The Emperor Has No Clothing

Keith Matthee SC

"At times it is not an easy read, but I believe it is a crucial read if we are to begin to regain our soul as a nation."

- Debra Linde, "First Applicant"

"(Unborn human life) is developing as a human being and not towards being a human being."

- The German Constitutional Court

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Since the last print of this book, the Emperor has made a decision which requires a change to the title of this book. It should be: “The Emperor Is Now Stark Naked”. I was asked to write an op-ed on its callous decision about the plea for help by traumatised parents who wish to bury their children who have died before they reached their 26th week of life in their mother’s womb.

In the op-ed at one stage I write: “Besides the further brutalising and dehumanising of our society, by aiding and abetting the ideology that some human life is more worthy of dignity than other human life, so fundamental to the apartheid regime of the past, in its effect this latest decision by the Constitutional Court is cruel and callous towards already traumatised parents.” The full op-ed has been added to the book in this reprint.

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Details of author

Keith Matthee obtained his BA LLB at the University of Natal. He was admitted as an advocate in 1979. He left law in 1979 for eight years to work for the Student Christian Association and then for the Methodist Church. During this period he worked on various university campuses in South Africa. From 1981 to 1982 he was based at St Aldates, Oxford. In 1987 he obtained a Bachelor of Divinity degree from Rhodes University, majoring in New Testament Studies and Hellenistic Greek.

He returned to the bar as an advocate in 1987. Since 1991 he has served in an adjudicating role in different forums, including serving as an arbitrator, a presiding officer in the Industrial Court, an assessor in the Labour Appeal Court, and on a number of occasions as an Acting Judge in the High Courts of Port Elizabeth, Grahamstown, East London, Mthatha, Cape Town and Gauteng.

He has appeared in all the courts of South Africa, including the Constitutional Court and the Supreme Court of Appeal. In 2002 he was appointed as Senior Counsel by President Mbeki. In 2007 he relocated from the Eastern Cape to Cape Town and for a number of years was a member of the Cape Town Bar. He has done extensive research on the subjective nature of the interpretation of the South African Bill of Rights, by the Constitutional Court Justices. This research is available on his website at www.keithmatthee.com. He also has authored "*The Resurrection - a lawyer's view*", "*Decolonising Jesus*", "*Whose WAY?*" and with his wife, "*One Man, One Woman*".

He married Roslyn Dorrington in 1980. They have two sons, a daughter and four granddaughters. He stays fit by running, marathon horse rides and hoping that the Sharks rugby team will win more finals! He and his wife now live in Greyton. Keith may be contacted at keith@mattd.co.za.

Dedicated to all past and future unborn children and their mothers, and to the three ordinary, brave and exceptional women who made this book a necessity.

"And when Elizabeth heard the greeting of Mary, the baby leaped in her womb."

Luke 1 verse 41

"Do not be afraid or dismayed at this great horde, for the battle is not yours but God's."

2 Chronicles 20 verse 15

"Our lives begin to end the day we become silent about things that matter."

Martin Luther King

The idea behind the title of this book is loosely based on Hans Christian Anderson's folktale, "The Emperor's New Clothes".

Foreword

Almost all of the pregnant girls and women I have worked with over the last some 20 years has involved offering non-judgemental care and love to them and their unborn and born children. All these women and girls come from desperately deprived circumstances, be that physical or emotional, usually both.

Some of them have been overjoyed by their pregnancy, some devastated by the prospect of bearing another child. My calling has never involved judging, only loving all these women at a particularly vulnerable stage of their lives, irrespective of the choice they make.

As I reflect back on these women one of the quotes in this book resonates with me. Contrasting the individualistic and isolated American view of a woman with that of the German Court, Professor Kommers writes that the German Court ***"has a strong community orientation, and it tells the story of human solidarity, a story that tries to join public virtue to liberty, one that speaks of social integration and the wholeness of life."***

All pregnant women are in need of such community support when bearing their child and making decisions about the child. None such more than during her pregnancy and the period immediately after she has given birth, or where she has decided to have an abortion.

Likewise as I reflect on all those babies I have helped the mothers nurture from conception to birth and thereafter, another thought from this book resonates with me. It is encapsulated in the words of the German Court ***"that gestating human life is developing as a human being and not towards being a human being"*** and

from Professor Lourens du Plessis that ***"birth is not the beginning of life: it is simply a drastic switch in lifestyle."***

My calling is to both mother and child. This book helps me draw into sharp focus that central to that calling is the recognition of the life and infinite worth and dignity of both mother and child. Simply seeing unborn children as the contents of a woman's uterus fundamentally undermines this quest. Furthermore, from having been exposed to what modern medical technology can reveal about unborn children, from as early as 7 weeks, this description also simply is wrong. How can a seven week old unborn child with a visible and beating heart, only be the contents of a uterus?

I obviously cannot vouch for the legal accuracy of the argument. Where Keith, Shelley, Roslyn and I are at one is a shared passion for all of human life, especially the marginalised and vulnerable, not least of all pregnant mothers in crisis and their unborn children. The challenge to me as a mother, adoptive mother, foster mother and indeed as a woman, is never to forget the three-fold challenge of Richard Hays highlighted in the last chapter of this book.

At times it is not an easy read, but I believe it is a crucial read if we are to begin to regain our soul as a nation.

Debra Linde

"First Applicant"

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Chapter 1 – Before it is too late

In this book the Emperor is the South African Constitutional Court. Given its positive role in trying to check the abuse of Mr Zuma's rule[1], it deserves the title. In law it is also the Emperor as any decision by it cannot in law be challenged. It is final.

Why then the title of this book, the reader might ask?

In terms of a ruling by it on 21st February, 2018, in effect unborn children are not human life worthy of dignity and it is acceptable to view unborn children as no more than "the contents of a woman's uterus"[2]. (To give context to this ruling, a fetoscopy of a nine week old unborn child can be viewed at https://www.africaapologeticsgateway.com/video)

It gave no reasons for its decision.

The number of unborn children affected by this ruling translates to some 4 250 Jumbo jets, each carrying 400 unborn children, crashing during the period 1998 to the present day. **That is 212 jumbo jets per year, or more than one every two days**. These figures represent the number of abortions since 1998 which the Constitutional Court was confronted with before it made its ruling. As you read this book these Jumbo jets continue crashing, with no end in sight[3].

The Constitutional Court had been asked, not to stop abortions, but to view unborn children as human life worthy of dignity so that the

[1] Mr Zuma was President of South Africa from 2009 to early 2018. His rule was characterized by widespread corruption and abuse of power.

[2] The origin of this description will be explained in chapter 3.

[3] See footnote 17. However, if statistics released subsequent to the application to the Constitutional Court by Mary Stopes and the State are to be believed, at the moment it is in excess of one Jumbo jet per day. Mary Stopes is a business aimed at profitting from abortions.

interests of the pregnant woman in crisis and that of the unborn child could be balanced out against each other.

A few years back an excellent film was made called Amazing Grace. It was about the men and women led by William Wilberforce who eventually succeeded in getting slavery abolished in England and all territories under her rule. It was a long, and at times extremely disheartening and fierce battle. At the end of the day what brought success was an obscure motion moved by an obscure member of Parliament. The motion dealt with the use of flags which ships had to fly when at sea.

By the time those who supported slavery realised that the resolution practically would end slavery, it was too late.

I believe that there have been a number of such cases in the Constitutional Court. Decisions or reasoning which have gone unnoticed because of their seemingly innocuous nature, but which have far reaching consequences for us as a society. Thus for example, a matter dealing with street names and an interim interdict[4]; or an empathetic sounding statement concerning religion by Justice Sachs hidden in a judgment distinguishing the world view of faith and reason, which in effect says faith in God is not based on reason[5].

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[4] See chapters 11 and 12.

[5] Sachs J in Christian Education South Africa v Minister of Education 2000(4) SA 757 (CC) referring to the competing rights as regards corporal punishment argues that they belong "to completely different conceptual and existential orders. Religious conviction and practice are generally based on faith. Countervailing public or private concerns are usually not and are evaluated mainly according to their reasonableness." In these words he declares his own view that reason has no significant role in religious conviction whereas it is central to secular humanism. Leaving aside the fact that this view is in stark contrast to the views of many men and women of "religious conviction", going back to St Paul, having decided that the test he must use includes reasonableness, he then asserts, without furnishing any reasons or evidence for this assertion, that the foundation of one of the conflicting interests which he must balance, does not involve reason whereas the other interest involved is driven by whether or not something is reasonable. Thus at the outset before he even begins to balance the conflicting interests, he

And then of course there is the ruling concerning the life and dignity of unborn children, which is the main subject matter of this book.

