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

Division:	High Court, Transvaal Provincial Division
Date:	10/07/1998
Case No:	**16291/97**
Before:	SW McCreath, Judge

Flynote

Life, right to

section 11 of the Final Constitution – foetus – while there may be uncertainty in the common law as to the extent to which the nasciturus fiction may clothe an unborn child with any legal personality, the word "everyone" in section 11 of the Final Constitution cannot be construed as including a foetus – a foetus does not enjoy a constitutional right to life, and is not afforded protection by section 11 against the termination of the mother's pregnancy.

Abortion

Choice on Termination of Pregnancy Act 72 of 1996 – action for an order striking down the Act in its entirety as unconstitutional on the basis of its conflict with section 11 of the Final Constitution guaranteeing the right to life – exception to particulars of claim upheld – particulars of claim not disclosing a cause of action – a foetus does not enjoy a constitutional right to life, and is not afforded protection by section 11 against the termination of the mother's pregnancy.

Editor's Summary

The Choice on Termination of Pregnancy Act 72 of 1996 permits an abortion upon the request of the mother during the first trimester of her pregnancy. It also permits an abortion from the thirteenth to the twentieth week of pregnancy, if a medical practitioner, after consultation with the mother, is of the opinion that the continued pregnancy would pose a risk of injury to the mother's physical or mental health, or that there exists a substantial risk that the unborn child would suffer from severe physical or mental abnormality, or that the pregnancy resulted from rape or incest, or that the continued pregnancy would significantly affect the social or economic circumstances of the mother. The Act also permits an abortion after the twentieth week of pregnancy, if a medical practitioner, after consultation with another medical practitioner or a registered midwife, is of the opinion that the continued pregnancy would endanger the mother's life, or would result in a severe malformation of the unborn child, or would pose a risk of injury to the unborn child.

Plaintiffs instituted an action in which they sought the striking down of the Act in its entirety. The particulars of claim averred that the Act was in conflict with section 11 of the Final Constitution in that it allowed the termination of human life at any stage after conception and at any stage prior to the child's birth. Section 11 provides that "everyone has the right to life".

Defendants noted an exception to Plaintiffs' summons on the ground that the particulars of claim did not disclose a cause of action. The exception was based on the

contention that a foetus is not a bearer of rights in terms of section 11 and that the constitutional guarantee contained in section 11 does not preclude the termination of pregnancy in the circumstances and manner contemplated by the Act. Defendants averred further that the right of women to choose to have their pregnancy terminated in the circumstances and manner contemplated by the Act is a right which is protected by various constitutional guarantees including section 11 itself.

<JL:Jump,"Act 108 of 1996 s 11">Section 11<EL>, the Court observed, conferred the right to life on "everyone". The terms "everyone" and "every person" were used interchangeably in the fundamental rights provisions of the Constitution. The bill of rights generally protected "everyone", but frequently referred to the holders of those rights as "people" or "persons". The Canadian Charter of Rights and Freedoms similarly conferred its protection on "everyone", "any person" and "anyone". The terms "every person" and "everyone" were used synonymously in the RSA Constitution. The crucial question in adjudicating the exception was therefore whether the words "everyone" or "every person" applied to an unborn child from the moment of the child's conception. The answer did not depend on medical or scientific evidence as to when the life of a human being commenced and the subsequent development of the foetus up to the date of birth. The issue was a purely legal one to be decided on the proper legal interpretation to be given to section 11. The Court was not required to enter into philosophical and theological debates about whether or not a foetus was a person. The task of properly classifying a foetus in law and in science were different pursuits. Ascribing personhood to a foetus in law was a fundamentally normative task, resulting in the recognition of rights and duties, a matter which fell outside the realm of scientific classification. Plaintiffs had argued that the question could not be decided without hearing evidence. In the view of the Court, however, there was no ambiguity in section 11 of such a nature that extraneous facts might be relevant to and assist in its interpretation. Where the relief sought by a party was the striking down of an Act of Parliament the same approach ought to be adopted at the exception stage as that which applied in claims involving the interpretation of a contract. In terms of that approach, courts would not assign a meaning to particular words of a contract at the exception stage if there were room for a contention, *ex facie* the pleadings, that other omitted terms of the contract, whether considered with or without additional evidence of surrounding circumstances, might have a significant bearing on the issue; but this would not avail the respondent where the contention was composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts. The relevance of extraneous facts ought at least to appear from the pleadings.

