction

The objectives of this mini thesis were to discuss the development of abortion laws in South Africa, examine whether paternal rights can be claimed where the child has not yet been born, and evaluate the right to abortion in South Africa and the interface of this right with paternal rights. These objectives were pursued in the three previous chapters. What remains is to answer the research sub-question of how other countries have dealt with the matter of abortion and paternal rights, and to provide recommendations on how the legal system in South Africa can best uphold the constitutional and human rights of everyone going forward.

Informed by sections 39(1) and 233 of the Constitution, this chapter begins by reviewing the African Charter on Human and Peoples' Rights on the Rights of Women in Africa ("the Maputo Protocol").<sup>1</sup> Section 39(1) states that international law must be considered when interpreting the Bill of Rights. On its part, section 233 states that when interpreting laws, the courts must do so in line with international law. The Maputo Protocol is one of the most progressive treaties dealing with the protection of women's rights in Africa and in the world. Thus, understanding what this treaty entails is essential for comparing the national laws of various countries.

The Maputo Protocol was adopted in July 2003 and came into effect in November 2005 after its ratification by 15 African Union member states.<sup>2</sup> Inter alia, the Maputo Protocol gives effect to the principles of equality, non-discrimination, dignity, privacy, and reproductive freedom.<sup>3</sup> Article 14 (XIV) of the Protocol states that, 'States Parties shall take all appropriate measures to: (c) Protect the reproductive rights of women by authorising medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus.'

---

<sup>1</sup> African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, African Union, 11 July 2003, <https://www.refworld.org/legal/agreements/au/2003/en/18176> (accessed 16 April 2024).

<sup>2</sup> Solidarity for African Women's Rights (SOAWR) 'Twenty years of the Maputo Protocol: Where are we now?' 15 July 2023 <https://equalitynow.org/resource/twenty-years-of-the-maputo-protocol-where-are-we-now/> (accessed 16 April 2024).

<sup>3</sup> Preamble of the Maputo Protocol.

While the Maputo Protocol is said to be one of the most progressive instruments that promote and protect the rights of women, it is crucial to note that its article 14(2)(c) is similar to the now repealed Abortion and Sterilisation Act 2 of 1975.<sup>4</sup> It is very worrisome that the ‘most progressive’ instrument in Africa embodies the same provisions as a legislation that was often critiqued for being too restrictive. However, it is pivotal to acknowledge the role that the Maputo Protocol played in ‘opening the doors’ for the enactment and adoption of legislation that guarantees the right to access reproductive healthcare services at national level.

This chapter reviews four countries and compares their laws with the South African legal framework. The countries are:

- (a) Mozambique (because the Maputo Protocol was adopted there, and it is therefore crucial to understand how the country’s laws deal with abortion and paternal rights);
- (b) Benin Republic (Benin has been recognised as one of the countries in Africa with liberal abortion laws); and
- (c) Ghana (Ghana is part of the African countries that ratified the Protocol but never enacted national legislation to ensure that women’s rights are protected and upheld).

## 5.2 Mozambique

Mozambique signed the Maputo Protocol in December 2003 and ratified it in December 2005. Since then, the country has taken further steps to ensure that abortion is accessible to women on request.<sup>5</sup> In its national legislation, Mozambique went further than the provisions of the Maputo Protocol and made abortion services available to women on request. According to the Mozambique Penal Code Law, abortion is permitted on request until twelve weeks of pregnancy, and at sixteen weeks, it is permitted only in cases of incest and rape.<sup>6</sup> However, at twenty-four weeks, abortion is only allowed when there are abnormalities in the pregnancy that could endanger either the mother or the foetus.<sup>7</sup>

---

<sup>4</sup> Section 3.

<sup>5</sup> Mozambique Penal Code Law No. 35/2014; Ministry of Health: Ministerial Diploma No. 60/2017.

<sup>6</sup> Article 168 of the Mozambique Penal Code Law No. 35/2014 (‘the Penal Code’) states that, ‘The termination of pregnancy carried out by a doctor or other health professional qualified for that purpose, or under their direction, in an official or officially recognised health establishment and with the consent of the pregnant woman, does not constitute a crime when, according to the state of knowledge and the experience of medicine: (d) the pregnancy resulted from the crime of sexual rape or incest relationships and the abortion took place within the first sixteen weeks; or (e) be carried out, by the woman’s express choice, within the first twelve weeks of pregnancy.’