As already mentioned, the ruling consists of a sentence with no reasons[6].

The argument in this book is that the probabilities clearly point to a number of things.

In essence my argument is that the probabilities suggest that the Constitutional Court used its freedom to make a specific policy choice condoning the description of unborn children as "the contents of a woman's uterus", whilst it legitimately could have made another policy choice, affirming the life and dignity of the unborn child without excluding a balancing act with the rights of the pregnant woman in crisis[7].

It is my assertion that giving no reasons would appear to have been part of its policy decision. The main effect of this was to close off any future attempt to obtain recognition for the life and dignity of unborn children. (It is striking that this decision was taken without allowing the Supreme Court of Appeal to give input on the issue[8].)

Another result flowing from the Constitutional Court not giving reasons, and indeed from excluding input by the Supreme Court of Appeal, is that there is more chance of the ruling simply going unnoticed. Linked to this is an additional and particularly disturbing possibility, namely that as the applicants in the matter were three

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illustrates his own bias by in effect opining that underlying the teaching in Christian Scriptures, in this case apropos corporal punishment, is faith, not reason.

[6] This will be introduced in chapter 6 as Addendum 3.

[7] I have analysed in depth a number of seminal decisions of the Constitutional Court which clearly demonstrates this freedom of choice the court has when it comes to making policy choices of a moral nature. If readers are interested in this research, they can contact me by means of email. See also footnote 44.

[8] This will be dealt with in chapters 6 and 10.

ordinary women, the Constitutional Court perhaps did not feel it necessary to give reasons as the women had no real power base to protest. If the applicants were high profile political parties or non-governmental organisations, reasons might then have been forthcoming.

Given its decision not to explain itself when it gave its ruling, we simply do not know the answer to the questions raised in the above paragraphs.

The main purpose of this book is to ensure that the Constitutional Court is not allowed to do away with the profound moral issue of the dignity and worth of unborn children and their mothers in crisis without reasons, without anyone noticing before it is too late.

Notwithstanding the huge popularity of the Constitutional Court at the moment, it is my hope that you the reader will approach the evidence and arguments which follow with an open mind, particularly as to whether or not the Emperor has the fine clothes the wider public at this stage thinks it has. At times the material might at first blush come across as too complex for a non-lawyer. I would earnestly encourage you to persevere, for the sake of all unborn children and their mothers, indeed for the very soul of our nation.

And crucially, to do this reading with a heart open to being challenged by the plight of unborn children and their mothers into practical ongoing action, so that South Africa might become a society which reveres and upholds all of human life, particularly the most vulnerable amongst us, and also that we might begin to break the vicious cycle of violence so pervasive in South Africa.

Chapter 2 - Farewell to naïvity

I spied for BOSS[9] in my first few years at Durban University. A product of christian nationalist school education at Grey College, a son and brother to policemen, a year in the South African Defence Force as a 17 year old, my reasoning was simple and uncomplicated. Students at English universities were unpatriotic communists motivated by a desire to destroy Christian civilisation as I knew it. The only reason I ended up at Durban University was because my father was transferred to Durban, where he ended up heading the Murder and Robbery Squad.

It was 1973, and I was 18 years old. Some 3 years later, as Student Representative Council (SRC) President at a conference at Stellenbosch University, the guest speaker was Cabinet Minister Piet Koornhof, I refused to stand up for the singing of Die Stem[10]. It was an emotionally draining protest for me. The anthem seemed to go on forever! I never sang Die Stem again. Indeed I resolved that day never again to sing any national anthem, which I have not.

Once again my reasoning was simple and uncomplicated. I had been lied to by the state and the ruling economic and cultural interest groups of the day. The anthem was key to the manipulation and exploitation of my youthful idealism and patriotism. One of the central reasons for my change, was the Christian rock artist, Larry Norman. In one of his songs[11] he sings –

“and when I was ten you murdered law

[9] Bureau For State Security, perhaps the most powerful of the instruments used by the ruling Nationalist Party to impose apartheid.

[10] The National Anthem of South Africa before the first democratic elections in 1994.

[11] The Great American Novel.

with courtroom politics
and you learned to make a lie sound just like truth
but I know you better now
and I don't fall for all your tricks
and you've lost the one advantage of my youth"

These words go a long way to describe the process I went through from 1973 to the day I did not stand up for the anthem.

This is not the time to dwell on the other influences during this period. Suffice to say that key to my change was the realisation that Jesus was not only my Saviour, but also my Lord. And as Lord He was a very different person to the picture with which I had grown up. Central to this change was the realisation that like Him I had to take all of Scripture seriously, including a prophet such as Amos.

Besides Larry Norman, no one had a greater influence on my picture of Jesus than Martin Luther King[12]. Getting to know leaders of these "communists" at Durban University, also exposed the lie of the state. So for example, after time with Fink Haysom on the SRC, perhaps the main such leader at the time, I saw that he was simply passionate about justice for all, and he even played his rugby hard! This was not the stereotype with which I was raised.

On a far more modest level, the tumult in the country between 1976 and 1994, was reflected in my own life.

Highlights of my life, or possibly lowlights, included a front page Sunday Times confession by me in August 1976 of my spying for BOSS; alienation from my father and brother as a result of the confession; dismissal as a public prosecutor in 1979 for refusing to

[12] Particularly his collection of sermons in "Strength To Love".

prosecute infringements of apartheid laws; being dismissed from the South African Defence Force in 1979 for refusing to do any further camps because of its role in enforcing apartheid (thankfully the State only cottoned on to the idea of jailing such people about a year later); leaving practising law in 1979; and entering ministry for 8 years, when my wife, children and I lived on donations, partially to minimise the benefits I as a professional white person obtained from the economic system in place.

Given the State of Emergency in 1987, I decided to return to the practise of law as an advocate. Central to all my work up until 1994 was representing the poor and marginalised in society, more often than not in the absence of funding. An interesting time in this period was being briefed alongside Advocate Izak Smuts in 1990 to assist Brigadier Gqozo as an advisor in the first year or so of his rule of the Ciskei homeland, which he had assumed as a result of a coup d'état. In this period in the Ciskei the death penalty was outlawed (there were some 13 people on death row at the time), trade unions were legalised, a labour court was established, a public defender was appointed to provide free legal representation in criminal matters and the first justiciable bill of rights was legislated. In terms of this bill, amongst other things, detention without trial was outlawed and Brigadier Gqozo was compelled to stand trial for murder whilst in office.

I was dismissed from this role early in 1991 when I refused to remain quiet in the face of Brigadier Gqozo's increasing abuse of power.

I have given this brief sketch of my journey from 1973 to 1994, to highlight my deep desire for a society where the dignity of all human beings would be affirmed and protected in a manner appropriate to them being created in God's image.

Then 27th April 1994 arrived, and I was elated and full of hope and expectation.

Chapter 3 - Disillusionment

Fundamental to my elation, hope and expectation in 1994 was the Bill of Rights. There had been one in the Ciskei, and meaningful and practical results flowed from it. Undergirding all of this was the affirmation of the dignity, worth and equality of all human beings. What the Ciskei High Court produced in two or so years, not least of all through the judgments of Judge Willem Heath, was somewhat bizarre given that the context was a military dictatorship!

I reasoned that if one could have such positive fruit from a bill of rights where there was no democracy, the sky was the limit where there was a democracy and accountability as regards affirming the worth and dignity of all people.

I did not pay much heed to the reasoning in the early seminal decision where the Constitutional Court outlawed the death penalty[13]. I had been a member of The Abolition of the Death Penalty Society since the 1980s, and along with Izak Smuts I had convinced Brigadier Gqozo to abolish the death penalty. So I was overjoyed by Justice Chaskalson's reasoning that, amongst other things, the equality provision in the Bill of Rights did not permit one part of the country, the Ciskei, not to have the death penalty whilst the rest of the country retained the death penalty.

It was only some 22 years later that I had cause to scrutinise the reasoning in that decision of Justice Chaskalson and his fellow justices of the Constitutional Court. Had I done that in 1995 I suspect my joy would have been tempered. The reason for this will emerge later in this book.

[13] S v Makwanyane And Another 1995 (3) SA 391 (CC) - hereafter "the death penalty matter".

The one thing which is certain about practising as an advocate, is that one has very little control of the direction of your practice. Thus for me, from a practice where for a number of years I did nothing else other than bill of rights litigation, in 1995 my practice took me in other directions.