In the view of the Court, on a proper interpretation of section 11, the word "everyone" could not include the unborn child. It did not follow from the proposition as averred by Plaintiffs that "the life of a human being starts at conception" that human beings were from conception persons as contemplated by section 11. It was not necessary to make any firm decision as to whether an unborn child was a legal *persona* under the common law. Some recent decisions and academic writings had revealed a move towards an acceptance of the capacity of the foetus to be the bearer of certain rights. At best for Plaintiffs, the status of the foetus under the common law was at present uncertain. There was no express provision in the Constitution affording the foetus legal personality or protection. It was improbable that the framers would not have made express provision in the bill of rights for the extension of rights to unborn children had such been their intention, in order to remove any uncertainty in the common law and in the light of the case law denying the foetus legal personality. On the contrary, there were contextual indications that that was not their intention. The Court identified those provisions and demonstrated that each was inconsistent with an intention to include the foetus within the meaning of the word "everyone" in section 11. The Court also pointed to anomalies and far-reaching consequences that would result from section 11 being interpreted as affording constitutional protection to the life of a foetus.

The conclusion was unavoidable that under the Constitution the foetus was not a legal *persona*. To afford the foetus the status of a legal *persona* would also impinge on rights accorded to women by the Constitution including the right to freedom and security of the person, the right to make decisions concerning reproduction, the right to security and control over their bodies, the right to human dignity, life, privacy, religion, belief and opinion, and health and care. Plaintiffs had framed their cause of action in absolute terms – namely, that the foetus was a person and that the Act had therefore to be struck down in its entirety. Their particulars of claim did not accommodate the possibility that there were competing rights, and that a balance had to be struck between the rights of a woman and those of a foetus.

A survey of foreign jurisdictions fortified the conclusion to which the Court had come. In many foreign jurisdictions the foetus could not have any right of its own at least until it had been born and had achieved a separate existence from the mother. The Canadian Charter of Rights and Freedoms provided expressly that "everyone has the right to life . . . and the right not to be deprived thereof except in accordance with the principles of fundamental justice". The word "everyone" in that provision had been construed as not including a foetus. It was widely accepted that a foetus did not enjoy a constitutional right to life, Germany being the only exception. Article 2(1) of the European Convention on Human Rights provided that "everyone's right to life shall be protected by law". This had been construed similarly as not including a foetus.

Accordingly, it had to be found that the particulars of claim did not make out a cause of action, and that the exception had to succeed. The Court made no order as to costs.

Judgment

McCreath J

The plaintiffs seek an order against the defendants declaring the Choice on Termination of Pregnancy Act 72 of 1996 ("the Act") to be unconstitutional and that it be struck down in its entirety. Paragraphs 12, 13, 14, 15, 16 and 17 of the plaintiffs' particulars of claim read as follows:

> "12. The act permits an abortion:
>
> 12.1 upon the request of the mother during the first twelve weeks of the gestation period of her pregnancy;
>
> 12.2 from the 13th up to and including the 20th week of the gestation period of the pregnancy if a medical practitioner, after consultation with the mother, is of the opinion that:
>
> (i) the continued pregnancy would pose a risk of injury to the mother's physical or mental health; or
>
> (ii) there exists a substantial risk that the unborn child would suffer from severe physical or mental abnormality; or
>
> (iii) the pregnancy resulted from rape or incest; or
>
> (iv) the continued pregnancy would significantly affect the social or economic circumstances of the mother.
>
> 12.3 after the 20th week of the gestation period, if a medical practitioner, after consultation

continued pregnancy-

(i) would endanger the mother's life; or

(ii) would result in a severe malformation of the unborn child; or

(iii) would pose a risk of injury to the unborn child.

13. The life of a human being starts at conception.

14. Abortion terminates the life of a human being.

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15.

15.1 In terms of section 11 of Act 108 of 1996, everyone has the right to life.

15.2 Section 11 applies to an unborn child.

15.3 Section 11 applies to an unborn child from the moment of the child's conception.

16. The act is in conflict with section 11 of the Constitution, in that it allows the termination of human life at any stage after conception and at any stage prior to the child's birth.