<sup>7</sup> Article 168 of the Penal Code provides that, ‘The termination of pregnancy carried out by a doctor or other health professional qualified for that purpose, or under their direction, in an official or officially recognized health establishment and with the consent of the pregnant woman, does not constitute a crime when, according to the state of knowledge and the experience of medicine: (a) the fetus is unviable; (b) there is reliable reason to predict

The Penal Code, however, only allows abortion done with the consent of the pregnant woman and carried out by a qualified medical or healthcare practitioner within the specified time frames.<sup>8</sup> An unqualified person who performs an abortion on a pregnant woman, or a pregnant woman who seeks an abortion from an unqualified person is guilty of a crime and punishable by imprisonment of up to two years.<sup>9</sup> Article 166 is similar to South Africa's Termination Act. In *Dembe v S*, a traditional herbalist who 'moonlighted as an abortionist' was charged and convicted in terms of section 10 of the Termination Act for contravening various provisions of the Termination Act.<sup>10</sup> Dembe unlawfully performed two abortions at the request of two women; the first one was between 13 and 20 weeks when the abortion was performed, and the other was over 20 weeks.<sup>11</sup> The first abortion (between 13 and 20 weeks) was unsuccessful and the Appellant was charged with an attempted contravention of the Act.<sup>12</sup> The two women later worked with the police and provided evidence against Dembe, which led to his arrest and conviction.<sup>13</sup>

In addition to the Penal Code, the Ministry of Health: Ministerial Diploma No. 60/2017 ('Ministerial Diploma') identifies the circumstances under which a voluntary pregnancy termination must be performed at a National Service Health Unit and approves the Clinical Standards on Safe Abortion and Aftercare Abortion.<sup>14</sup> Article 2 of the Ministerial Diploma provides the cases under which a termination of pregnancy may be performed by a trained medical professional. These are as follows: (a) where the pregnancy endangers the life, physical, or mental wellbeing of the pregnant woman; (b) the pregnancy results from sexual violence including rape or incest; (c) the pregnancy results from a failure of a modern contraceptive method; (d) the pregnant woman is infected with HIV/AIDS; (e) a minor is

---

that the unborn child will suffer, incurably, from a serious illness or illness -congenital formation, and is carried out in the first twenty-four weeks of pregnancy; (c) if there is an appropriate means to avoid danger of death or serious and lasting injury to the body or physical health of the pregnant woman or is recommended, in the case of chronic degenerative diseases.

<sup>8</sup> Section 168 of the Penal Code.

<sup>9</sup> Article 166 of the Penal Code.

<sup>10</sup> *Dembe v S* 2010 1 SACR 360 (NCK). Section 10 of the Termination Act provides that, '**10. Offences and penalties** (1) Any person who- (a) is not a medical practitioner, or a registered midwife or registered nurse who has completed the prescribed training course, and who performs the termination of a pregnancy referred to in section 2 (1) (a); (b) is not a medical practitioner and who performs the termination of a pregnancy referred to in section 2 (1) (b) or (c); (c) prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy; or (d) terminates a pregnancy or allows the termination of a pregnancy at a facility not approved in terms of section 3 (1) or not contemplated in section 3 (3) (a), shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 years.

<sup>11</sup> *Dembe v S* para 4.

<sup>12</sup> *Dembe v S* para 3-4.

<sup>13</sup> *Dembe v S* para 12-13.

<sup>14</sup> Summary of the Ministerial Diploma.

pregnant and is unprepared for the psychological, social and biological changes that come with a pregnancy or a child; (f) the pregnancy poses a risk to the wellbeing of the foetus, or there is a possibility that the foetus is severely deformed. Article 3 sets out the time periods and requirements under which a legal abortion may be procured: ‘(a) maximum gestational age of 12 weeks; (b) in the case of clinically proven chronic degenerative disease or congenital malformation, or infectious-contagious disease within the period referred to in paragraph 1, extended up to 16 to 24 weeks; (c) non-viable foetuses, whose pregnancy termination can occur at any time of pregnancy; (d) sexual rape or incest directly confirmed by the woman or girl, or proven through a complaint or police complaint.’

Contrary to the Termination Act, the Ministerial Diploma requires the consent of a minor before an abortion can be procured. Article 4.2 stipulates that, ‘2. In the case of a minor, Abortion can only take place at the request and with the consent of the parents, guardians, legal representative, or another person who is recognized as having legal custody of the pregnant woman, when the natural guardian cannot be reached or refuses to give consent or by another adult, even without legal responsibility, but who acts as a confidant.’