However in 1998 I was approached to be part of a team led by Advocate Bertelsmann SC, now a retired judge, concerning the constitutional right to life and dignity of unborn children. This for me was to be the first of three appearances in High Courts, and on two occasions making written submissions to the Constitutional Court, in an attempt to have the courts affirm the dignity and worth of unborn children. All these attempts were unsuccessful. But I get ahead of myself.

As I read the 1998 judgment[14] a questioning process began, the result of which is this book.

Since my fuller conversion in 1976, in my own inadequate way every major life decision has been geared towards trying to help make South Africa a country where the dignity and worth of all human life, particularly the vulnerable and powerless, was affirmed and protected. That was central to my involvement in the 1998 case. One simply does not get more vulnerable human life than unborn children.

The description of unborn children in the abortion act[15] filled me with outrage. Unborn children were infinitely more than "the contents of a woman's uterus."

And yet the 1998 judgment used the concept of dignity to defeat our

[14] Christian Lawyer's Association v Minister of Health 1998 (4) SA 1113 (T).

[15] Choice On Termination of Pregnancy Act 92 of 1996 – this euphemistic description of abortion is identical to the equivalent Act in East Germany, prior to its unification with West Germany - hereafter this Act will be referred to as "the abortion act".

arguments. Other concepts it used to justify its finding that unborn children were not human life worthy of dignity were freedom and equality. All these concepts I had been overjoyed about being included in the Bill of Rights. The problem was that the court could only see the pregnant mother, and not also the separate human life in her.

On reflection, the approach we took in the 1998 matter did not encourage the judge to see that two human lives were involved, both very vulnerable, and in the mother's case often very broken. During argument we did try and persuade the judge that despite how we had presented the case, it was still open for him to see the matter as a balancing act between that of the mother and that of the unborn child.

On technical grounds, he refused to accept our invitation. Thus the only focus of the judgment was on the dignity, freedom and equality of the pregnant woman. The unborn child remained no more than "the contents of a woman's uterus."

It was at that stage that I began to have doubts about looking to a bill of rights for the moral transformation of South Africa, or indeed any society. I was reminded of one of Martin Luther King's sermons, "Transformed nonconformists." In it he argued that it was not sufficient to be a nonconformist when it came to matters like justice, one also had to be transformed inwardly. His wisdom was that laws cannot change the hearts of people, they can only restrain heartless people.

And yet I still believed and hoped that when the plight of unborn children in South Africa came before the Constitutional Court, using the lens of *ubuntu*, they would come to the assistance of unborn children whilst at the same time being sensitive to the dignity of the pregnant mother. I had to wait some 20 years for a decision by the Constitutional Court.

Chapter 4 - "An evil of gigantic proportions"

Both I and the team I now led received another blood nose in 2002, from another judge. Although the focus of that matter was the need to give assistance to girl children before and after a decision by her to have an abortion[16], the trial judge of his own accord used the opportunity to repeat the essence of the 1998 judgment.

The organisation which had briefed me decided not to appeal the judgment.

As the numbers of aborted unborn children grew after the 2002 judgment, (some 1, 637 544[17] between 1998 and 2017), so my sense of disquiet about the purported transforming value of the Bill of Rights grew. However, I kept reminding myself that the Constitutional Court had not yet applied its mind to the issue. Until it had, I knew that the plight of the unborn child and the possible refuge they might find in the Bill of Rights, would not let me go.

In this regard, the first problem was for a person to be convicted to the extent that she would be prepared to take a risk on behalf of unborn children. This risk embraced possible vilification by means of, amongst other things, caricature by people very influential in the popular press. And then of course there was the significant risk of exorbitant legal costs. Although my attorney, Peter Le Mottée, and I throughout made it clear to all and sundry that we would not charge,

[16] In terms of the abortion act a girl child can have an abortion without the knowledge of her parents or a guardian.

[17] The Health Department was not able to provide statistics, thus these figures were extrapolated from "Abortion statistics and other data – Johnston's Archive", compiled by Wm Robert Johnston and used in the cases brought before the Constitutional Court, referred to hereafter. In terms of the abortion act the department is compelled to keep statistics. The department at that stage was either failing in this duty or refused to give us the statistics because of the sheer numbers involved. See footnote 3.

even for our disbursements, in the event of a legal challenge failing there was always the risk of being ordered to pay the legal costs of whoever opposed it. As it turned out, when it did eventually get to court again, the Minister of Health asked the court to order that the applicants pay the state's costs, even though this was not usual in this type of court action. But once again, I get ahead of myself.

We only managed to get a final decision from the Constitutional Court on 21st February, 2018. How we got there will be told in the following chapters.

A profound experience for me in the years leading up to that final decision in 2018, was my exposure to the prevalence in South African society of an "evil of gigantic proportions"[18], the rape of girl children.

During one of my stints as an acting judge in the Eastern Cape, I found myself presiding in five consecutive rape trials where the victims were all 7 years of age and under. The one exception was a teenager who was severely mentally disabled.

By the time I got to the fifth matter I was in need of counselling from my psychologist wife. The examination, and particularly the cross examination, of the victims was emotionally harrowing. In at least one of the matters the rapist was the father.

I was told by my colleagues on the bench that my rape case load was not unusual for Eastern Cape judges. When I got to the fifth matter I decided to instruct the South African Police to furnish me with statistics for the Eastern Cape before I passed sentence.

The evidence was frightening. On average about every third day

[18] SvDayimani, Case No:CC12/2007,The High Court of South Africa (Eastern Cape Division),Grahamstown,26 September 2007.

during a two and a half year period there had been a report to the South African Police Services of the rape of a girl 15 years old and younger. On average, for the same period, every approximately 16 days there had been a rape report involving a girl of 5 years old and younger. These figures only represented matters which were in fact reported to the South African Police Services.

Truly frightening evidence was that for the period January through to June 2007, in the Eastern Cape, only 28 % of reported matters reached the Courts and of those there was only a conviction rate of 3.6 %.

In that judgment, after reflecting on the statistical evidence, I concluded: "I have an aversion for adjectives and exaggeration, but in the light of the statistics highlighted above I can without fear of contradiction state that our Province and indeed our Country faces an evil of gigantic proportions especially when it comes to the barbaric dehumanisation and brutalisation of girl children by means of rape."

Some years later, whilst acting as a judge in Cape Town, I found out that this evil was not only rampant in the Eastern Cape[19]. The statistics for the Western Cape were equally horrific. And there was no reason to believe that it was any better in any other part of South Africa.

What I found particularly disturbing in the Eastern Cape matter where I asked for evidence, was that the Sunday Times newspaper sent an investigative journalist to the Eastern Cape town where the rape had been committed. In that case the victim was 5 years old. I had sentenced the rapist to life imprisonment.

The journalist interviewed various members of the community where

[19] GK vs The State A05/2013 , in which I wrote a dissenting judgment that a man who forced a very young girl to perform oral sex on him also deserved the maximum sentence of life. In it similar statistics are again highlighted.

it had happened. The response when asked about the sentence, was that it was too harsh as the rapist was a good builder.

I had just completed reading Noel Mostert's history of the Frontier Wars, titled "Frontiers". One of the things that had struck me in it was that unlike the English, Zulu or Boer warriors, Xhosa warriors did not target women and children. How then, I asked myself, had such a community, which was at the centre of all the Frontier Wars, been transformed into a community which was not outraged by the rape of a 5-year-old girl?

I rationalised that perhaps the journalist had been selective, for the sake of sensation.

Of course in "Frontiers" the economic, cultural and political structural dehumanising evil, reaching its zenith in the period 1948 – 1994, is already very apparent. However, generations of men, including the Mandela generation, at the receiving end of this all embracing dehumanising evil of colonialism and apartheid, would have been outraged by the rape of girls.

To me, confronted by these statistics, the very soul of our nation was in peril. The problem was far more profound than structural inequality and oppression. We had become a society where some human life was worth more than other human life. We had become a society which objectified others.

How else could one explain the mass rape of young girls, the murdering of thousands of people, often for a few rand, rampant violence against women, not least of all by men in high places who continued to be kept there by the electorate, the treatment by the Gauteng Health Department of people with mental health problems,

leading to the humiliating death of many of them[20], the carnage on the roads, violent and abusive language in an institution such as Parliament? The examples are endless.

