Christian Lawyers' Association v National Minister of Health and Others

Case No: 7728/2000

High Court, Transvaal Provincial Division

2004 (10) BCLR 1086 (T)

JUDGMENT DATE: 24/05/2004

Mojapelo J

Introduction

This is a judgment on an exception filed by the defendants against the plaintiff's particulars of claim on the ground that the particulars of claim do not disclose a cause of action.

The plaintiff instituted an action in which it seeks an order declaring sections 5(2) and 5(3) read with, the definition of "woman" in sections 1 and 5(1) of the Choice on Termination of Pregnancy Act 92 of 1996 ("the Act") to be unconstitutional and an order striking down sections 5(2) and 5(3) and the definition of "woman" in section 1 of the Act.

The essence of the claim and the exception

The provisions of the Act that the plaintiff's claim is directed at are the provisions that allow women under the age of 18 years to choose to have their [*12] pregnancies terminated without (a) the consent of the parents or guardians, (b) consulting the parents or guardians, (c) first undergoing counselling, and (d) reflecting on their decision or decisions for a prescribed period. The measures in (a) to (d) are for the sake of convenience collectively hereafter referred to as parental consent or control.

It is the plaintiff's case in essence that young women or girls below that age are not capable on their own, that is, without parental consent or control to take an informed decision whether or not to have a termination of pregnancy which serves their best interests.

The plaintiff structured its particulars of claim into five identifiable parts: an introduction (paragraphs 1 to 22), claim A (paragraphs 23 to 25), claim B (paragraphs 26 to 28), claim B (paragraphs 29 to 32) and conclusion (paragraph 33 to 35): all in support of the same prayers set out above (prayers 1 to 3).

In order to succeed with its claim the plaintiff has to establish that the relevant provisions of the Choice Act are in conflict with and affront the specified sections of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").
[*13]
In the particulars of claim the plaintiff makes a number of allegations in paragraphs 5 to 18 about inter alia the effect of the termination of pregnancy on a girl, the vulnerability of the girl when making such decisions, certain changes in the developmental stages of a girl and characteristics of such changes. In paragraphs 19 to 20 the plaintiff makes the following allegations which are critical for its claim-

"19.Given paragraphs 16 to 18 above, a girl is not in a position to make an informed decision about whether or not to have an abortion which serves her best interests without the assistance and/or guidance of her parents/guardian and/or counsellor."

20.Given paragraphs l6 to 18 above, a girl:

20.1is unable fully to appreciate the need for and value of parental care and support, and the assistance and/or guidance

of a counsellor;

20.2is not capable of giving consent as required in section 5(1) of the Act."

Those introductory paragraphs of the plaintiff's particulars of claim then conclude as follows in paragraph 21:

"21Given paragraphs 10 to 20 above a pregnant girl requires special protection by the State, inter alia by ensuring that when enacting legislation [*14] which affects her, she is not deprived in any way of the support, guidance and care of her parents/guardian and/or counsellor."

It is on the basis of these conclusionary factual allegations that the plaintiff concludes in its particulars of claim in paragraphs 23 to 35 that the Act is in conflict with the Constitution in the specific respects specified in claims A, B and C.

The essence of the various causes of action relied upon by the plaintiff is that the provisions under attack are unconstitutional because they permit a woman under the age of 18 years to choose to have her pregnancy terminated without parental consent or control. The defendants filed an exception to these particulars of claim, alternatively, to claims A, B and C, on the ground that they do not disclose a cause of action for the relief that the plaintiff seeks. In particular, the defendants except to the plaintiffs claims on the ground that the conclusions in law in regard to claims A, B and C and the overall conclusions that flow therefrom are not supported by the facts on which they are based. The amicus curiae filed a brief which supports the position of the defendants.

The provisions of the Act and the [*15] Constitution

It is necessary when considering the issues raised to bear in mind the statutory provisions that came under attack in this case.

The relevant sections of the Act provide as follows:

In section 1 of the Act the word "woman" is defined as follows:

"'woman' means any female person of any age."

Subsections 5(1), 5(2) and 5(3) provide as follows:

"(1)Subject to the provisions of subsections (4) and (5) the termination of a pregnancy may only take place with the informed consent of the pregnant woman.

(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, as the case may be, shall advice 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."

Subsections (4) and (5) deal with exceptional cases which arc not relevant for the present purposes. The [*16] subsections deal with situations such as the case of a woman who is severely mentally disabled, is in a state of continuous unconsciousness or where the medical practitioners involved are of the opinion that continued pregnancy would pose the risk of injuries to the woman's physical or mental health, where there exists substantial risk that the foetus would suffer from severe physical or mental abnormality, where continued pregnancy would endanger the woman's life, result in severe malformation of the foetus or pose a risk of injuries to the foetus. The provisions of both subsections are therefore not in issue in the present case.

The constitutional pegs on which the plaintiff hangs its case are the following sections 28(1)(b), 28(1)(d) and 9(1) read with section 7(1) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

The relevant sections of the Constitution read as follows:

Section 28(1)(b):

"Every child has the right to family care or parent care.

Section 28(1)(d):

"Everyone has the right to be protected from maltreatment, neglect, abuse or degradation."