17. The act is consequently unconstitutional and must be struck down."

The defendants noted an exception to the plaintiffs' summons on the ground that the particulars of claim do not disclose a cause of action. In the notice of exception the following is alleged:

"1. a foetus is not a bearer of rights in terms of section 11 of the constitution;

2. section 11 of the constitution does not preclude the termination of pregnancy in the circumstances and manner contemplated by the act; and

3. the right of women to choose to have their pregnancy terminated in the circumstances and manner contemplated by the act, is protected under sections 9, 10, 11, 12, 14, 15(1) and 27(1)(a) of the constitution."

The defendants accordingly contend that the plaintiffs' claims should be dismissed.

At the hearing of the exception counsel for the plaintiffs argued as a preliminary point that the issues raised by the plaintiffs cannot be decided without the hearing of evidence and that an exception is therefore inappropriate. It was argued that if there is a possibility that some evidence can be led to establish the plaintiffs' cause of action, an exception is inapposite [cf *South African Defence and Aid Fund and Another v Minister of Justice* 1967 (1) SA 31 (C) 37G *et seq*]. The plaintiffs contend that evidence is admissible and available to establish that a foetus has rights in terms of section 11 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), alternatively to prove that a foetus is entitled to protection under the Constitution generally. Counsel mentioned expert evidence on when the life of a human being starts and the subsequent development of the foetus within the womb of a mother, as well as evidence on various aspects of reproduction, as examples of the testimony which the plaintiffs propose to adduce.

In my view this argument overlooks the fundamental issue which this court is called upon to decide in regard to the plaintiffs' cause of action as formulated in the particulars of claim. It is apparent from subparagraphs 15.1, 15.2 and 15.3 thereof that the plaintiffs rely solely on the provisions of section 11 of the Constitution to substantiate their cause of action. That section provides that "everyone has the

right to life". A perusal of the Constitution indicates that the terms "everyone" and "every person" are used interchangeably. Thus, the bill of rights generally protects "everyone", but frequently refers to the holders of those rights as "people" or "persons" – eg section 7(1), which enshrines the rights of all "people"; section 38, which confers *locus standi* on "everyone listed in this section" to approach the court for relief under the bill of rights but goes on to describe in the list "the persons" who may do so.

It should be mentioned that in the interim Constitution (the predecessor to the Constitution) a general protection was afforded in the bill of rights forming part

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thereof to "every person". The change to the word "everyone" was presumably to meet the requirement of Constitutional Principle II that "everyone shall enjoy all universally accepted fundamental rights, freedoms and civil liberties". Be that as it may, this change across the board could never, in my judgment, have been intended to introduce a significant new class of rights-bearer. It is inconceivable that any new category could have been introduced by the legislature in this obscure way. The Canadian Charter of Rights confers its protection on "everyone", "any person" and "anyone". Hogg *Constitutional Law of Canada* (3 ed), Volume 2 paragraph 34.1(b) says that "it seems likely that these various terms are synonymous for purposes, of the relevant sections of the Canadian Charter". There can be no doubt in my mind that, as far as the Republic of South Africa is concerned, the terms "every person" and "everyone", as used in the Constitution (and more particularly in section 11 thereof) are synonymous. Counsel for the plaintiffs did not suggest otherwise.

The plaintiffs' cause of action, founded, as it is, solely on section 11 of the Constitution, is therefore dependent for its validity on the question whether "everyone" or "every person" applies to an unborn child "from the moment of the child's conception". The answer hereto does not depend on medical or scientific evidence as to when the life of a human being commences and the subsequent development of the foetus up to date of birth. Nor is it the function of this Court to decide the issue on religious or philosophical grounds. The issue is a legal one to be decided on the proper legal interpretation to be given to section 11. I am in agreement with the dictum of the Canadian Supreme Court in *Tremblay v Daigle* (1989) 62 DLR (4th) 634 (SC) at 650a-c, where the following is said:

> "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 or not 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."