Throughout this questioning process, the conviction grew that the most dehumanising and brutalising part of us as a society, was our describing unborn children as merely "the contents of a woman's uterus" so that we could dispose of them before they become an added burden to us. (In the final chapter we will see that in effect this was one of the Minister's arguments as to why an unborn child should remain no more than the contents of a woman's uterus.)

Whether this objectification of unborn children was a cause or a result of the all pervasive violence in South Africa, was, and remains, unclear to me. Perhaps it is both. What is clear is that underlying the horrific rape and abortion statistics, and indeed the contemptuous treatment of people with mental health problems, is the objectification of human life – of the mind set that some human life is worth more than other human life.

I became convinced that the increasingly violent tide in the life of our nation could not be turned whilst, for expedient reasons, we saw unborn children as no more than "the contents of a woman's uterus." (In this regard an interesting study will be to examine the soul of East Germany, where it would seem our parliament got the description of the abortion act, prior to its unification with West Germany – see footnote 15.)

[20] Referred to as the Esidmeni scandal, after a commission of enquiry in 2017, a judge ordered the Gauteng Provincial government to pay more than R180 million in damages to families of at least 144 psychiatric patients who he said died of negligence after being moved to unregistered facilities in early 2016. About 1 300 psychiatric patients were shifted from a unit of the Life Healthcare Group to charities as part of cost-cutting measures by Gauteng's health department, sparking public outrage. The hearing was televised. The testimony of many relatives was heart rending.

Whilst this conviction grew, no high profile person or institution willing to take the risk that I referred to at the beginning of this chapter, was to be found. In 2016 three unexpected applicants presented themselves.

Chapter 5 – Three ordinary, brave and exceptional women

Fighting for the life and dignity of unborn children is like trying to walk through a mine field.

There are people who have hearts of flesh when it comes to unborn children, so much so that they fear that giving any recognition to the agony of the pregnant mother in crisis will further endanger the fragile existence of unborn children.

There are people with hearts of flesh when it comes to the pregnant mother in crisis, so much so that they fear that giving any recognition to the unborn child will compound the agony of the pregnant mother.

There are the heartless ideologists on both sides. For them all that is important is that their belief system prevails. The strategy of both sides is similar. Caricaturisation, demonisation and over simplification of the issues.

And then there are the merciless profiteers who will use any argument and misinformation to ensure they get good returns for their shareholders. It is difficult to find a more despicable way of making money than exploiting women in crisis and killing unborn children. To their credit, Germany has recognised this and criminalised the commercialisation of abortion.

Scripture's imperative is clear. We must have hearts of flesh to all women in crisis, whether or not they have an abortion, whilst at the same time affirming the Psalmist's words that it is God who knitted us together in our mothers' wombs. Thus unborn children, like the rest of humanity, are of infinite worth and value in God's eyes.

To be true to this imperative a litigant was needed who embraced this imperative and who also was prepared to take all the risks involved, including being demonised, caricatured, and of course the obvious financial risks. Finding such a person proved to be a very difficult and disillusioning exercise.

After about a year of waiting, a friend who shared our convictions, made a passing comment. Why not see if there were not some "ordinary" women who felt strongly enough to take the risk for unborn children and their mothers. This suggestion immediately made sense to us, not least of all as we reflected on how Jesus used ordinary men and women, not the high profile and "important" in society.

Once our eyes were opened to this option, it did not take long before such women presented themselves. Debra Linde, who had left her job as a pharmacist to care on a full time basis for mothers and children at risk. Shelley Loots, who as a doctor more often than not found herself caring for women in crisis and delivering their precious children. And my wife Roslyn, who as a psychologist knew the struggles pregnant women in crisis go through, both before and after a decision to abort.

All three of them were not activists, but simply women and mothers who had a profound awe for all of human life, whilst at the same time knowing that at times tough decisions and compromises needed to be made[21]. There was not a hint of self righteousness or of judgmentalism in any of these women, only a deep love for women and their unborn children.

[21] There is a more detailed description of these three women in Case No 37801/2015 referred to in footnote 23 in chapter 6.

Not being activists by nature, taking the risk involved did not come naturally to them. Thus although “ordinary”, they were indeed brave and exceptional women!

Chapter 6 - The law is an ass!

In a delightful extract from Charles Dickens' "Bleak House", we read: "The one great principle of the … law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble."

Having found Debra, Shelley and Roslyn, that monstrous maze in a nutshell was as follows.

The normal route would be to start in a High Court. I accepted that whatever the decision of the High Court, the losing party would appeal. Usually such appeal would end up in the Supreme Court of Appeal, in Bloemfontein. Thereafter, in a matter such as ours which required a constitutional finding, the final court of appeal would be the Constitutional Court.

Such a procedure could take many years, particularly if any party involved in the matter at any stage did not act with a sense of urgency. As will become apparent there was no sense of urgency from the Minister, nor the High Court nor indeed the Constitutional Court. But once again, I get ahead of myself.

However, the law does allow for direct access to the Constitutional Court, where urgency and "the interests of justice" warrant it. Thus recently, for example, political parties and non-governmental organisations have been granted direct access on issues touching on

political and economic issues. One of the main reasons why the Constitutional Court is reticent to grant such direct access is that before it makes a ruling it wants the benefit of the input from the other courts, not least of all the Supreme Court of Appeal.

We decided to apply for direct access to the Constitutional Court. Our argument was two-fold.

Firstly, if after argument the court agreed with us that unborn children were indeed human life, anything more urgent was unimaginable. Also, given the complete vulnerability of unborn children, the interests of justice screamed out for direct access. Secondly, two High Courts had already pronounced on the issue. Furthermore, in a matter where the issue had not been specifically addressed, the Constitutional Court had nevertheless felt free to express a view (this case will be dealt with in chapter 9).

The Constitutional Court promptly denied direct access, but qualified it by saying that "it is not in the interest of justice to hear it at this stage"[22]. This was lawyer talk telling us it wanted us to go the normal route.

We then immediately re-drafted the papers for a hearing in the High Court, and filed them with the High Court in Johannesburg. The time period between our filing of the papers and the hearing of the matter, was 12 months.

The matter was heard on 24th October 2016. The judge reserved judgment. After a number of requests about when she was going to hand down judgment, the judge produced her judgment on 15th September 2017, some 11 months after the matter was argued[23].

[22] Addendum 1.

[23] Linde and Two Others v Minister of Health, Gauteng Local Division, Johannesburg with Case No 37801/2015 - this will be referred to as the Modiba judgment.

She dismissed our application. Her judgment failed to address significant aspects of our arguments.

An option open to us at this stage, was once again to apply for direct access to the Constitutional Court to have our appeal heard by the Constitutional Court without it first going to the Supreme Court of Appeal, in Bloemfontein.

We filed such an application with the Constitutional Court on 9th October 2017[24]. Our reasons were the same as before, with the additional reason that now the Constitutional Court would have the benefit of a third High Court judgment.

Our reasoning was that we had nothing to lose by once again trying for direct access. In any event, given the nature of the relief we were seeking we still had a deep conviction that nothing could be more urgent, nothing could be more demanded by the interests of justice, than that the Constitutional Court come to the assistance of the most vulnerable human life in South Africa. I also personally consulted with one of the most experienced Constitutional Court practitioners before we launched this application for direct access. He confirmed my view that such an application made sense.

We reasoned that at worst, the Constitutional Court would refuse and say that we first had to go to the Supreme Court of Appeal in Bloemfontein. At best it would grant direct access, and so the monstrous maze would be simplified.

Seven months later, on the 21st February 2018, the Constitutional Court ruled that the argument that an unborn child is life worthy of

[24] Addendum 2 - for the reasons set out in chapter 7, and not to unnecessarily burden this book, I have only included our submissions.

dignity, constitutionally had no merit. In effect that as a society it was okay for us to see unborn children as no more than the contents of a woman's uterus. As previously mentioned, it gave no reasons for this ruling[25].

As will be seen in chapter 10, one of the effects of this ruling was for the Constitutional Court to deny itself the benefit of first having input from the Supreme Court of Appeal before it made its final ruling. This thus flew in the face of its earlier refusal, obviously partially based on its desire to have input from other courts before it made its decision. And, as also argued in chapter 10, this is where it was conscious of the Supreme Court of Appeal possibly having a view different to its own. This all without giving reasons.

My response ranged from numbness, to incredulity, to a feeling of helplessness, to rage. Combined with the picture in my mind of millions of unborn children simply having been abandoned by the Constitutional Court as no more than the contents of a woman's uterus, it was the seeming arrogance involved which produced the rage. The arrogance of using its power, which in law cannot be challenged, not to give reasons and of choosing not to first get the input of the Supreme Court of Appeal before it made its decision.