Section 28(2):

"A child's best interests are of paramount importance in [*17] every matter concerning the child."

Section 9(1):

"Everyone is equal before the law and has the right to equal protection and benefit of the law."

Section 7(1):

"This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."

The plaintiff structured its attack on the constitutionality into three separate claims relying on different sections of the Constitution as follows: claim A - section 28(1)(b), 28(1)(d); claim B - section 28(2) and claim C - section 9(1).

The structure or scheme of the Choice Act

It is necessary (when examining the plaintiff's claim in order to determine whether the exception is sustainable or not) to understand and bear in mind the structure or scheme of the Act.

The Act regulates the termination of pregnancy of women. The principal rules by which it does so are the following:

(a)The termination of a pregnancy may only be done with the informed consent of the woman.

(b)If she gives her informed consent to the termination of her pregnancy, no other consent is required (section 5(1) and 5(2)).

(c)During the first [*18] twelve weeks of pregnancy, no more is required than the woman's informed consent.

(d)Thereafter a pregnancy may only be terminated in certain circumstances (section 2).

(e)The termination may only be performed by a medical practitioner or, if it is performed during the first twelve weeks, by a registered midwife who has completed a prescribed training course (section 2(2)).

(f)The termination may only be performed at a facility designated by the Minister (section 3(1)).

(g)A pregnancy may not be terminated unless two medical practitioners or a medical practitioner and a registered midwife who has completed a prescribed course consent thereto (proviso to section 5).

The Act also has the following ancillary provisions regulating the termination of the pregnancy: The State is obliged to promote the provision of counselling to women before and after the termination of pregnancy. The counselling is, however, not mandatory or directive (section 4). Young women (below the age of 18 years) are encouraged to consult with their parents, guardians, family members or friends before termination of their pregnancy. The medical practitioner or midwife, who performs the termination, must [*19] advise them to do so before their pregnancy is terminated. The actual final decision is, however, left to them to decide whether or not to consult with their parents, guardians, family members and/or friends (section 5(3)). The medical practitioner or midwife, who performs a termination, must inform the woman of their rights under the Act (section 6).

It is therefore not as if the Legislature left the termination of pregnancy totally unregulated.

The cornerstone of the regulation of the termination of pregnancy of a girl and indeed of any woman under the Act is the requirement of her "informed consent", No woman, regardless of her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so.

It is therefore necessary to consider the juridical meaning and effect of the requirement of informed consent.

The requirement of "informed consent" at law

The Act does not define or elaborate on what is meant by the requirement of "informed consent" for the termination of pregnancy.

The concept is, however, not alien to our common law. It forms the basis of the doctrine of volenti non fit injuria that justifies [*20] conduct that would otherwise have constituted a delict or crime if it took place without the victim's informed consent. More particularly, day to day invasive medical treatment, which would otherwise have constituted a violation of a patient's right to privacy and personal integrity, is justified and is lawful only because as a requirement of the law, it is performed with the patient's Informed consent. See Van Wyk v Lewis 1924 AD 438 at 451, Castell v Greef 1994 (4) SA 408 (C) at 425, C v Minister of Correctional services 1996 (4) SA 292 (T) at 300, Neethling Potgieter and Visser: Law of Delict, 3ed at 100 - 101; Neethling: Persoonlikheidsreg 4ed at 121-122. It has come to be settled in our law that in this context, the informed consent requirement rests on three independent legs of knowledge, appreciation and consent.

The courts have often endorsed the following statements by Innes, CJ in Waring & Gillow Ltd v Sherborne 1904 Th 340 at 344 to found a defence of consent:

"It must be clearly shown that the risk was known, that it was realised, that it was voluntarily undertaken. Knowledge, appreciation, consent - these are the essential elements; but [*21] knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent."

The requirement of "knowledge" means that the woman who consents to the termination of a pregnancy must have full knowledge "of the nature and extent of the harm or risks". See Castell v De Greef (supra) at 425. Neethling Potgieter & Visser (op cit) at 100 - 101 and Neethling (op cit) at 121-122.

The requirement of "appreciation" implies more than mere knowledge. The woman who gives consent to the termination of her pregnancy "must also comprehend and understand the nature and extent of the harm or risk." See Castell v De Greef (supra) at 425), Neethling Potgieter & Visser (op cit) at 101 and Neethling (op cit) at 122.

The last requirement of "consent" means that the woman must "in fact subjectively consent" to the harm or risk associated with the termination of her pregnancy and her consent "must be comprehensive" in that it must "extend to the entire transaction, inclusive of its consequences". Castell v De Greef (supra), at 425, Neethling Potgieter & Visser, (op cit) at 120 and Neethling (op cit) at 122.

The capacity to consent

In this context, valid consent [*22] can only be given by someone with the intellectual and emotional capacity for the required knowledge, appreciation and consent. Because consent is a manifestation of will "capacity to consent depends on the ability to form an intelligent will on the basis of an appreciation of the nature and consequences of the act consented to" Van Heerden and others Boberg's Law of Persons and the Family, 2ed at 849.