Counsel for the plaintiffs also argued that in the interpretation of a constitution it is permissible to lead evidence of the legislative history and the circumstances existing at the time such constitution was adopted in order to arrive at the correct interpretation thereof. The general rule is that evidence of surrounding circumstances in order to interpret a statute is not permissible. In this respect Steyn JA said the following in *Consolidated Diamond Mines of South West Africa Ltd v Administrator, SWA and Another* 1958 (4) SA 572 (A) at 657H–658A:

> "To the extent to which the interpretation of a statute should be based upon surrounding circumstances requiring evidential proof, it would be an interpretation which could operate *inter partes* only. If the leading of

> evidence were to be admissible, no other person, when affected by the statute, could be denied the right to bring other evidence proving other surrounding circumstances or disproving those accepted in a

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> previous case; and in every case the evidence, unless the parties are in agreement as to its effect, would have to be led anew. The result would be that the interpretation of the same provision in an enactment may for good reason differ from case to case. The uncertainty and confusion which would arise from that, needs no elaboration. I consider, therefore, that generally speaking such evidential proof would not be admissible."

An exception to this general rule is where reference is made to the report of a judicial commission of enquiry whose investigations shortly preceded the passing of the statute, but only in order to ascertain the mischief aimed at by the statutory enactment in question (*Attorney-General, Eastern Cape v Blom and Others* 1988 (4) SA 645 (A), 669D).

Counsel for the plaintiffs relied on the remarks of Chaskalson P in *S v Makwanyane and Another* 11995 (3) SA 391 (CC) at 405H where the following is said:

> "[16] In countries in which the constitution is similarly the supreme law, it is not unusual for the courts to have regard to the circumstances existing at the time the constitution was adopted, including the debates and writings which formed part of the process."

The learned President of the Constitutional Court goes on, however, to state the following at 406E:

> "[19] Background evidence may, however, be useful to show why particular provisions were or were not included in the Constitution. It is neither necessary nor desirable at this stage in the development of our constitutional law to express any opinion on whether it might also be relevant for other purposes, nor to attempt to lay down general principles governing the admissibility of such evidence. It is sufficient to say that where the background material is clear, is not in dispute, and is relevant to showing why particular provisions were or were not included in the Constitution, it can be taken into account by a Court in interpreting the Constitution. These conditions are satisfied in the present case."

Counsel for the plaintiffs also referred to *Harris and Others v Minister of the Interior and Another* 1952 (2) SA 428 (A) in which it was held (at 457B-C) that in order to understand the reasons for passing a constitutional Act like the Statute of Westminster it is permissible to refer to the events which led up to such Act being passed, and that these events might throw light on the meaning of the statute.

It is not apparent what the exact nature of the evidence is which the plaintiffs wish to lead to substantiate their cause of action. The pleadings are silent thereon. No obvious facts exist from which the court can deduce that there is evidence of circumstances surrounding the enactment of the Constitution which may cast a light on the meaning to be attached to the term "anyone" or "every person" therein, and more particularly in section 11. Nor do I consider that there is an ambiguity in section 11 of such a nature that extraneous facts may be relevant in the interpretation thereof. Nothing is pleaded in the particulars of claim to indicate that resort should be had to extrinsic evidence to elucidate the content of the section. In these circumstances the remarks of Miller J in *Davenport Corner Tea Room (Pty) Ltd v Joubert* 1962 (2) SA 709 (D) are, in my

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view, particularly apposite and bear quoting in full. At 715G-716E the learned Judge says the following:

> "It is clear from these decisions and from many others which it is not necessary to quote in this judgment that, where the whole contract is not before it, the court will not assign a meaning to particular words or

> clauses thereof at the exception stage if there is room for a contention, *ex facie* the pleadings, that the omitted terms of the contract, whether considered with or without additional evidence of surrounding circumstances, might have a significant bearing on the issue before the Court. The Court's reluctance to decide issues of interpretation in such circumstances has undoubtedly placed an effective weapon in the hands of respondents in exception proceedings. This weapon in the litigant's armoury is frequently used as a shield rather than a sword, if I may borrow from the lore of estoppel cases. When it is properly used as a sword, it is usually fatal to the exception, for it cuts through the tissue of which the exception is compounded and exposes its vulnerability. This is clearly illustrated in cases where the contract is ambiguous, thus enabling the respondent to attack the soundness of the exception by showing that on the contract as pleaded an interpretation adverse to the excipient is reasonably possible, and that extrinsic evidence could resolve the ambiguity in favour of the respondent. The case of *Sacks v Venter*, 1954 2 SA 427 (W), is an example thereof. But where the argument is used as a shield to protect the frail body of the pleading which is being attacked on exception, it is necessary to examine with some care a contention that the whole contract might 'possibly' or 'conceivably' reveal a situation favourable to the respondent, or that evidence of surrounding circumstances might 'possibly' be admissible, and if admissible, might 'conceivably' confound the excipient. It is clearly not correct to say that the Court will never interpret a clause in an agreement on exception, or decide an issue as to the rights of the parties under an agreement, merely because the whole agreement is not before it. The Rules of Court expressly permit of extracts from a written agreement being set out in a pleading. Nor do I think that the mere notional possibility that evidence of surrounding circumstances may influence the issue should necessarily operate to debar the Court from deciding such issue on exception. There must, I think, be something more than a notional or remote possibility. Usually that something more can be gathered from the pleadings and the facts alleged or admitted therein. There may be a specific allegation in the pleadings showing the relevance of extraneous facts, or there may be allegations from which it may be inferred that further facts affecting interpretation may reasonably possibly exist. A measure of conjecture is undoubtedly both permissible and proper, but the shield should not be allowed to protect the respondent where it is composed entirely of conjectural and speculative hypotheses, lacking any real foundation in the pleadings or in the obvious facts."