The Termination Act, on the other hand, defines a woman as a female of any age and provides in section 5 that, ‘(2) Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy. (3) In the case of a pregnant minor, a medical practitioner or a registered midwife or registered nurse, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: **Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them.**’ (own emphasis)

One would anticipate that Mozambique's access to safe abortion services would rise significantly given the country's liberal legal framework. However, a recent study on young women who had undergone induced abortions discovered that, of those who had the procedure carried out in a medical institution, none had adhered to the legislation since they were unaware of the current state of the abortion law and its protocols.<sup>15</sup> The study also showed that abortion services were unavailable in most local healthcare facilities; meaning that women had to travel

---

<sup>15</sup> Frederico M, Arnaldo C, Decat P, et. al. ‘Induced abortion: a cross-sectional study on knowledge of and attitudes toward the new abortion law in Maputo and Quelimane cities, Mozambique’ (2020) 20 (129) *BMC Women's Health* 2.

to suburban areas in order to access abortion services.<sup>16</sup> Unfortunately, this means that women from economically disadvantaged backgrounds are unable to access abortion services at their local clinics due to a lack of resources and are left with no option but to seek out backdoor, illegal abortions.<sup>17</sup>

It is quite clear from the wording of the legislation in Mozambique that the law only requires consent from the mother in order to perform an abortion procedure unless the mother is a minor. In terms of protecting foetal interests over the rights of the woman, the law in Mozambique defines a child as anyone under the age of eighteen.<sup>18</sup> It can be inferred that paternal rights in Mozambique, like in South Africa, are non-existent until after the child is born. Therefore, until the foetus is born and lives independently from the mother, the law in Mozambique rightfully prioritises the interests and well-being of the woman.

### 5.3 Benin Republic

Benin is a small country in West Africa; it signed the Maputo Protocol in February 2004 and ratified it in September 2005. Like Mozambique and South Africa, Benin went further than the provisions of the Maputo Protocol and provides for the termination of pregnancy at the request of a woman for economic reasons.<sup>19</sup> Until 2021, Benin only allowed the voluntary termination of pregnancy in cases when the continued pregnancy endangered the life and wellbeing of the pregnant woman.<sup>20</sup> Second, if the pregnancy was a result of incest or rape, the termination of pregnancy would be permitted upon the request of the woman; and, when the foetus was diagnosed with a life-threatening condition.<sup>21</sup> The Sexual and Reproductive Health Law, 2021 amends and supplements article 17 of the Law on Sexual and Reproductive Health, 2003. In terms of the amended legislation, abortion is permitted after the production of a doctor's prescription, when the continued pregnancy endangers either the life of the foetus or the mother, the pregnancy is a result of incest or rape, or the foetus may be born with severe abnormalities.<sup>22</sup> At the request of the pregnant woman, a pregnancy may be terminated if, 'it is

---

<sup>16</sup> Frederico M, Michielsen K, Arnaldo C, et al. 'Factors Influencing Abortion Decision-Making Processes among Young Women' (2018) 15 (329) *International Journal of Environmental Research and Public Health* 8-10.

<sup>17</sup> Frederico M, Michielsen K, Arnaldo C, et al. 'Factors Influencing Abortion Decision-Making Processes among Young Women' (2018) 15 (329) *International Journal of Environmental Research and Public Health* 8-10.

<sup>18</sup> Article 25 of the Constitution of the Republic of Mozambique provides that the age of majority is eighteen years old. Constitution of the Republic of Mozambique, 16 November 2004.

<sup>19</sup> Sexual and Reproductive Health Law, 2021.

<sup>20</sup> Article 17 of Law No. 2003-04 of March 3, 2003, Related to Sexual Health and Reproduction ('Law on Sexual and Reproductive Health, 2003).

<sup>21</sup> Article 17 of the Law on Sexual and Reproductive Health, 2003.

<sup>22</sup> Article 17(1).

likely to aggravate or cause a situation of material, educational, professional, or moral distress incompatible with the interests of the pregnant woman. of the woman and/or unborn child.<sup>23</sup> Article 17(3) provides that the termination of pregnancy in terms of 17(2) may be authorised until 12 weeks of pregnancy; the Act is silent about the time limits for a termination of pregnancy under Article 17(1).