Young and immature children do not have the capacity for real knowledge, appreciation and consent. Such young and immature children therefore would not qualify under the Act to access the rights to termination of pregnancy because they are incapable of complying with the important jurisdictional requirement of giving informed consent. If such children are to be considered for termination of pregnancy, then in such a case, the normal common-law rules that require the consent to be given by or with the assistance of the guardian must necessarily kick in. S v Marx 1962 (1) SA 848 (N) at 854.

What the Act does not do however is to fix a rigid age or number of years for the kicking in of such rules. Instead of using age as a measure of control or regulation, the Legislature resorted/opted [*23] to use capacity to give informed consent as the yardstick. Where such capacity exists the Act recognises it in spite of the youthfulness or age of the person. Where it does not exist, then no such recognition is given, again in spite of youthfulness or age of the candidate for termination of pregnancy.

A girl or any woman has the capacity to consent to the termination of her pregnancy and its concomitant invasion of her privacy and personal integrity, only if she is, "in fact mature enough to form an intelligent will" (Van Heerden and others op cit at 850) and is "verstandelik ryp genoeg om die implikasie van (haar) handelinge te besef . . ." (Neethling Potgieter & Visser op cit at 100, Neethling op cit at 212).

Within the context of the Act, actual capacity to give informed consent, as determined in each and every case by the medical practitioner, based on the emotional and intellectual maturity of the individual concerned and not on arbitrarily predetermined and inflexible age or fixed number of years, is the distinguishing line between those who may access the option to terminate their pregnancies unassisted on the one hand and those who require assistance on the other.

As [*24] already mentioned above, the Act makes informed consent, and not age, the cornerstone of its regulation of access to termination of pregnancy. Subject to the provisions of subsections (4) and (5), of the Act, the termination of a pregnancy may only take place with the informed consent of the pregnant woman. Notwithstanding any other law but subject to the provisions of the said subsections, no consent other than that of the pregnant woman shall be required for the termination of the pregnancy.

It would be incorrect to approach the matter as if the Act is totally blind to the question of youth or minority. The Act has specific provisions dealing with minors. In. the case of a pregnant minor, a medical practitioner or registered midwife is enjoined in peremptory language to advise such minor to consult with her parents, guardian, family members or friends, before the pregnancy is terminated. The person performing the termination of pregnancy has no choice in this regard. This is a further regulatory measure of the Act but not a cornerstone of regulation under the Act. The injunction is thus subject to the proviso that the termination of pregnancy shall not be denied if such minor, [*25] having been duly advised, should choose not to consult with her parents, family members or friends. This is a useful provision that prevents frustration of a constitutional right when the minor is in fact emotionally and intellectually able to give informed consent to the procedure.

A medical practitioner or registered midwife who is not satisfied that the pregnant minor has the capacity to give informed consent should therefore not perform the termination of pregnancy on such minor. This of course applies equally to pregnant minors and pregnant adults. If in such a case the medical practitioner or registered midwife performs the termination of pregnancy, then he or she will be doing so without the informed consent of his or her patient, and his or her conduct will not be in accordance with the Act and will accordingly be unlawful. Informed consent required by the Act is therefore a consent that can be given by each and every person having the capacity to do so. It is a threshold with both intellectual and emotional attributes and those performing termination of pregnancy operations have to satisfy themselves that it is met.

The ratio behind informed consent

An examination of [*26] the ratio or rationale behind the requirement of informed consent in medical procedures, brings one up to, or pretty close to, the very foundation principles of and from which the right to termination of pregnancy in itself arises.

In the leading judgment on the requirement of informed consent, Ackermann J on behalf of the full bench of the CPD) in Castell v De Greef (supra) made it clear that the ratio for that requirement was to give effect to the patient's fundamental right to self-determination.

At 4203J the court said that it was:

"clearly for the patient to decide whether he or she wishes to undergo the operation, in the exercise of the patient's fundamental right to self-determination."

He explained again at 426B that:

"it is in accord with the fundamental right of individual autonomy and self-determination to which South African law is moving. This formulation also set its face against paternalism, from many other species whereof South Africa is now turning away."

This court more recently endorsed the approach in Castell on the basis of the patient's right to exercise her "fundamental right to self-determination". See C v Minister of Correctional Services 1996 [*27] (4) SA 292 (T) at 300. The fundamental right to individual self-determination itself lies at the very heart and base of the constitutional right to termination of pregnancy.

The recognition of the right of every individual to self-determination has now become an imperative under the Constitution and particularly the following provisions of the Bill of Rights:

(a)In terms of section 12(2), "everyone" has the right to bodily and psychological integrity which includes the right "to make decisions concerning reproduction" and "the security and control over their body".

(b)In terms of section 27(1)(a) "everyone" has the right to have access to "reproductive health care".

(c)In terms of section 10, "everyone" has "inherent dignity and the right to have their dignity respected and protected."

(d)In terms of section 14, "everyone" has "the right to privacy".

It is recognition of these rights that provide a foundation for the right to termination of pregnancy in South Africa. The South African Constitution recognises and protects the right to termination of pregnancy or abortion in two ways, firstly under section 12(2)(a), that is, the right to bodily and psychological integrity [*28] which includes the right to make decisions concerning reproduction, and secondly, under section 12(2)(b), that is, the right to control over one's body. The closeness or commonality of the source of the right to termination of pregnancy with the ratio for informed consent, make informed consent not only a viable and desirable principle for the regulation of the right, but also the most appropriates.