Although Miller J was dealing with the interpretation of a contract, I see no reason why a similar approach should not be adopted in the interpretation of statutory provisions, including the Constitution, where relief is sought to strike down an Act of Parliament. The defendants are surely entitled to be apprised of the background material on which the plaintiffs will seek to rely, when that material is fundamental to the plaintiffs' cause of action.

I turn to consider the question whether the word "everyone" in section 11 includes the unborn child. It is desirable that some consideration be given to the common law status of the foetus. A word of caution should perhaps first be sounded. In the particulars of claim the plaintiffs allege that the foetus qualifies for protection under section 11 because "the life of a human being starts at conception" and by implication therefore that human beings are from conception a person as envisaged by the said section. This is a *non sequitur*. As pointed

out by Professor Glanville Williams in an article entitled *The Foetus and the Right to Life* (1994) 33 Cambridge Law Journal 71 at 78 "the question is not whether the *conceptus* is human but whether it should be given the same legal protection as you and me".

In *Van Heerden and Another v Joubert NO and Others* 1994 (4) SA 793 (A) the Appellate Division of the Supreme Court (as it then was) considered various dictionary meanings of the word "person" *(inter alia* "an individual human being") and concluded (at 796F) that there is no suggestion in any of these meanings that the word "person" can also connote a still-born child, an unborn child, a viable unborn child, an unborn human being or a living foetus. The court went on, however, (at 797H-798B) to point

out that there are a growing number of jurists who hold the view that the application of *the nasciturus pro iam nato habetur quotiens de commodo eius agitur* rule of the Roman law amounts to predating the legal subjectivity of the foetus. Thus, PJJ *Olivier Legal Fictions: An Analysis and Evaluation (Doctoral Thesis Leiden)* and L M du Plessis *Jurisprudential reflections on the status of unborn life* 1990 TSAR 44 maintain that the foetus is recognised as a legal *persona* and is protected as such. As pointed out by Professor du Plessis, the decision in *Pinchin NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W), in which a person's right to claim, after birth, compensation for injuries sustained *in ventre matris*, was recognised, makes sense only if it is assumed that that person was indeed in law a *persona* at the time when the injuries were sustained.

The status of the foetus under our common law was left open in *Van Heerden's* case (*supra*). The Appellate Division decided that, even if it is to be assumed that a stage has been reached in our legal development where the law recognises the foetus as a legal *persona*, the legislature had no such legal *persona* in mind when it used the word "person" in the legislation there under consideration, namely the Inquests Act 58 of 1959.

There are South African decisions denying the foetus legal personality – see *Christian League of Southern Africa v Rall* 1981 (2) SA 821 (O) 829 *in fin*; *Friedman v Glicksman* 1996 (1) SA 1134 (W) 1140G.

It is not necessary for me to make any firm decision as to whether an unborn child is a legal *persona* under the common law. What is important for purposes of interpreting section 11 of the Constitution is that, at best for the plaintiffs, the status of the foetus under the common law may, as at present, be somewhat uncertain.

I proceed to a consideration of the provisions of the Constitution itself. 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 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 matter goes further than that. Section 12(2) provides that everyone has the right to make decisions concerning reproduction and to security in and control over their body. Nowhere is a woman's rights in this respect qualified in terms of the Constitution

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in order to protect the foetus. This does not, of course, mean that the State is prohibited from enacting legislation to restrict and/or regulate abortion. The State may invoke section 36 for that purpose "to the extent that the limitation is reasonable aud justifiable in an open and democratic society based on human dignity, equality and freedom" and taking into account all relevant factors, including those specified in the section.