The consent of a minor is required before a pregnancy can be terminated. In cases where the legal guardian of a minor is against the termination of pregnancy, a social worker approaches a judge who will act on behalf of the minor and provide a ruling either for or against the termination of the pregnancy.<sup>24</sup> This is contrary to the provisions of the Termination Act which require only the consent of the minor, regardless of whether the legal guardian consents or not. The Benin Penal Code criminalises the carrying out of an abortion by an unqualified person and without authorisation and sentences offenders for up to 20 years. However, when a woman loses her life, the offender may be sentenced to life imprisonment.<sup>25</sup>

While the legislation in Benin is progressive, it is still restrictive compared to the legislation in South Africa because a woman is still required to provide reasons why she is seeking a termination of pregnancy in Benin.<sup>26</sup> However, it is imperative to appreciate the good that the new legislation could bring for women in Benin. Because the legislation has been recently enacted, there are no publications reviewing its impact.

The Constitution of Benin Republic has no precise definition of a child; however, the age of majority is set at eighteen.<sup>27</sup> Therefore, like South African and Mozambican laws, a foetus in utero is not legally recognised as a child. In order to terminate a pregnancy, the law only requires consent from the pregnant woman and does not consider paternal rights until after the birth of the child.

---

<sup>23</sup> Article 17(2).

<sup>24</sup> Article 17(4)-(5).

<sup>25</sup> Article 519 of the Benin Penal Code, Law No.: 2018-16.

<sup>26</sup> Article 17(2) of the Sexual and Reproductive Health Law, 2021.

<sup>27</sup> Article 6 of the Constitution of the Republic of Benin, 2 December 1990.

## 5.4 Ghana

Ghana signed the Maputo Protocol in October 2003 and ratified it in June 2007. While countries like South Africa, Mozambique and Benin Republic went further than the provisions of the Protocol and ensured that abortion services are accessible to women on request, Ghana's legislation did not improve on the Protocol.<sup>28</sup> Save for the provisions outlined in the Protocol and in section 58 of the Ghana Criminal Code, abortion is illegal in Ghana and punishable by imprisonment of up to five years.<sup>29</sup> Section 58(3) defines abortion as, 'the premature expulsion or removal of conception from the uterus or womb before the period of gestation is completed.' Section 58(1) criminalises abortion, regardless of whether it has been performed with the consent of the woman. Section 58(2) provides the exceptional circumstances under which an abortion will not be punishable by law: (2) It is not an offence under subsection (1) of this section if an abortion or a miscarriage is caused in any of the following circumstances by a registered medical practitioner specialising in gynaecology or any other registered medical practitioner in a Government hospital or in a private hospital or clinic registered under the Private Hospitals and Maternity Homes Act, 1958 (No. 9) or in a place approved for the purpose by legislative instrument made by the Secretary: (a) where the pregnancy is the result of rape, defilement of a female idiot or incest and the abortion or miscarriage is requested by the victim or her next of kin or the person in loco parentis, if she lacks the capacity to make such request; (b) where the continuance of the pregnancy would involve risk to the life of the pregnant woman or injury to her physical or mental health and such woman consents to it or if she lacks the capacity to give such consent it is given on her behalf by her next of kin or the person in loco parentis; or (c) where there is substantial risk that if the child were born, it may suffer from, or later develop, a serious physical abnormality or disease.

Unlike the legislation in other countries, the Ghana Criminal Code makes no mention of the time periods within which an abortion will be permitted, in the circumstances mentioned above in section 58(2).

RAS Morhee and ESK Morhee ('Morhee'), a legal academic and a medical professional published an article on the availability of abortion services and argued that while there is legislation regulating abortion, enforceability and access is non-existent.<sup>30</sup> Morhee contends

---

<sup>28</sup> Ghana Criminal Code, Act 29 of 1960.

<sup>29</sup> Section 58 of the Criminal Code.

<sup>30</sup> Morhee RAS and Morhee ESK 'Overview of the law and availability of abortion services in Ghana' (2006) 40(3) *Ghana Medical Journal* 80-86.

that while the law permits the termination of pregnancy in cases where the continued pregnancy may cause harm to the mental or physical wellbeing of the mother, accessing an abortion on such grounds is a service only available in ‘some private hospitals in urban centres’.<sup>31</sup> Secondly, most women who are illiterate and some of whom are economically disadvantaged are not even aware of their rights of access to termination of pregnancy services.<sup>32</sup> As a result, maternal morbidity rates remain extremely high in Ghana because women who cannot access abortion services at an accredited institution will seek out backdoor abortions, and most do not survive the subsequent complications.<sup>33</sup> Furthermore, Morhee submits that the availability of safe abortion services is not always determined primarily by the legal status of abortion. This is because the country’s policies, the attitude of medical practitioners, the general public, and societal norms are additional significant elements.<sup>34</sup> These factors, unfortunately, lead to a lot of women procuring clandestine abortions. The law in Ghana, Morhee argues, aims to protect the foetus by adopting the theory that human life begins at conception.<sup>35</sup> Therefore, once a woman becomes pregnant, the pregnancy cannot be terminated save under the specified circumstances from the time of conception to the time the foetus is born.<sup>36</sup>