In a sense therefore the Constitution not only permits the Choice on Termination of Pregnancy Act to make a pregnant woman's informed consent the cornerstone of its regulation of the termination of her pregnancy, but indeed requires the Choice Act to do so. To provide otherwise would be unconstitutional.

Paragraph 20.2 of particulars of claim

The plaintiff alleges in paragraph 20.2 quoted above, that a girl below 18 years is not capable of giving informed consent as required in section 5(1) of the Act that is, to make the decision whether or not to have a termination of her pregnancy which serves her best interests without the assistance and/or guidance of her parents/guardian and/or counsellor.

The plaintiff argues that it is because such a person is not in a position to appreciate [*29] the need for and value of parental care and support. If indeed this were to be so then the very incapacity to give informed consent would disqualify such a girl from accessing termination of pregnancy right. The plaintiff's approach is however a rigid approach to maturity which is blind to the fact of life that there will be women below that age who are in fact mature, much as there will be those above that age (or any fixed age) who are in fact immature. It fails to recognise and accommodate individual differences. This in my respectful view Is a major flaw or weak link in the plaintiff's case.

Allegations in particulars of claim accepted as truth

When considering the validity of an exception to the particulars of claim on the basis that such particulars of claim do not disclose a cause of action, the proper judicial approach is that the allegations in such particulars of claim must be accepted as true. I am indeed urged to do so by the plaintiff in paragraph 8 of its written heads of argument where I am referred to Van Zyl NO v Bolton 1994 (4) SA 648 (C) at 651E-F. This is indeed the correct legal position on which the plaintiff, the defendant and the amicus curiae are agreed. [*30] See also Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd 1990 (4) SA 749 (N) at 754B-755B.

What has to be accepted as true include the allegation in paragraph 20.2 of the plaintiff's particulars of claim to the effect that a woman under the age of 18 "is not capable of giving informed consent" as required in section 5(1) of the

Act. This approach is fatal to the plaintiff's claim as formulated. The allegations in paragraph 20.2 form part of the introductory portion of the particulars of claim and therefore relate to claims A, B and C being the entire claim of the plaintiff On the basis of the truth of the allegation in paragraph 20.2 that a girl under the age of 18 is incapable of giving informed consent, then on the proper interpretation of informed consent, then such a girl will for that reason be excluded from accessing the termination of pregnancy right under the Act because such consent is the cornerstone of the regulation and a prerequisite for the exercise of the right. It is in this regard that paragraph 20.2 of the particulars of claim is fatal to the plaintiff's claim.

The plaintiff and the amicus curiae ostensibly do not agree with the generalised statement [*31] in paragraph 20.2 of the particulars of claim that a girl under the age of 18 is incapable of giving informed consent. However as a matter of correct approach to the allegations in the particulars of claim at the exception stage, they both argued that the allegations in the particulars of claim, particularly paragraph 20.2, must be accepted as true. Save for that purpose they however expressly reserved for themselves the right to challenge the truth of the statement in paragraph 20.2 of the particulars of claim.

In this judgement the particulars of claim are being considered only for the purposes of the exception and for no other purpose. For that direct purpose of determination of the issue in this judgement this Court must accept that girls under the age of 18 years are incapable of giving informed consent.

Section 5(1) of the Act provides that the termination of pregnancy may only take place with the "informed consent of the pregnant woman". The implications of paragraphs 20.2 of the particulars of claim is therefore that girls who are less than 18 years old cannot (on their own) have their pregnancy terminated under the Act. They, for that reason, fall outside the ambit of [*32] section 5(1) of the Choice Act which is under attack and have to be dealt with on some other basis. The subsection applies only to those who are capable of giving informed consent.

The plaintiff's claims A, B and C complain about the legislative failure to impose stricter or additional control on the termination of pregnancies of girls under 18. It should however, never be permissible for a girl under 18 years to have her pregnancy terminated because, on the plaintiff's case, she is never capable of meeting the threshold required for termination imposed by section 5(1) of that Act, which is "informed consent". The plaintiff therefore complains about the failure of the Act to impose stricter regulation on something which the Act does not permit at all. The Act cannot possibly impose stricter control on something it prohibits altogether.

I specifically invited Mr Mathee SC who appeared for the plaintiff to address me on paragraph 20.2 as in my view it clearly posed difficulties for the plaintiff, if one accepts its truth albeit for the present purposes (exception stage) only. He still maintained that one must accept its truth. He argued further that the allegations in the paragraph [*33] must be read and understood in the context of the preceding allegations and that in the context the paragraph meant that such a girl is not capable of giving informed consent as required in the section without the assistance and/or guidance of parents, guardians and/or counsellors.

That argument, however, does not help the plaintiff. If the people who are in terms of paragraph 20.2 incapable of giving informed consent are unassisted girls under 18 years, then that becomes the category of persons in respect of whom the plaintiff complains. They are by virtue of their incapacity to give informed consent, excluded in the category of people for whom it is permissible to terminate pregnancy.