Had the drafters of the Constitution wished to protect the foetus in the bill of rights at all, one would have expected this to have been done in section 28, which specifically protects the rights of the child. The right of every child to family or parental care [28(1)(b)], to basic nutrition, health care and social services [28(1)(c)], to protection against maltreatment, neglect, abuse or degradation [28(1)(d)], and to legal representation [28(1)(h)], as well as the provision in subsection (2) that a child's best interests are of paramount importance in every matter concerning the child, would have been particularly apposite to protect the foetus as well. Yet there are clear indications that the safeguards in section 28 do not

extend to protect the foetus. A "child" for purposes of the section is defined in subsection (3) as a person under the age of eighteen years. Age commences at birth. The protection afforded by subsections (1)(f)(i) and (1)(g)(ii) is dependent on the "child's age". A foetus is not a "child" of any "age". The rights afforded by section 28(1) are in respect of "every child" – ie all children. Yet certain of the rights could not have been intended to protect a foetus; paragraph (f) relates to work, paragraph (g) to detention and (i) to armed conflict. The protection afforded in the other paragraphs of subsection (1) must accordingly also exclude the foetus.

If section 28 of the Constitution, the section specifically designed to protect the rights of the child, does not include the foetus within the ambit of its protection then it can hardly be said that the other provisions of the bill of rights, including section 11, were intended to do so. This conclusion finds further support in the fact that in all the provisions of the bill of rights, other than those in which a specific class of person is singled out for special protection, the rights are conferred on "everyone". Yet in many instances it is clear that the term "everyone" could not have been intended to include the foetus within the scope of its protection. Thus, the right not to be deprived of one's freedom [section 12(1)(a)], not to be detained without trial [section 12(1)(b)], to make decisions concerning reproduction and to security in and control over one's body [section 12(2)(b)], not to be subjected to slavery, servitude or forced labour (section 13), rights relating to privacy and freedom of conscience, religion, thought, belief, opinion, expression, assembly, association and movement [*vide* sections 14, 15(1), 16(1), 17, 18 and 21] and other rights in regard to language, cultural life, arrest and detention (sections 30 and 35) are all afforded to "everyone" and clearly do not include a foetus. To include the foetus in the meaning of that term in section 11 would ascribe to it a meaning different from that which it bears everywhere else in the bill of rights. That, in my judgment, is clearly untenable.

Moreover, if section 11 were to be interpreted as affording constitutional protection to the life of a foetus far-reaching and anomalous consequences would ensue. The life of the foetus would enjoy the same protection as that of the mother. Abortion would be constitutionally prohibited even though the

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pregnancy constitutes a serious threat to the life of the mother. The prohibition would apply even if the pregnancy resulted from rape or incest, or if there were a likelihood that the child to be born would suffer from severe physical or mental abnormality. Abortion in these circumstances has, subject to certain controls, been permissible since 1975, when the Abortion and Sterilisation Act 2 of 1975 came into operation. If the plaintiffs' contentions are correct then the termination of a woman's pregnancy would no longer constitute the crime of abortion, but that of murder. In my view, the drafters of the Constitution could not have contemplated such far-reaching results without expressing themselves in no uncertain terms. For the above reasons, and whatever the status of the foetus may be under the common law, I consider that under the Constitution the foetus is not a legal *persona*.

Counsel for the fourth and fifth defendants have also emphasised the fact that the Constitution is "primarily and emphatically" an egalitarian Constitution [per Kriegler J in *President of the RSA and Another v Hugo* 21997 (4) SA 1 (CC) paragraph 401 and argue that the transformation of our society along egalitarian lines involves the eradication of systematic forms of domination and disadvantage based on race, gender, class and other grounds of inequality (see Albertyn and Goldblatt *Facing the Challenge of Transformation: Difficulties in Developing an Indigenous Jurisprudence of Equality*: an article to be published in 1998 SAJHR). I agree that proper regard must be had to the rights of women as enshrined in section 9 of the Constitution (the right to equality, which includes the full and actual enjoyment of all rights and freedoms and the protection that the State may not unfairly discriminate against anyone *inter alia* on the grounds of sex), section 12 (the right to freedom and security of the person, including *inter*

alia the right to make decisions concerning reproduction and the right to security and control over their body) and the rights in respect of human dignity (section 10), life (section 11), privacy (section 14), religion, belief and opinion (section 15) and health and care (section 27), to which I have already referred within another context. I agree also that to afford the foetus the status of a legal *persona* may impinge, to a greater or lesser extent, on these rights.