Never have I been so convinced that the law indeed is an ass!

[25] Addendum 3 [The ruling was: "The Constitutional Court… has concluded that the application should be dismissed as it bears no reasonable prospects of success."].

Chapter 7 – Why the inconsistency?

The choice by the Constitutional Court not to give reasons as to why in effect it was happy that unborn children were no more than the contents of a woman's uterus, at one level makes my task easier, but at another level makes my task impossible.

On the one hand I safely can assume that they carefully considered each of our submissions on their own merits, and found they had no merit. I thus can choose which submissions I want to highlight, without fear of being accused of being selective or failing to highlight the Minister's arguments.

On the other hand, the absence of reasons makes it impossible for me to challenge their reasoning. Thus for example, it is not possible for me to know whether when they found that our arguments had no merit, they had in mind any particular arguments of the Minister, or indeed of the Modiba judgment[26].

For a court which proudly claims to be an instrument for transformation and transparency, this is a fundamental blow to the right to a meaningful hearing for Debra, Shelley and Roslyn, and to millions of past and future unborn children.

With these qualifications in mind I now turn to the question of what actually was happening when the Constitutional Court made its ruling. Did it grapple with the profound and complex moral issues at play, mindful of the full context of the arguments? Or was the ruling merely a pragmatic policy choice, or a policy choice reflecting its own undeclared moral outlook? To answer this I will rely only on its own

[26] *Inter alia* for this reason, in Addendum 2, I have simply attached the submissions of the applicants to the Constitutional Court.

past judgments and our submissions which it had before it, when making its decision.

A good place to start is the death penalty matter.

One of the arguments by those supporting the retention of the death penalty, was that it was an issue which should be decided by Parliament, not the courts. Chaskalson P[27], supported by the other ten justices of that court, made it clear that during the negotiation process leading up to the adoption of the Constitution, two issues were left for the Constitutional Court to decide on. These were the **death penalty** and **abortion**, the latter by necessary implication involving how the court should view unborn children. (In addition Justices Mahomed, Didcott, Kentridge and Kriegler in the death penalty matter implied that whether or not unborn children were life as envisaged by the Constitution, still had to be decided[28]).

Chaskalson P thus stated that as the Constitution was silent on the death penalty, it was for that court, using the Bill of Rights, to decide whether or not the death penalty was consistent with the society envisaged by the Bill of Rights. By necessary implication the same process would have to be followed when the issue of how unborn children should be viewed came before the court[29].

The Constitutional Court duly found that the death penalty was an anathema to the society envisaged by the Bill of Rights. Unlike in their decision that unborn children were not human life worthy of dignity,

[27] The first head of the Constitutional Court was called The President.

[28] Justices Mahomed at [268], Didcott at [176], Kentridge at [193] and Kriegler at [208] in the death penalty matter.

[29] See also *Ex parte* Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa, 1996(4) SA 744 (CC) paragraphs 59 – 62, where the issue of abortion in the Constitution is left open by the Constitutional Court – see Footnote 31 explaining the relationship between the Interim Constitution and the Constitution.

all eleven justices gave lengthy reasons for their decision that convicted murderers must be accorded dignity.

The obvious question is why the inconsistency? In 1995 it specifically found that these two profound moral issues had been left by the politicians for the Constitutional Court to grapple with in the context of the Bill of Rights and the society it envisaged.

Any reading of the eleven judgments in the death penalty matter leaves no doubt about the enormity of the moral issues facing the justices. Whether or not one agrees with their conclusion, it simply is not an option to argue that they did not grasp and grapple with the profound moral questions before them.

There is not even a hint of such insight or grappling with the issue in their ruling that unborn children are not life worthy of dignity. There is no attempt at justifying its view that the society envisaged by the Bill of Rights is okay with unborn children being seen as no more than the contents of a woman's uterus.

One obvious possible conclusion is that the court simply made a policy decision and felt it safest to use its power not to give reasons. A second possible conclusion is that because the three applicants were women without a power base, it was a safe option.

Another possibility is that our submissions were so poor that they did not warrant reasons.

Before you, the reader, come to any conclusion, let me set out the essence of our submissions to the Constitutional Court.

Chapter 8 - What the Constitutional Court found to have no merit

In our papers before the Constitutional Court asking for direct access to have our appeal heard[30], we presented the court with the following foundation for our request that it should declare unborn children human life worthy of dignity in terms of the Constitution.

At paragraph 20. b. xi. of Addendum 2 we stated: "The Constitution is silent about the constitutionality of abortion. It is thus for our courts to make a constitutional normative value choice in this regard as was done in S v Makwanyane and Another (the death penalty matter)."

As seen in the previous chapter, this assertion by us was supported by Chaskalson P's reference to the history leading up to the adoption of the unqualified right to life provision in the Interim Constitution, as it applies to the death penalty and abortion[31]. (We also have seen in footnote 29 that the issue was consciously left open again in 1996, in terms of the Constitution.) Similarly we have seen that Justices Mahomed, Didcott, Kentridge and Kriegler in the death penalty matter also implied that the decision concerning the constitutional value of unborn children must still be taken by the Constitutional Court sometime in the future.

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[30] Addendum 2.

[31] The first Constitution negotiated by the parties and implemented in 1993, is referred to as the Interim Constitution. The Constitution now in place is referred to as the Constitution. It has been in place since 1996. The wording of the right to life and dignity in the Interim Constitution and the Constitution is in effect identical. Whereas "Every person" is used in the Interim Constitution, "Everyone" is used in the Constitution. Arguably a cementing of the dignity provision is found in the Constitution, where in addition to the right to have their dignity respected and protected, this is preceded by "Everyone has inherent dignity …. ." The full text of the Constitution is, "10 **Human dignity** - Everyone has inherent dignity and the right to have their dignity respected and protected. 11 **Life** – Everyone has the right to life."

At paragraphs 7, 8 and 9 of Addendum 2 the justices of the Constitutional Court were alerted to the death of the undisputed figure of an annual figure of 73 614 unborn children. Throughout our papers the justices were invited to use the lens of *ubuntu* when deciding on what constitutional value should be placed on the lives of unborn children and that they were more than "the contents of the uterus of a pregnant woman".

At paragraph 29 the justices were alerted to the position in Germany where the national conversation about how to balance out the conflicting rights of the pregnant woman and the life within her, presupposed an acknowledgment by all parties that unborn children were human lives worthy of dignity, and that the state has a duty to protect the life of the unborn child at all stages of pregnancy[32].

At paragraph 31 reference was made to the words of the late Chief Justice Mahomed in the death penalty matter: *"[268] In the first place, (the death penalty) offends section 9 of the Constitution, which prescribes in peremptory terms that 'every person shall have the right to life'. What does that mean? What is a 'person'? When does 'personhood' and 'life' begin? Can there be a conflict between the 'right to life' in section 9 and the right of a mother to 'personal privacy' in terms of section 13 and her possible right to the freedom and control of her body?....[269] It is, for the purposes of the present case, unnecessary to give to the word 'life' in section 9 a comprehensive legal definition which will accommodate the answer to these and other complex questions. Whatever be the proper*

[32] The relevant provisions in the German Constitution are: Article 1(1): Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. Article 2 (2): "Every person shall have the right to life and physical integrity." These provisions are in substance the same as the equivalent provisions in our Bill of Rights.

resolution of such issues, should they arise in the future, it is possible to approach the constitutionality of the death sentence by a question with a sharper and narrower focus … ".

At paragraph 32 the Constitutional Court was alerted to the arguments of retired Constitutional Court Justice Ackerman, who was part of the Constitutional Court in the death penalty matter. We stated: "It is respectfully submitted that the learned judge erred in not having any regard to the scholarly contribution of retired Constitutional Court justice, L Ackerman, in **Human Dignity: Lodestar for Equality in South Africa** (2012, Cape Town: Juta Publishers), referred to by the Applicants in their submissions, more particularly:

a. that German dignity jurisprudence is singularly important for a proper understanding of dignity and its application to gestating human life under the South African Constitution;

b. his argument that *'certain aspects of human dignity pre-date birth and that the Constitution (and not the scientist) must ultimately determine when the various aspects of human dignity, guaranteed by the Constitution, begin and cease';*

c. his argument that *'human dignity accrues to human life, regardless of the stage of development of this life and* (relying on the German Court) *'that gestating human life is developing as a human being and not towards being a human being'*; and

d. his caution that if the Constitution does not protect human beings as a species, and not merely as individual human beings, there will be the ever present danger of relativising the concept of human dignity and the right to life flowing from it, resulting in human dignity being launched on a slippery slope that has no non-arbitrary restraints."