For the particulars of claim to disclose a cause of action the allegations contained in them must support the conclusion of fact reached by operation of law as well as the remedy sought. Because a category of persons to whom the plaintiff's complaint relates are those excluded by incapacity to give informed consent, the allegations in the particulars of claim do not support the conclusion. Claims A, B and C are excipiable because they assume that the Act permits girls under 18 years to have their [*34] pregnancies terminated when it in fact never permits them to do so (assuming the truth of paragraph 20.2).

On the basis that it is true, that a girl under the age of 18 years is not capable of giving informed consent required by section 51(1) of the Act, and if in practice the pregnancy of such girls is terminated on the basis of their purported consent, then the plaintiff's remedy is not to attack the Act but to stop the medical practitioners and midwives who terminate the pregnancies of girls under the age of 18 because they are doing so unlawfully in violation of section 5(1) of the Act. The constitutionality attack can therefore not be sustained on the particulars of claim.

Conclusion recapped

To recap, the defendant has excepted to the plaintiff's particulars of claim on the basis that they do not disclose a cause of action. In order to determine whether the particulars of claim disclose a cause of action, one must determine whether, the allegations contained in the particulars of claim, if proven, would entitle the plaintiff to the relief sought by the plaintiff as prayed for in such particulars of claim. To determine whether the allegations in the particulars of claim [*35] support the relief prayed for therein, the allegations must be presumed to be true. Accordingly the test is whether the allegations or statements in the particulars of claim, read together with the correct position of the law, support the relief. The law requires "informed consent" from a person in order for such person to exercise the right to terminate pregnancy. The particulars of claim say that children under the age of 18 are incapable of giving "informed consent". The conclusion (on the plaintiff's case) must therefore be that girls under 18 years of ago cannot exercise the right to terminate pregnancy when unassisted.

The particulars of claim, nonetheless, conclude that the law allows girls under 18 years of age to exercise the fight to terminate pregnancy - and leave them unprotected, unassisted, isolated and without counselling when they do so. The remedy is sought on the basis of this assumption being a correct conclusion.

The assumption is, however, wrong because if any person, whether under 18 years or not, cannot give "informed consent" then such a person cannot exercise the right.

As a result, a girl under the age of 18 years cannot lawfully exercise that right [*36] since she does not meet the jurisdictional threshold of informed consent (on the plaintiff's case). The factual allegations in the particulars of claim read with the law do not lend support for the relief prayed for in the particulars of claim. The particulars of claim therefore do not disclose a cause of action. Consequently, the particulars of claim do not disclose a cause of action.

On the plaintiff's case, as pleaded, therefore there is no cause of action disclosed and the exception must be upheld. That really should put an end to the plaintiff's claim as pleaded.

Perspective of the right

However, I find it both instructive and helpful to make some remarks and examine the matter from the perspective of the basis in law of the right of a woman to determine the fate of her pregnancy, or for short, the right to termination of pregnancy, as I have called it in this judgement In the process I will also examine and compare the position, from the same perspective, in other leading democracies such as the United States of America, Canada, Germany and the European Union. At the same time, a comparison will be made with the position in South Africa, as to the foundation of such a [*37] right. I will conclude finally with some remarks as to whether the regulation of the right in South Africa through the mechanism employed in the Choice on Termination of Pregnancy Act is constitutional or not.

In the United States of America in Roe v Wade (1972) 35 Led 2ed 147 the US Supreme Court founded the woman's constitutional right to determine the fate of her own pregnancy on the constitutional right to "liberty" entrenched in the Fourteenth Amendment to the US Constitution. It did so as follows:

1.In a line of previous cases the court recognised an implied constitutional. guarantee of personal privacy derived from a variety of express constitutional guarantees, principally the guarantee of "liberty" in the Fourteenth Amendment. In some of those cases the court struck down State prohibitions on the sale of contraceptives. In one of them Brennan J articulated the point of those decisions as follows:

"If the right of privacy means anything, it is the right of the individual, married or single, to be free from governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." (See Eisenstad [*38] v Baird (1972) 31 L ed 2ed 349 at 364.)

2.This fight of personal privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy". Blackman J in Roe v Wade (supra) at 177 explained:

"The detriment that the State would impose upon the pregnant woman by denying this choice altogether, is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care

for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved."

3.The woman's right of privacy and her concomitant right to reproductive self-determination, are however not absolute. The State has an important and legitimate interest in the preservation and protection of the health and welfare of the woman herself and of the potential [*39] life of the foetus. When its interest in doing so becomes sufficiently "compelling", it warrants State intrusion upon the woman's privacy and self-determination (Roe v Wade (supra) at 177, 182).

4.During the first twelve weeks of the woman's pregnancy, the State's interest is not sufficiently compelling to warrant intrusion.

5.During the second period of twelve weeks, however, the State's interest in the protection of the health and welfare of the woman herself; is sufficiently compelling to warrant regulation and control for that purpose. Its interest in the health and welfare of the foetus is however not yet sufficiently compelling to warrant intrusion for its protection (at 182 - 183).

6.Only when the foetus becomes viable, which occurs more or less at the end of the second trimester, does the State's interest in the protection of the health and welfare of the foetus become sufficiently compelling to warrant intrusion for that purpose. The State may then regulate and even prohibit abortion to protect the life of the foetus provided that it does not preclude abortion when necessary to preserve the life and health of the woman herself (at 183-184).