Ghana is one of the many countries in Africa that protect the interests of the foetus over those of the woman. Of this, it is not too hard to assume that should a case arise where a father tries to block a woman from accessing a pregnancy, the law would side with the ‘father’. This can be deduced from the fact that section 58 of the Ghana Penal Code provides that abortion is a criminal offence punishable by law.

---

<sup>31</sup> Morhee RAS and Morhee ESK ‘Overview of the law and availability of abortion services in Ghana’ (2006) 40(3) *Ghana Medical Journal* 80-86.

<sup>32</sup> Morhee RAS and Morhee ESK ‘Overview of the law and availability of abortion services in Ghana’ (2006) 40(3) *Ghana Medical Journal* 80-86.

<sup>33</sup> Morhee RAS and Morhee ESK ‘Overview of the law and availability of abortion services in Ghana’ (2006) 40(3) *Ghana Medical Journal* 80-86.

<sup>34</sup> Morhee RAS and Morhee ESK ‘Overview of the law and availability of abortion services in Ghana’ (2006) 40(3) *Ghana Medical Journal* 80-86.

<sup>35</sup> Morhee RAS and Morhee ESK ‘Overview of the law and availability of abortion services in Ghana’ (2006) 40(3) *Ghana Medical Journal* 80-86.

<sup>36</sup> Morhee RAS and Morhee ESK ‘Overview of the law and availability of abortion services in Ghana’ (2006) 40(3) *Ghana Medical Journal* 80-86.

## 5.6 Conclusion and Recommendations

The right to abortion is provided for under sections 12(2)(a) and (b), as well as section 27(1)(a) of the Constitution of the Republic of South Africa. Section 12(2) provides that ‘Everyone has the right to bodily and psychological integrity, which includes the right– (a) to make decisions concerning reproduction; (b) to security and control over their body...’ Section 27(1) provides that, ‘Everyone has the right to have access to– (a) health care services, including reproductive health care.’ While the Constitution does not expressly provide for the right to abortion, it is included in the umbrella protection of reproductive health care and the right to bodily integrity. The right to abortion would be less subject to scrutiny and challenges if it was expressly provided for in the Constitution like it was recently done in the French Constitution. Journalists proudly wrote in the Al Jazeera news website, ‘[France] becomes first in the world to explicitly guarantee abortion as a constitutional right as [President] Macron seals amendment and pledges to push for the lifting of restrictions across Europe.’<sup>37</sup>

The effect of the explicit provision of the right to abortion would be that, like other constitutional rights, the right to abortion would never be put to challenge again. No one would dare to test the limits and/or exclusions of the right to privacy or the right to life because it is expressly provided for in the Constitution. Even if the right were to be challenged, the challenge would not be based on an argument that a woman’s right to abort should come secondary to a non-person’s (foetus) right to life. Religious fanatics, conservatives, and prospective fathers would not so frequently disregard a protected constitutional right on the grounds that life ‘begins at conception’.

The second issue with abortion rights in South Africa and other African countries is the lack of access to safe abortion services. It has been over twenty years since the adoption of the Maputo Protocol but abortion in Africa remains as taboo as ever. Regardless of the spring towards liberalisation and protection of women’s rights that the Protocol has set, countries like Ghana remain stagnant, twenty years after the adoption of the Protocol. Abortion services are reserved for the elite while people in rural, disadvantaged communities are not even aware they have such a right to access abortion services, or that there is an entire Act dedicated to protecting and upholding a woman’s right to terminate an unwanted pregnancy.<sup>38</sup> Hodes sums this issue

---

<sup>37</sup> Al Jazeera ‘France makes abortion a constitutional right on international women’s day’ 8 March 2024 <https://www.aljazeera.com/news/2024/3/8/france-makes-abortion-a-constitutional-right-on-womens-day> (Accessed 1 May 2024).