The question which arises is why the Constitutional Court, faced *inter alia* with the above, not least of all the reasoning of Chaskalson P that the negotiators adopted the 'Solomonic solution', when it came to the death penalty and abortion, of not spelling it out in the Constitution but leaving these issues for the Constitutional Court to make a decision, made such a profound moral choice without giving reasons for their choice. This arises particularly as it is clear from Chaskalson P's judgment that from the outset of negotiations leading up to the adoption of the Interim Constitution, there were and are deeply held and mutually exclusive convictions in the wider community on the issue of abortion, and by necessary implication, the constitutional value to be attached to unborn children.

Furthermore, there simply is no indication as to why it had no regard to the opinion of the German Court[33], the words of the late Chief Justice Mahomed where he clearly alludes to the complexity of the moral choice to which the Constitutional Court would still have to apply its mind, and the clear and strong views of retired Constitutional Court justice, Laurie Ackerman.

At one level, absent reasons for its decision, particularly faced amongst other things with what is set out above, this ruling by the Constitutional Court at best can be described as arbitrary. More probable is that it made a policy choice, and for reasons only known to it, thought it best not to say why it made such a choice.

[33] See chapter 14.

Chapter 9 - Issue pre-judged by the Constitutional Court?

With my argument in mind that a policy choice was made, a revealing decision is the matter of **H and Fetal Assessment Centre**[34] (hereafter the Fetal Assessment matter), decided some two years before the unborn child decision by the Constitutional Court.

In this matter the Constitutional Court had to decide whether a boy born with Down Syndrome had a claim for damages based on the alleged wrongful and negligent failure of the Fetal Assessment Centre to warn his mother that there was a high risk of him being born with that condition. His mother alleged that had she been warned, she would have chosen to undergo an abortion. Whether the unborn child was life worthy of dignity, in terms of the Constitution, was not a question before the Constitutional Court in this matter. In other words, no argument was presented to the court on the issue. Furthermore, possible interested parties, for example women such as Debra, Shelley and Roslyn, and anyone else on behalf of the millions of past and future unborn children, were not given an opportunity to make submissions to the court on the issue.

Nevertheless in the course of the judgment, Justice Froneman, who wrote the judgment on behalf of his fellow justices of the Constitutional Court opined as follows:

"[59] … Today, having regard to the fundamental right of everyone to make decisions concerning reproduction (section 12(2)(a) of the Constitution) and to security in and control over one's body (section 12(2)(b) of the Constitution), the harm may simply be seen as an

[34] H and Fetal Assessment Centre CCT 74/14.

infringement of the right of the parents to exercise a free and informed choice in relation to these interests…[61] The harm to the parents,…, manifested itself only when the children were born and the unwanted financial burden to the parents became apparent, apart from the loss of personal choice that is now evident under the Constitution… [62] When a medical expert negligently fails to inform the mother that her child will be born with a congenital disability, this deprives the mother of an opportunity to make an informed choice to terminate the pregnancy… [71] … For a separate claim against the parents or mother (for not choosing an abortion despite being told of the potential disability), the child would have to show that it was wrongful and negligent for the mother not to have an abortion while being aware of the disability before giving birth. This might prove difficult having regard to the parents' (particularly the mother's) right to a free and informed choice in relation to reproduction." (Four of the justices in this matter were also part of the ruling of the Constitutional Court in the unborn child matter.)

In these extracts it is clear that Justice Froneman and his fellow justices assumed that the only articulated right in the Constitution was that of the mother to make an informed choice about an abortion. The Court in effect also assumed that abortion was a form of contraception by linking the informed choice about an abortion to the right to make decisions concerning reproduction.

At no stage in these extracts is there any acknowledgment of the value choice which still needed to be made by the Constitutional Court as highlighted in the extracts from the death penalty matter by Chaskalson P and Justice Mahomed. There also is no recognition of Laurie Ackermann's and the German Court's approach to unborn children.

As the issue was not before the Constitutional Court, and thus not argued, the only reasonable conclusion one can arrive at is that the extracts from the Fetal Assessment matter were underpinned by unexpressed assumptions, personal worldviews and/or a policy choice by the Constitutional Court that an unborn child was not life worthy of dignity in terms of the Constitution.

This conclusion is borne out by their ruling in the unborn child matter. From their perspective the probabilities suggest that there was no need to give reasons because a policy decision had been made by the Constitutional Court, dating back at least to the Fetal Assessment matter, that it would brook no challenge to the right of a woman to an abortion. Fundamental to such a policy decision was the assumption that unborn children should not be regarded as life worthy of dignity in terms of the Constitution. Furthermore, for reasons only known to themselves, the probabilities suggest that it simply made no sense to them to give reasons after the fact.

Chapter 10 - What is good for the goose...

For other reasons it also is instructive to compare the approach of the Constitutional Court in the Fetal Assessment matter to that of the unborn child matter.

As referred to in the previous chapter, in the Fetal Assessment matter the Constitutional Court had to decide whether a boy born with Down Syndrome had a claim for damages based on the alleged wrongful and negligent failure of the Fetal Assessment Centre to warn his mother that there was a high risk of him being born with Down Syndrome. His mother alleged that had she been warned, she would have chosen to undergo an abortion.

In dealing with the matter, the Constitutional Court traversed a decision by the Supreme Court of Appeal[35] (hereafter "Stewart"). (Given the profound moral questions raised in these matters, and the fundamental difference of opinion between the two courts, I will give lengthy quotes from both judgments to ensure that justice is done to both the courts.)

In Stewart the Supreme Court of Appeal stated: "[15] The nature and extent of the debate that has been raging is apparent from the cases and articles referred to and many more. The debate illustrates that for every argument there has been a counter argument and vice versa and there are hardly novel contentions being raised. Like Omar Khayam I have heard 'Great Argument About it and about: but evermore Came out by the same Door as in I went'. In view of the conclusion that I have arrived at I do not think it necessary to evaluate all the arguments. I intend to refer to the most significant issues in the

[35] Stewart and Another v Botha and Another 2008 (6) SA 310 (SCA).

debate only to demonstrate the kind of difficult questions that arise. [16] Whilst bearing in mind that the negligence of the medical practitioners did not cause the congenital defects, the starting point of the enquiry was aptly stated in the matter Speck v Finegold 408 A 2d 496 at 508 para 7 and 512: 'Whether it is better to have never been born at all rather than to have been born with serious mental defects is a mystery more properly left to the philosophers and theologians, a mystery which would lead us into the field of metaphysics, beyond the realm of understanding or ability to solve. The law cannot assert a knowledge which can resolve this inscrutable and enigmatic issue.... If it were possible to approach a being before its conception and ask it whether it would prefer to live in an impaired state, or not to live at all, none of us can imagine what the answer would be...**We cannot give an answer susceptible to reasoned or objective valuation** (my emphasis). ...[27] In those jurisdictions where these claims have been allowed the debate has not been resolved, but an answer has simply been favoured on selected policy considerations without striking a balance that takes all the relevant norms and demands of justice into account and without resolving the impossible comparison between life with disabilities and non-existence.... **Making...(the) choice in favour of non-existence not only involves a disregard for the sanctity of life and the dignity of the child (see sections 10 and 11 of the Constitution)** (my emphasis), but involves an arbitrary, subjective preference for some policy considerations and the denial of others....[28]... I have pointed out that from whatever perspective one views the matter the essential question that a court will be called upon to answer if it is called upon to adjudicate a claim of this kind is whether the particular child should have been born at all. That is a question that goes so deeply to

the heart of what it is to be human that it should not even be asked of the law. For that reason in my view this court should not recognise an action of this kind."