Professor Dworkin defends [*40] the court's conclusion that the Constitution protects the woman's freedom to determine the fate of her own pregnancy. He describes the impact of a prohibition on abortion as follows:

"Laws that prohibit abortion or make it difficult or expensive to procure one, deprive pregnant women of a freedom or opportunity that is crucia1 to many of them. A woman who is forced to bear a child she does not want because she cannot have an early and safe abortion, is no longer in charge of her own body: the law has imposed a kind of slavery on her. That is, however, only the beginning. For many women, bearing unwanted children means the destruction of their own lives, because they are still children themselves, because they will no longer be able to work or study or live in ways important to them, or because they cannot support the children . . . Adoption even when it is available, does not remove the injury, for many Women would suffer great emotional pain for many years if they turned a child over to others to raise and love." (Dworkin, Life's Dominion.)

He concludes that, once one accepts that the Constitution protects personal privacy, then it follows that it also protects women's right [*41] to determine the fate of their own pregnancy:

"But once one accepts (the dictum of Brennan I quoted above) as good law, then It follows that women do have a constitutional right to privacy that In principle includes the decision not only whether to beget children but whether to bear them. (The line of privacy decisions referred to above) can be justified only on the presumption that decisions affecting marriage and childbirth are so intimate and personal that people must in principle be allowed to make these decisions for themselves, consulting their own preferences and convictions, rather than having society impose its collective decision on them.

A decision about abortion is at least as private in that sense as any other decision the court has protected. In one way it a more so, because it involves a woman's control not just of her sexual relations but of changes within her own body, and the Supreme Court has recognised in various ways the importance of physical integrity." (Op cit 106 - 107).

In the later case of Thornburg v American College of Obstetricians and Gynaecologists (1986) 476 US 747 at 772 Blackmun J again explained the fundamental nature [*42] of the privacy of a woman's decision to terminate her pregnancy:

"Few decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision - with the guidance of her physician and within the limits specified in Roe - whether to end her pregnancy. A woman's right to make that choice freely is fundamental Any other result, in our view, would protect inadequately a central part of the sphere of liberty that our law guarantees equally to all."

In Casey v Planned Parenthood of Southeastern Pennsylvania (1992) 120 L ed 2d 674 the US Supreme Court again affirmed the essential findings of Roe including the principle that women have a constitutional right to determine the

fate of their own pregnancy (at 694). O'Connor J, who gave the judgment of the court, said the following in explaining the justification of that conclusion:

"it is settled now, as it was when the court heard arguments in Roe v Wade, that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood."(At 696-697.)

"Some of us as individuals find abortion offensive to our most basic [*43] principles of morality, but that cannot control our decision. Our obligation is to define the liberty of all, not to mandate our own moral code. The underlying constitutional issue is whether the State can resolve these philosophic questions in such a definitive way that a woman lacks all choice in the matter, except perhaps in those rare circumstances in which the pregnancy is itself a danger to her own life or health, or is the result of rape or incest." (At 698-699).

"Our law affords constitutional protection to those personal decisions relating to marriage, procreation, contraception, family relationship., child rearing and education . . .These matters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." (At 698.)

"Abortion is a unique act. It is an act fraught with consequences [*44] for others: for the woman who must live with the implications of her decision; for the persons who perform and assist in the procedure; for the spouse, family and society which must confront the knowledge that these procedures exist, procedures some deem nothing short of an act of violence against innocent human life; and, depending on one's beliefs, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in. a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. That these sacrifices have from the beginning of the human race been endured by woman with a pride that ennobles her in the eyes of others and gives to the infant a bond of love, cannot alone be grounds for the State to insist she makes the sacrifice. Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on [*45] her own conception of her spiritual imperatives and her place in society." (At 698-699.)

The same considerations as applied in the US would compel one to conclude that our Constitution protects a woman's right to choose under its guarantees of dignity in section 10 and privacy in section 14. It is however not necessary to resort to those general guarantees because section 12(2) specifically guarantees the woman's right "to bodily and psychological integrity" including the right "to make decisions concerning reproduction" and "to security in and control over their body". They were clearly designed specifically to protect the woman's right to reproductive self-determination.

In Canada section 7 of the Canadian Charter also protects the right to "liberty" but goes further by providing express protection to the right to "security of the person".

In R v Morgentaler (2) (1988) DLR (4th) 385 the Canadian Supreme Court, like its US counterpart, held that the woman's right to determine the fate of her own pregnancy enjoyed constitutional protection. The majority of the court (Dickson J, Lamer J, Beetz J, Estey J) founded that protection on the guarantee of [*46] "security of the person" in section 7. Wilson J, who concurred with the majority, held that the protection could also be founded on the right to "liberty" in section 7 and the concomitant implied guarantee of human dignity.

At issue before the court was the constitutionality of section 251 of the Canadian Criminal Code, which placed severe procedural restrictions on a woman's freedom to obtain an abortion. Dickson CJ explained his conclusion that it violated the constitutional right to security of the person thus:

"At the most basic, physical and emotional level every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to [*47] her own priorities and

aspirations, is a profound interference with a woman's body and thus a violation of security of the person."(At 402).