<sup>38</sup> Hodes R ‘The Culture of Illegal Abortions in South Africa’ (2016) 42(1) *Journal of Southern African Studies* at <http://dx.doi.org/10.1080/03057070.2016.1133086> (accessed 01 May 2024).

up as, ‘A lack of knowledge about how to access a safe, legal abortion in the public health sector, together with the fear of mistreatment by healthcare workers, are among the main reasons for the continued high rates of illegal abortion procurement.’<sup>39</sup>

To counter the problem of unsafe abortions, I would recommend the formation of advocacy groups dedicated solely to educating women in rural areas of their rights to abortion. Women have, for decades died from procuring illegal abortions. Now that we have the legal means to counter this problem, everyone should be aware of it. There is also the issue of a lack of resources in public hospitals, or where there are resources, the problem of medical professionals who refuse to perform an abortion procedure because of their religious convictions. So, in addition to advocacy groups and the provision of resources, I would also recommend proper training for practitioners entrusted to provide abortion services to women.

The fact that there are still arguments that men are entitled to have a say when women seek to terminate pregnancies is a non-factor that has no standing in a court of law. The real issue at hand is ensuring that women are aware of their rights and can access abortion services whenever required.

---

<sup>39</sup> Hodes R ‘The Culture of Illegal Abortions in South Africa’ (2016) 42(1) *Journal of Southern African Studies* at <http://dx.doi.org/10.1080/03057070.2016.1133086> (accessed 01 May 2024).

## 6. BIBLIOGRAPHY

### Books

Barratt A 'Through the Looking Glass' in Barratt A, Domingo W, Amien W et al *Law of Persons and the Family* 2 ed. (2017).

Boezaart T *Child Law in South Africa* (2009).

Bradford H 'Herbs, Knives, and Plastic: 150 Years of Abortions in South Africa' in Meade T and Walker M (eds) *Science, Medicine, and Cultural Imperialism* London: MacMillan (1991).

Cockrell A, Keightley R and Van Heerden B (eds) *Boberg's Law of Persons and the Family* (1999).

Cope J *A Matter of Choice: Abortion Law Reform in Apartheid South Africa* Haded Books (1993).

Currie I & De Waal J *The Bill of Rights Handbook* 6<sup>th</sup> ed JUTA (2013).

Fellmeth A.X and Horwitz M *Guide to Latin in International Law* Oxford University Press (2009).

Heaton J *Casebook on the South African Law of Persons* 4 ed. Lexis Nexis (2012) 24.

Heaton J *The South African Law of Persons* 4 ed (2012).

Klausen S.M *Abortion Under Apartheid: Nationalism, Sexuality, and Women's Reproductive Rights in South Africa* Oxford: Oxford University Press (2015).

Louw A 'Adoption of Children' in Boezaart T *Child Law in South Africa* (2009).

Mahler-Coetzee J 'The Beginning of Legal Personality' in Barratt A, Domingo W, Amien W et al *Law of Persons and the Family* 2 ed. (2017).

O'Sullivan M 'Reproductive Rights' in Woolman S and Bishop M *Constitutional Law of South Africa* 2 ed (2014) 37-1.

Waldmeir P *Anatomy of a Miracle: The End of Apartheid and the Birth of the New South Africa* Rutgers University Press (1998).

### Legislation

The Constitution of the Republic of South Africa, 1996.

Abortion and Sterilization Act 2 of 1975.

Abortion and Sterilization Bill.

Bantu Education Act 47 of 1953.

Births and Deaths Registration Act 51 of 1992.

Child Justice Act 75 of 2008.

Children's Act 38 of 2005.

Choice on Termination of Pregnancy Act 92 of 1996.

Constitution of the Republic of Benin, 2 December 1990.

Criminal Procedure Act 51 of 1977.

General Law Amendment Act 46 of 1935.

Ghana Criminal Code, Act 29 of 1960.

Immorality Act 5 of 1927.

Interim Constitution of the Republic of South Africa Act 200 of 1993.

Law No. 2003-04 of March 3, 2003, Related to Sexual Health and Reproduction ('Law on Sexual and Reproductive Health, 2003).

Law on Sexual and Reproductive Health, 2003.

Ministry of Health: Ministerial Diploma No. 60/2017.

Mozambique Penal Code Law No. 35/2014.

National Health Act 61 of 2003.

Regulations Relating to the Management of Human Remains, Government Gazette Notice No. R 363 dated 22 May 2013.

Sexual and Reproductive Health Law, 2021.

Wills Act 7 of 1953.