It is convenient at this stage to point out that the plaintiffs have framed their cause of action in absolute terms – namely, that the foetus is a person and that the Act must therefore be struck down in its entirety. The particulars of claim do not suggest that there are competing rights and that a balance must be struck between the rights of a woman and that of a foetus. This also negates the alternative argument advanced on behalf of the plaintiffs that the Act is "overbroad" and, if the court is not prepared to strike it down in its entirety, the "objectionable" features thereof, and in particular section 2, should be declared invalid. This is not raised on the plaintiffs' pleadings. It was, however, argued that it was competent for this court to do so under the alternative relief sought. That, however, would be deciding the issue on a cause of action different from that pleaded.

Clearly this is not permissible. The plaintiffs must stand or fall on the case pleaded by them.

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Finally, a brief survey of the law on the status of the unborn child in comparable jurisdictions is useful and instructive. The *nasciturus* rule (or fiction) operates in English and Scots law for the protection of the foetus but only if it is subsequently born alive [*Elliot v Joicey* (1935) AC 209 (BL) at 2331]. In *Paton v Trustees of BPAS* [1978 2 All ER 987 (QB)] a husband sought an injunction against his estranged wife to prohibit her from undergoing an abortion. He sought to do so *inter alia* on behalf of the foetus by invoking the *nasciturus* fiction. The court held that the foetus did not enjoy any protection in law against abortion and that the *nasciturus* fiction could not be invoked to confer such protection. At 989h-j the learned Judge said the following:

> "The foetus cannot, in English law, in my view, have any right of its own at least until it is born and has a separate existence from the mother. That permeates the whole of the civil law of this country . . . and is, indeed, the basis of the decisions in those countries where the law is founded on the common law, that is to say, in America, Canada, Australia and, I have no doubt, in others."

In *C v S* [1987 1 All ER 1241 (CA)] the court of appeal approved and applied the principles in *Paton*'s case. An appeal to the House of Lords was refused. See also *In re F (in utero)* [1988 2 All ER 193 (CA).] Professor Glanville Williams *op cit* at 71-72 sums up the position in English law in the following terms:

> "English law does not try to answer the question when human life begins, but it gives a clear answer to the question when human personhood begins. It begins with birth, which means that the child must be completely extruded and must breathe."

The fourteenth amendment to the Constitution of the United States provides that the States may not deprive any person of life, liberty or property, without due process of law. In its landmark ruling in *Roe v Wade* [410 US 35; L ed 2nd 147] the United States Supreme Court held that a foetus is not a "person" within the meaning of the fourteenth amendment and accordingly does not enjoy a constitutional right to life. The court reasoned that a "person" is not defined in the United States constitution and as in nearly all the other instances where the term is used in that constitution it can only apply after birth, the foetus could not be regarded as a "person" for purposes of the fourteenth amendment. The court also pointed out that if the foetus had a constitutional right to life, it would not have been permissible for the States to allow abortion when the pregnancy threatened the life or health of the mother and that, as abortion had traditionally been permissible in those circumstances, it could not have been intended to

afford the foetus a constitutional right to life.

The further findings in *Roe*'s case in regard to the woman's right to choose to have her pregnancy terminated and the State's legitimate interest in the potential life of the foetus, and the balance to be struck between these conflicting rights, have been the subject of subsequent controversy in the United States. However, the finding that the foetus is not a person and does not enjoy a constitutional right to life has been generally accepted. Professor Dworkin *Life's Dominion* at 110-111, notes that there is near unanimity on this issue:

> "Almost all responsible lawyers, including the political and academic critics of *Roe v Wade*, agree that his decision on that point was correct. . . . Therefore, all those who say that the supreme court should leave the question of abortion to the states to decide as their politics dictate, have in effect conceded that a foetus is not a constitutional person. The legal arguments for that near-universally accepted position are very strong."

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Section 7 of the Canadian Charter of Rights and Freedoms provides that

> "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice".