Disagreeing with Stewart, writing for the Constitutional Court, Justice Froneman responded: "[21] This was, in the end, also the approach of the Supreme Court of Appeal in Stewart. It found that for a child's claim to succeed it would require a court to evaluate the existence of children against their non-existence, an exercise 'that goes so deeply to the heart of what it is to be human that it should not even be asked of the law'. [22] It is as well to acknowledge the logic of this paradox right at the outset. But more important is to recognise that framing the question in this manner might inadvertently disguise a value choice. If one says that no harm has been done to the child by the medical expert's negligence, why do we say so? The answer given in our law and in many other jurisdictions is that we can establish harm only by comparing existence with non-existence. **But this risks hiding a value choice. And it is a choice that judges under our Constitution need to acknowledge openly and defend squarely when they make it** (my emphasis). [23] Not to do so says that there are areas of life and law where the values of the Constitution may be ignored. That is not the kind of choice that our Constitution allows judges to make. They must ensure that the values of the Constitution underlie all law, not that some part of the law can exist beyond the reach of constitutional values. [24] So acknowledging the paradox is not necessarily dispositive of the real issue, namely whether our constitutional values and rights should allow the child, in the circumstances of this case, to claim compensation for a life with disability. It may well be that the conclusion should be drawn that they do not so allow, but it is not a decision that lies outside the law.

[25] We thus need to go further. If, despite this clarification that the proper approach **involves an inevitably evaluative legal choice in accordance with the Constitution** (my emphasis), we nevertheless conclude that the claim cannot be sustained at all, no matter what the facts of a particular case may be, … ".

In this extract we see the Constitutional Court emphasising the need for the court to make "a value choice", which justices "under our Constitution need to acknowledge openly and defend squarely when they make it." He also uses the phrase "an evaluative legal choice". His choice of words explicitly requires subjective choices. Thus the Supreme Court of Appeal chose the option that: "That is a question that goes so deeply to the heart of what it is to be human that it should not even be asked of the law." The justices of the Constitutional Court made another choice with possible profound implications for what it is to be human.

Similarly, in the unborn child matter, the Constitutional Court justices made a choice, namely that unborn children must not be considered as human life worthy of dignity.

However, unlike in the death penalty and Fetal Assessment matters, in the unborn child matter whilst the Constitutional Court made a "value choice", it did not "acknowledge (it) openly and defend (it) squarely". To adapt Stewart, in the absence of reasons the Constitutional Court made a profound value choice which was not "susceptible to reasoned or objective valuation".

Before moving off Stewart, arguably implicit in its reasoning that **"Making…(the) choice in favour of non-existence not only involves a disregard for the sanctity of life and the dignity of the child (see sections 10 and 11 of the Constitution)** (my

emphasis)", is that at the very least, alongside Justice Mahomed's reflections on the complexity of what human life is, the Supreme Court of Appeal was of the view that the sanctity and dignity of life may have a bearing on unborn children. Notwithstanding the Constitutional Court being aware of this, it still saw fit to dispose of this profound value choice without giving reasons as to why it disagreed with Stewart in this regard, if that is what was meant in Stewart.

By making the choice it did, which stopped the appeal process in its tracks, it also took away the opportunity for the Supreme Court of Appeal to give its view on whether unborn children were human life worthy of dignity, and not merely the contents of a woman's uterus. As mentioned before, this undermined its first ruling recorded in Addendum 1 which must have been motivated by its desire first to have the input of other courts before making a final ruling. Given the profundity of the moral issue before it, at best, denying itself such input was shortsighted, at worst, arrogant.

It is very important to remind ourselves of the profound moral nature of the issue which was before the Constitutional Court. It was being called on to make a pronouncement on what is human life. No matter how poorly the matter was brought before it, or how obliquely the Supreme Court of Appeal might have made reference to the issue, given the profundity of the issue it simply was not open to the Constitutional Court to resort to technical reasoning, without dealing with the substantive issue before it. I will return to this in the next chapter, when I consider the "street naming matter" when compared to the approach in the unborn child matter.

Furthermore, another inconsistency is seen in how the Constitutional

Court justices dealt with the use of foreign law in the Fetal Assessment matter. Writing for them Justice Froneman states: "[32] The relevant question then is what role foreign law can fulfil in considering this case. Where a case potentially has both moral and legal implications in line with the importance and nature of those in this case, it would be prudent to determine whether similar legal questions have arisen in other jurisdictions. In making this determination, it is necessary for this Court to consider the context in which these problems have arisen and their similarities and differences to the South African context. Of importance is the reasoning used to justify the conclusion reached in each of the foreign jurisdictions considered, and whether such reasoning is possible in light of the Constitution's normative framework and our social context."

He goes on to highlight that the German Court acknowledges unborn children as human life[36]: "[41] In Germany the …(Federal Court of Justice) reasoned that there is no direct duty to prevent the birth of a child with a foreseeable disability because human life might appear valueless if one was to accept such a duty."

In the unborn child matter, the justices of the Constitutional Court were alerted to the German Court holding that unborn children are human life worthy of dignity[37]. Despite this, the justices are once again inconsistent when on the one hand they give reasons for their decision in the Fetal Assessment matter, inclusive of their reliance on germane foreign law, but are silent concerning why they are of the view that the German Court's approach does not assist Debra, Shelley, Roslyn and the millions of past and future unborn children.

[36] The relevant provisions in the German Constitution are set out in footnote 32.

[37] We see when comparing footnotes 31 and 32, that the provisions in the two Constitutions in effect are very similar.

Chapter 11 – *Ubuntu*

After reading Tolstoy's War and Peace, our one son summed it up by arguing that Tolstoy's view was that human beings are not rational beings, they are rationalising beings. I have not had the energy to reread it to check his theory out!

An illuminating exercise in this regard is the use of *ubuntu* by the Constitutional Court.

Relying on the death penalty matter, we placed *ubuntu* squarely before the Constitutional Court in the unborn child matter.

For this we also relied on The City Of Tshwane Metropolitan Municipality and Afriforum and Another, [2016] ZACC 19 (hereafter "the street naming matter").

The street naming matter is a matter which has attracted very little attention. As in the death penalty matter, the main judgment was written by the head of that court.

For various reasons it is a seminal judgment. In the absence of any explicit reference to *ubuntu* in the Constitution[38], the Chief Justice assigned special status to it. The court was divided. The majority judgment was supported by nine justices. There is a dissenting judgment written by two justices of that court, *inter alia* highlighting differences concerning the status of *ubuntu* when it comes to interpreting and applying the Constitution.

The matter involved an interim restraining order granted by the North Gauteng High Court stopping the Tshwane City Council from

[38] There is one reference to *ubuntu* in the Interim Constitution, highlighted in the death penalty matter.

removing old street names in Pretoria until it followed the correct legal procedures to change the names.

In it the Chief Justice held: "[8] … we also need to take steps to breathe life into the underlying philosophy and constitutional vision we have crafted for our collective good and for the good of posterity…. We all have a duty to transform our society."

Responding to the approach of earlier court decisions, he writes: "[18] Our peculiarity as a nation impels us to remember always, that our Constitution and law could never have been meant to facilitate the frustration of real justice and equity through technicalities…. We cannot emphasise enough, that form should never be allowed to triumph over substance."

Central to his theoretical framework for this approach is *ubuntu*. He finds: "[11] All peace and reconciliation-loving South Africans whose world-view is inspired by our constitutional vision **must** (my emphasis) embrace the African philosophy of '*ubuntu*'. *'Motho ke motho ka batho ba bangwe' or 'umuntu ngumuntu ngabantu'* (literally translated it means that a person is a person because of others). The African world-outlook that one only becomes complete when others are appreciated, accommodated and respected, must also enjoy prominence in our approach and attitudes to all matters of importance in this country, … .".

It is thus clear that the Chief Justice and the other eight justices who supported him used their understanding of *ubuntu* to justify their conclusions. (In the death penalty matter seven of the eleven justices refer to it.)

The Chief Justice in his reasoning in the street naming matter about the centrality of *ubuntu* as a lens through which to look at the Constitution, did not have the support of the explicit text of the Constitution. In other words the Constitution, unlike in the Interim Constitution, makes no reference to *ubuntu*. He and his fellow justices thus had to assume that *ubuntu's* "underlying idea and its accompanying values" are implicitly expressed in the Constitution, or implicitly "permeate" the Constitution, or implicitly are "enshrined" in the Constitution.

This conundrum of the Chief Justice was identified by two of his fellow justices, Justices Cameron and Froneman, who wrote the dissenting judgment in the street naming matter. At one point of their judgment they reason: "[137] Again, we agree that it would be beneficial if all South Africans approached matters with appreciation and respect for others. But the Constitution does not impose that as an obligation on citizens, either by enjoining the adoption of the *ubuntu* worldview, or otherwise. And, again, the Constitution does not allow the judiciary to impose that obligation generally, least in the naming of streets, which falls within local authorities' constitutional competence."

This dissent emphasises the central role assigned to *ubuntu* by the Chief Justice and his fellow concurring justices.