### Journal articles

- Albertyn C 'Claiming and Defending Abortion Rights in South Africa' (2015) 11(2) *Revista Direito GV*.
- Armstrong N.W 'The New Abortion Bill – Medicine and Society' (1973) 2(5) *Responso Meridiana*.
- Beckwith F.J 'Roe v Wade: Its Logic and Its Legacy' 1(1) *The Southern Baptist Journal of Theology* (2003).
- Brown B.B 'Facing the "Black Peril": The Politics of Population Control in South Africa' (1987) 13(2) *Journal of Southern African Studies*.
- Charney C.R 'Towards Rupture or Stasis? An Analysis of the 1981 South African General Election' (1982) 81(325) *Oxford Journals, Oxford University Press*.
- D'Souza K 'Abortion and the Three bodies: An Interpretive Understanding of Barriers to Abortion Access in South Africa' (2013) 3 *Journal for Undergraduate Anthropology* 8.
- Devenish, A. 'Judicial Deconstruction of Customary Law for Gender Equality: Some Thoughts on Selected Case Law' (2016) 30(1) *Agenda* 26-35.
- Du Plessis G.A 'Feticide: Creating a Statutory Crime in South African Law' (2013) 1 *STELL LR* 72-92.
- Favier M, Greenberg JMS, and Stevens M 'Safe abortion in South Africa: "We Have Wonderful Laws, but we Don't Have People to Implement Those Laws"' (2018) 143(4) *International Journal of Gynecology and Obstetrics* 38-44.
- Frederico M, Arnaldo C, Decat P, et. al. 'Induced abortion: a cross-sectional study on knowledge of and attitudes toward the new abortion law in Maputo and Quelimane cities, Mozambique' (2020) 20 (129) *BMC Women's Health* 2.
- Gutmacher S, Kapadia F, Naude J, and de Pinho H 'Abortion Reform in South Africa: A Case Study of the 1996 Choice on Termination of Pregnancy Act' (1998) 24(4) *International Family Planning Perspectives* 191-194.
- Harsch D 'Society, the State, and Abortion in East Germany 1950-1972' 102(1) *The American Historical Review*.

Hodes R 'The Medical History of Abortion in South Africa, c.1970 – 2000' (2013) 29(3) *Journal of Southern African Studies*.

Kabir M & Banu A 'Who Is a Parent? Parenthood in Islamic Ethics' (2007) 33(10) *Journal of Medical Ethics* 605–609.

Macleod, C & Hansjee, J 'Men and Talk About Legal Abortion in South Africa: Equality, Support and Rights Discourses Undermining Reproductive "Choice"' (2013) 15(8) *Culture, Health & Sexuality: An International Journal for Research, Intervention and Care* 997.

Mhlanga R.E 'Abortion: Development and Impacts in South Africa' (2003) 67 *British Medical Bulletin*.

Morhee RAS and Morhee ESK 'Overview of the law and availability of abortion services in Ghana' (2006) 40(3) *Ghana Medical Journal* 80-86.

Okonofua F 'Roe v Wade conundrum: Africa must Increase Commitment to Sexual and Reproductive Health and Rights' (2022) 26(6) *African Journal of Reproductive Health*.

Sarkin J 'Patriarchy and Discrimination in Apartheid South Africa's Abortion Law' (1998) 4(9) *Buffalo Human Rights Law Review*.

Snyder H 'Literature Review as a Research Methodology: An Overview and Guidelines' (2019) 104 *Journal of Business Research* 333 at 333.

Van Marle K 'Rights as Relationships – Abortion' (1995) 10(1) *South African Public Law*.

Williams G 'The Foetus and the Right to Life' (1994) 33 *Cambridge Law Journal*.

#### Case law

*Brink v Kitshoff* NO 1996 ZACC 9.

Certification of the Constitution of the Republic of South Africa, 1996 (CCT 23/96) [1996] ZACC 26.

*Christian Lawyers Association of SA and Others v Minister of Health and Others* 1998 11 BCLR 1434 (T).

*Cuming v Cuming* 1945 AD 201.

*de Martell v Metron and Sutton Health Authority* 1992 3 All ER 820 (QBD).

*Dembe v S* 2010 1 SACR 360 (NCK).

*Ex Parte Van Zyl NO* 1938 OPD 144 at 152.

*Ex Parte Boedel Steenkamp* 1962 3 SA 954 (O).

*Montreal Tramways Co v Leveille* (1933) 4 DLR 337 (SCC).

*Ontario re Duval v Seguin* 1972 26 DLR (3d) 418.