In the subsequent case of Rodriguez v British Columbia (Attorney General) (1993) 17 CRR (2ed) 193 at 203 - 204 and 107 DLR (4th) 342 at 391a-b which concerned the constitutionality of a criminal prohibition of assisted suicide, Sopinka J, who gave the judgment of the majority of the court, reviewed its jurisprudence on the right to security of the person and concluded as follows:

"In my view, then, the judgment of this court in Morgantaler can be seen to encompass a notion of personal autonomy involving, at the very least, control over one's bodily integrity free from State interference and freedom from State-imposed psychological and emotional stress . . .

There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity, are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these."

Insofar [*48] as our Constitution also guarantees a right to "security of the person" in section 12(1), it could similarly found constitutional protection of a woman's right to determine the fate of her own pregnancy. It is however not necessary to resort to section 12(1) because section 12(2)(a) and (b) expressly guarantees a more specific right "to bodily and psychological integrity" including the right "to make decisions concerning reproduction" and "to security in and control over (one's) body".

The German Constitutional Court has held that the right to life extends to the protection of pre-natal life. It has however also recognised a countervailing constitutional right which protects the woman's personal autonomy to determine the fate of her own pregnancy.

The jurisprudence of the German Constitutional Court accordingly lends support to an alternative perspective that the right to freedom and security of the person affords constitutional protection to a woman's right to determine the fate of her own pregnancy, albeit subject to limitation to protect the life of the foetus.

In Europe Article 8 of the European Convention on Human Rights provides that "everyone has the right to respect for [*49] his private and family life".

In Bruggemann and Scheutan v Federal Republic of Germany (1977) 3 EHRR 244 the European Commission held that this right founded constitutional protection of a woman's right to self-determination. It said the following in this regard:

"The right to respect for private life is of such a scope as to secure to the individual a sphere within which he can freely pursue the development and fulfilment of his personality. To this effect, he must also have the possibility of establishing relationships of various kinds, including sexual, with other persons. In principle, therefore, whenever the State sets up rules for the behaviour of the individual within this sphere, it interferes with the respect for private life . . ." (at 252 paragraph 55).

"However, pregnancy cannot be said to pertain uniquely to the sphere of private life. Whenever a woman is pregnant, her private life becomes closely connected with the developing foetus." (At 253 paragraph 59).

The Commission accordingly concluded that, although the woman has a right of self-determination, it was permissible for the State to regulate abortion because the right to privacy "cannot be interpreted as [*50] meaning that pregnancy and Its termination are, as a principle, solely a matter of the private life of the mother." (At 253 paragraph 61).

The jurisprudence of the European Union accordingly recognises the woman's constitutional right to self-determination but also recognises that it is permissible for the State to regulate its exercise.

In South Africa section 12(2)(a) and (b) of the Constitution provides that:

"Everyone has the right to bodily and psychological integrity which includes the right-

(a)to make decisions concerning reproduction;

(b)to security in and over their body."

Compared to the foreign jurisdictions referred to above, it is clear that ours is the most explicit provision concerning the right The specific provisions of section 12(2)(a) and (b) of our Constitution guarantee the right of every woman to determine the fate of her pregnancy. The Constitution of this country in explicit language affords "everyone" the right to bodily integrity including the right "to make decisions concerning reproduction" and "to security in and control over their body." This is quite clearly the right to choose whether to have her pregnancy terminated or not, for short, [*51] the right to termination of pregnancy. Her freedom of choice protected under the explicit provisions of section 12(2)(a) and (b) is moreover reinforced by the following constitutional rights: the right to equality and protection against discrimination on the grounds of gender, sex and pregnancy (section 9), the inherent right to dignity and to have her dignity respected and protected (section 10), the right to life (section 11), the right to privacy (section 14) arid more importantly the right to have access to reproductive health care (section 27(1)(a)).

As has been seen in some of the foreign jurisdictions above, some of the rights cited above as reinforcing the right to termination of pregnancy in this country, were in those jurisdictions, themselves developed by courts through judicial interpretation to found the right to termination of pregnancy. Cumulatively therefore the more explicit rights in section 12(2)(a) and (b) and all the other reinforcing rights provide a strong constitutional base for the right to termination of pregnancy in our law. The explicit rights that found the right to termination of pregnancy as well as all the rights that reinforce that right are all part [*52] of the Bill of Rights under our Constitution. The right therefore has a strong constitutional base in our law. It is part of the cornerstone of democracy which enshrines "the right of all people in the country" (section 7(1)).

Like all other constitutional rights, the right to termination of pregnancy is not absolute. The State has a legitimate role, in the protection of pre-natal life as an important value in our society to regulate and limit the woman's right to choose in that regard. However because the right itself is derived from the Constitution the regulation thereof by the State may not amount to the denial of that right. Similarly any limitation of the right constitutes a limitation of a woman's fundamental right and is therefore valid only to the extent that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom (section 36(1) of the Constitution).

Impact of State-imposed interference

I referred earlier to the vivid descriptions of the Supreme Courts of the United States and Canada of the impact of any State-imposed interference with the autonomy of a woman to determine the fate of her own pregnancy. [*53] Our courts have never had to address the issue but have in different contexts recognised the potential for catastrophic consequences that might flow from the unwanted, but State-enforced, birth of a child.