In *Borowski v Attorney-General for Canada* [(1987) 39 DLR (4th) 73] the Saskatchewan court of appeal held that a foetus was not included within the concept of "everyone" and therefore did not enjoy a constitutional right to life. The court found that there were various reasons to support this conclusion; *inter alia* that Canadian private law has never recognised the foetus as a person in law and the protection of its private law interests have been limited to the operation of the *nasciturus* fiction; that the language of the charter contradicts the suggestion that a foetus is included in the term "everyone" in section 7 in that when the term is used elsewhere in the charter, its context indicates that it could not have been intended to include a foetus; and that it is widely accepted in the United States and Europe that a foetus does not enjoy a constitutional right to life, Germany being the only exception. I shall return to the findings of the German constitutional court.

In *Tremblay*'s case (*supra*) the Supreme Court of Canada had occasion to consider the provision in the Quebec Charter of Human Rights that "every human being has a right to life". The court held that a foetus was not a "human being" within the meaning of this provision and that the operation of the *nasciturus* fiction at common law did not support the contention that it was, but rather provided grounds for the opposite conclusion that a foetus is not a juridical person. The court found that "it would be wrong to interpret the vague provisions of the Quebec Charter as conferring legal personhood upon the foetus".

Professor Hogg, *op cit*, concludes that under Canadian law a foetus is not a person and is not entitled to "a right to life under section 7 or any other right under the Charter".

Article 2(1) of the European Convention on Human Rights provides that "everyone's right to life shall be protected by law". The unsuccessful applicant in the English case of *Paton*, (*supra*), took his case to the European Court of Human Rights, contending that the foetus which he sought to protect enjoyed a right to life under the said article 2(1). The contention was rejected [*Paton v United Kingdom* (1980) 3 EHRR 408].

The exception to this line of authority in England, the United States of America, Canada and the European Court of Human Rights, is Germany. The German constitutional court in a case decided in 1975 (39BVerfGE1) and again in a case decided in 1993 (88BVerfGE203) held that a foetus does enjoy limited constitutional protection under article 2(2) of the German Basic Law (see Kommers *The*

Constitutional Jurisprudence of the Federal Republic of Germany 2 ed 335 *et seq*). Article 2(2) provides that "everyone has the right to life and to the inviolability of his person".

According to Professor Neuman of the Columbian University of Law, in an article in the *American Journal of Comparative Law* Volume 43 (1995) 273, entitled *Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany*, the German constitutional court's approach "reflects the reaction against the contempt for individual life displayed in the

Nazi period as well as the Catholic natural law that provided one strand of the rights orientation in the 1949 Constitution". This fact, and the fact that the legislative history of the German Basic Law shows that the drafters thereof discussed the problem of the constitutional status of the unborn, were considered to be influential in the conclusion arrived at by the German constitutional court, in the Canadian case of *Borowski* (*supra*) at 748. The Canadian court relied on these distinguishing features in concluding that the Canadian Charter did not bear the same meaning as the German Basic Law.

These two German cases in any event do not support the contention advanced by the plaintiffs in their pleadings in the present case that section 11 of the Constitution confers an absolute right to life on the foetus. Firstly, in the 1975 case the court did not hold that a foetus is a "person", but that foetal life has an "independent legal value" worthy of protection (Kommers *op cit* at 346). Secondly, in both the 1975 and 1993 cases the German constitutional court also gave express recognition to the constitutional protection of the woman's right to her own dignity, physical integrity and personal development and sought to strike a balance between the State's obligation to protect foetal life on the one hand and its obligation to protect the autonomy of the woman on the other (Kommers *op cit* at 338 and 352).

I have accordingly come to the conclusion that the particulars of claim to make out a cause of action and the exception must succeed.

Counsel were in principle in agreement that the case involves a matter of public interest and that costs should not be granted in favour of any party. Counsel for the first, second and third defendants, however, left the issue of costs in the hands of the court as they were unable to obtain instructions from their clients on this aspect. I consider that it is an appropriate case in which no order as to costs should be made.

In the result, the following order is made:

1. The exception is upheld.
2. The plaintiffs' claims are dismissed.
3. No order is made in respect of costs.

For the excipient:

WH Trengove SC instructed by the State Attorney

For the respondent:

E Bertelsmann SC instructed by *Brink Bonsma & De Bruyn*, Pretoria

Cases referred to

Southern Africa

Footnotes