*Pinchin NO v Santam Insurance Co. Ltd* 1963 2 All SA 267 (W).

*R v Dema* 1947 1 S A 599 (E).

*Re Estate Van Helden* 1901 18 SC 31.

*Rex v Freestone* 1913 TPD 758.

*Rex v Oliphant* 1950 1 SA 48 (O).

*Rex v Whitchurch* 1890 24 Q.B.D 420.

*Road Accident Fund v Mtati* 2005 ZASCA 65.

*Roe v Wade* 410 U.S. 113 (1973) 37-72.

*S v Collop* 1981 1 SA 150 (A).

*S v Jasi* 1994 1 SACR 568 (ZH).

*S v M* 2008 (3) SA 232 (CC).

*S v Maleka* 1965 2 SA 774 (T).

*S v Manngo* 1980 (3) SA 1041 (V).

*S v Molefe* 2012 ZAGPPHC 52.

*The Voice of the Unborn Baby NPC and Another v Minister of Home Affairs and Others* (CCT 120/21) 2022 ZACC 20.

*Tremblay v Daigle* (1989) 62 DLR (4th) 634 (SC).

*Union Government v National Bank of South Africa Ltd* 1921 AD 121.

*Van Heerden and Another v Joubert NO and Others* 1994 (4) SA 793 (A).

*Watt v Rama* 1972 V.R 353.

### Internet sources

African Union, Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, African Union, 11 July 2003, <https://www.refworld.org/legal/agreements/au/2003/en/18176> (accessed 16 April 2024).

Al Jazeera 'France makes abortion a constitutional right on international women's day' 8 March 2024 <https://www.aljazeera.com/news/2024/3/8/france-makes-abortion-a-constitutional-right-on-womens-day> (Accessed 1 May 2024).

Bluris L.R 'Determining the crime for concealment of birth' (2019). Accessed at <https://www.derebus.org.za/determining-the-crime-for-concealment-of-birth/> (06 March 2024).

Cherry K 'Why the Thematic Apperception Test is Used in Therapy' (2023) at <https://www.verywellmind.com/what-is-the-thematic-apperception-test-tat-2795588#:~:text=The%20Thematic%20Apperception%20Test%2C%20OR,Murray%20and%20Christina%20D> (Accessed 05 September 2023).

Forde S 'Cape Town Taxi Strike Exposes a Deeply Unequal City – and the Legacy of Apartheid' (2023) at <https://theconversation.com/cape-town-taxi-strike-exposes-a-deeply-unequal-city-and-the-legacy-of-apartheid-211828> (accessed 01 September 2023).

Hodes R 'The Culture of Illegal Abortions in South Africa' (2016) 42(1) *Journal of Southern African Studies* at <http://dx.doi.org/10.1080/03057070.2016.1133086> (accessed 27 April 2023).

Kaswa R and Yogeswaran P 'Abortion reforms in South Africa: An overview of the Choice on Termination of Pregnancy Act.' (2020) 62(1) *South African Family Practice*. <https://doi.org/10.4102/safp.v62i1.5240> (accessed 13 September 2023).

Klausen, S. M. "'The Trial the World is Watching": The 1972 Prosecution of Derk Crichton and James Watts, Abortion, and the Regulation of the Medical Profession in Apartheid South Africa.' (2014) 58(2) *Medical History* at <https://doi.org/10.1017/mdh.2014.6> (accessed 02 September 2023).

Norling J 'Family Planning and Fertility in South Africa under Apartheid' (2019) 23(3) *European Review of Economic History* at <https://doi.org/10.1093/ereh/hey016> (accessed 01 September 2023).

Policy Documents: A National Health Plan for South Africa (1994)  
<https://www.anc1912.org.za/policy-documents-1994-a-national-health-plan-for-south-africa/>  
(accessed 27 April 2023).

Solidarity for African Women's Rights (SOAWR) 'Twenty years of the Maputo Protocol: Where are we now?' 15 July 2023 <https://equalitynow.org/resource/twenty-years-of-the-maputo-protocol-where-are-we-now/> (accessed 16 April 2024).

The Constitutional Court of South Africa 'The Certification Process'  
<https://www.concourt.org.za/index.php/constitution/the-certification-process> (accessed 30 August 2023).

### Thesis

Sigcau N *Public Discourses on Choice of Termination of Pregnancy in a Rural Area of the Eastern Cape Province in South Africa*. (Master's thesis, Rhodes University, 2009).