Such an example is to be found in Administrator, Natal v Edouard 1990 (3) SA 581 (A) at 591G where Van Heerden JA referred with express approval to certain judicial pronouncements including the following statement:

"There is no justification for holding, as a matter of law, that the birth of an 'unwanted' child is a 'blessing'. The birth of such a child may be a catastrophe, not only for the parents and the child itself, but also for previously born siblings."

If the State were to prohibit termination, its prohibition would force pregnant women to bear, give birth to and nurture unwanted children at the risk of suffering such "catastrophes" arid with the associated impairment of their physical and psychological well-being. The State's interference would clearly constitute an impairment of women's right "to bodily and psychological integrity" and more particularly of their right "to make decisions concerning reproduction" and "to security in and control over their body".

[*54] Our Constitution protects the right of a woman to determine the fate of her own pregnancy. It follows that the State may not unduly interfere with a woman's right to choose whether or not to undergo an abortion.

The plaintiff recognises and acknowledges that the right in issue here is a constitutional one and complains about the way the Legislature, through the Act allows girls to access the right. The plaintiff would have restriction or regulation of access to the right which is based on age.

A girl's right to choose under our Constitution

The Act allows all women who have the intellectual and emotional capacity for informed consent, to choose whether to terminate their pregnancies or not. It does not distinguish between them on the ground of age. The plaintiff in essence

complains that this approach is unconstitutional. The approach is however consistent with the Constitution inter alia for the following reasons:

1.The right of every woman to choose whether to terminate her pregnancy or not, is enshrined in sections 12(2)(a) and (b), 27(1)(a), 10 and 14 of the Constitution. All of those rights are afforded to "everyone" including girls under the age of 18. They are accordingly [*55] also entitled to respect for and protection of their right to self-determination.

2.Section 9(1) moreover provides that "everyone" is equal before the law and has the right to equal protection and benefit of the law". Section 9(3) goes further to prevent unfair discrimination against "anyone" inter alia on the ground of "age". Any distinction between women on the ground of their age, would invade these rights.

3.It follows that, any limitation upon the freedom of any woman, including any girl under the ago of 18 years, to have their pregnancy terminated, constitutes a limitation of their fundamental rights. Such a limitation is valid only if justified in terms of section 36(1).

Because the right is afforded is constitutional, one of the minimum requirements for justification, is that the limitation must be rational. The distinction made by the Act, between those women (including those girls under the age of 18 years) who have the capacity for informed consent on the one hand and those who do not have the capacity on the other, is a rational distinction. It is for that reason capable of justification and is therefore constitutional.

The argument that the provisions of the Act [*56] which are under attack are unconstitutional because they do not cater for the interest of the child is unsustainable. The legislative choice opted for in the Act serves the best interest of the pregnant girl child (section 28(2)) because it is flexible to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority. It cannot be in the interest of the pregnant minor girl to adopt a rigid age-based approach that takes no account, little or inadequate account of her individual peculiarities. However even if the plaintiff was to establish that the age-based control or regulation is in the interest of the child, that would not be enough, the plaintiff has to go further and establish that the legislative choice adopted in the Act (which is based on informed consent) is in fact unjustifiable and unconstitutional.

While the plaintiff has formulated its claim on the basis that girls or young women below the age of 12 are incapable of giving informed consent, this is not necessarily so. The true position will depend on the particular individual girl or woman and on her particular circumstances and must [*57] therefore be determined for each and every woman in each case. In enacting the Act, the Legislature assumed that there will be women below and above the age of 18 who will be incapable of giving informed consent and for this category the law requires parental or some other assistance in giving the informed consent. The Legislature also recognised that there will be women above and below the age of 18 who are capable of giving informed consent, and for this category the Legislature requires no assistance when they give consent to termination of pregnancy. As to whether a particular individual, irrespective of age, is capable of giving such consent, the legislature has left the determination of the "factual position" to the medical professional or registered midwife who performs the act. I cannot find that the exercise of this legislative choice is so unreasonable or otherwise flawed that judicial interference is called for in what is essentially a legislative function.

Women or girls under the age of 12 are not unprotected for as long as they are incapable of giving informed consent. What is more, the legislation makes provision to ensure that all young women or girls below the age [*58] of 18 are encouraged to seek parental support and guidance when seeking to exercise the right to reproductive choice. The constitutional right of a pregnant child to family or parental care (section 28(1)(b)) is therefore not denied. It is accommodated but not imposed. It Is given effect to under the Act in a manner that does not seek to negate other constitutional rights including the right to equality before the law, to equal protection and benefit of the law as well as the right to termination of pregnancy itself

I cannot find that the legislation is unconstitutional when it provides for what is constitutionally permissible and regulates it without affronting the Constitution. The exercise of the right is not unregulated. For this reason too, the plaintiff's particulars of claim do not disclose a cause of action.

In the premises I make the following order:

1.The exception is upheld.

2.The plaintiff's claims are dismissed.

3.No order is made in respect of costs.

SOLICITORS:
For the plaintiff:

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For the defendant:

W Trengove SC instructed by State Attorney
For the Amicus Curiae:

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