Relying heavily on the use of *ubuntu* by the various justices in the death penalty and street naming matters, to set out the type of society envisaged by the Bill of Rights, in the unborn child matter we made the following submissions to the Constitutional Court.

A building block for this new society and a crucial lens through which the Constitution must be interpreted, is *ubuntu*.

Central to *ubuntu* is recognising the innate humanity of all human life within a context of communality as opposed to the rampant individualism of non African jurisdictions. Here we had in mind the all pervasive influence of much of the West, which in effect isolated the woman in crisis from her community, under the guise of her human right to make a choice in isolation from the community she was part of, as opposed to *ubuntu* where the community had a responsibility to care for and support her.

Ubuntu demands the nurturing and valuing of all human life and does not permit some human life to be variable, nor indeed the objectification of human life, as illustrated by the description of an unborn child being the contents of the woman's uterus. This means that no arbitrary measures must be permitted when it comes to the sanctity of all human life. Thus for example, there are arbitrary time periods in the abortion act. Here we reminded the Constitutional Court of the need for a deep mindfulness of our past where *inter alia* some human life was made more important than other human life. Here we had in mind the ever present danger flowing from ranking the value of some human life over other human life.

As already highlighted, it must be borne in mind that in the death penalty matter, Chaskalson P held that the court still needed to make a decision concerning abortion, and by necessary implication, unborn children. Likewise Justice Mahomed in the death penalty matter implied that whether or not unborn children were life as envisaged by the Constitution, still had to be decided. We have also seen retired Justice Ackermann express his answer to the outstanding question in

the affirmative.

Notwithstanding all the above, in the unborn child matter the Constitutional Court dismissed the application without giving reasons as to why *ubuntu* permitted a society where unborn children were seen only as the contents of a woman's uterus. (In her judgment dismissing Debra, Shelley and Roslyn's application, Judge Modiba in the Modiba judgment also did not address the applicants' submissions concerning the relevance of *ubuntu*.)

The question crying out for an answer, is why the Constitutional Court chose to give detailed reasons concerning why and how *ubuntu* must come to the assistance of convicted murderers, and indeed why it was relevant to street naming, but chose not to give reasons why *ubuntu* does not assist unborn children.

Chapter 12 - Once again, what is good for the goose…

In the street naming matter we have seen what impact *ubuntu* had on the approach of the Chief Justice and eight of his fellow justices to procedural requirements of the law. In a nutshell, using the lens of *ubuntu* the Chief Justice ruled that form must never be allowed to trump justice. In it we also see the two dissenting justices opine that the route followed by the Chief Justice undermined the rule of law. Thus two of the justices of the Constitutional Court were of the view that the binding judgment of the Chief Justice went further than simply not allowing technicalities to trump justice, it struck at the heart of the rule of law.

The relevance of highlighting the dissenting judgment is to highlight the deep conviction, driven by their understanding of *ubuntu*, of the majority of justices that at all times substance must trump form.

A crucial pillar of the Modiba judgment was that "The applicants fail to articulate the nature of the impact they contend the relief they seek will have on …gestating human lives" and (the applicants) failed to advance "evidence on the impact a woman's decision to terminate her pregnancy has on gestating human life[39]."

In the unborn child matter the Constitutional Court was alerted to the fact that the profound impact on the gestating human life within her of a woman's decision to terminate her pregnancy, is self evident. As an alternative, the Constitutional Court was alerted to the fact that it is self evident that such separation and expulsion of the gestating human life from the mother's uterus (the description of an abortion in

[39] Paragraphs 4 – 9 of Addendum 2.

the abortion act) will have profound physical effects for the average annual figure of 73 614 gestating human lives[40].

In the absence of reasons one is compelled to conclude that the Constitutional Court despite its understanding of *ubuntu* chose not to distance itself from this legalistic, technical and formalistic approach of the Modiba judgment, even when confronted with the undisputed statistic of the annual death of 73 614 unborn children. This in stark contrast to them being willing to overlook the legally prescribed procedures to change street names because *inter alia* that is what *ubuntu* requires. Similarly, the Constitutional Court chose to abide by the choice in the Modiba judgment not even to address the issue of *ubuntu* clearly raised by Debra, Shelley and Roslyn, despite its finding in the street naming matter concerning the centrality of *ubuntu* in creating the type of society envisaged by the Constitution.

Which choice was correct and which not, is not germane. What is relevant is that choices were made, and in the absence of reasons in the unborn child matter, such choices are clearly inconsistent. Furthermore, it is deeply distressing that the Constitutional Court was passionate about street names, even to the extent of overriding legally prescribed procedures, but did not even bother to give reasons for finding that the society envisaged by the Bill of Rights is comfortable with unborn children being seen as no more than the contents of a woman's uterus.

[40] Paragraphs 4 – 9 of Addendum 2.

Chapter 13 - The other foundation of the Modiba judgment

In the Modiba judgment, the judge based her conclusion on two hurdles she said the applicants failed to overcome. I have dealt with an aspect of one of these hurdles in chapter 12, namely her finding that it had not been shown that unborn children would be affected by an abortion.

The other hurdle was her reliance on the 1998 judgment, referred to in chapter 3.

In the absence of it giving reasons for its ruling, I must assume that the Constitutional Court was aware of this reliance on the 1998 judgment and saw fit to ignore any shortcomings in it.

Given that the main target group of this book is the lay reader, I will not deal with some of the technical arguments presented by us in this regard. For those who are interested, I would refer them to Addendum 2 where a number of reasons are submitted as to why the 1998 judgment either does not apply or was wrong.

However, it would be instructive to have a closer look at perhaps the most important foundation for the argument in the 1998 judgment, which was not dealt with by Judge Modiba, but which should have been dealt with by the Constitutional Court if it in any way relied on the Modiba judgment.

On a number of occasions in the 1998 judgment the judge based his reasoning on the assumption that when the Constitution was written a decision probably had already been made concerning whether unborn children were human lives worthy of constitutional

protection. Thus for example at page 1121 he writes: “There is no express provision affording the foetus… legal… protection. It is improbable, in my view, that the drafters of the Constitution would not have made express provision therefor had they intended to enshrine the rights of the unborn child in the bill of rights… ”.

As we have seen in chapter 7, **this assumption is simply wrong**. To refresh our memory I highlight the actual words of Chaskalson P in the death penalty matter. At paragraph [25] in a footnote dealing with the constitutional negotiations leading up to the adoption of the unqualified right to life provision in the Bill of Rights he quotes with approval the following from the Sixth Report of the Technical Committee on Fundamental Rights: “The unqualified inclusion of the right (to life) will result in the (Constitutional Court) having to decide on the validity of any law relating to capital punishment or abortion.” Relying on this Chaskalson P found it was the duty of the Constitutional Court to make a ruling as regards the death penalty, and Justice Mahomed found that other related issues as to the full extent of what is life will have to be decided in the future by the Constitutional Court. (We also have seen the issue being left for future decision by the Constitutional Court in 1996 – see footnote 29.)

In other words, contrary to what the judge argued in the 1998 judgment, and thus in the Modiba judgment, the negotiators specifically left the issue open for the Constitutional Court to decide.

The practical effect of this error in the 1998 judgment, is that all the reasoning which is based on this building block is from the outset fatally flawed.

One can forgive the 1998 judge and the judge in the Modiba judgment for not being aware of these words by Chaskalson P, and indeed the case referred to in footnote 29. However the Constitutional Court should not only have been aware of these words by its first Chief Justice (and indeed as we have already seen words on the issue by its second Chief Justice, Justice Mahomed), it should have dealt with them when it saw that in the Modiba judgment the 1998 judgment was foundational to its conclusion.

Looking at the probabilities, this failure also suggests that a policy decision was taken by the Constitutional Court. Being aware that it would find it very difficult and contentious to support such reasoning, it simply gave no reasons. And that given the reality that its decision would be final and beyond challenge, not giving reasons made the most sense.

Chapter 14 - *Coup de grace* – ignoring the German Court

In a trial where a judge is having difficulty in making a decision, often she looks for something in the maze of evidence before her, to help her come to a conclusion.

I am of the view that in the present matter there is no such need. An assessment of what I have dealt with so far clearly indicates that the Constitutional Court, unlike in the death penalty matter, simply made a policy choice without in a transparent manner grappling with the profound moral issue it was faced with.

However, if there is such a need, then the failure by the Constitutional Court to give reasons as to why it disagreed with the German Court, addresses this need.

Although I already have made mention of this failure, given the significance of this failure it warrants a chapter of its own.

Any perusal of the judgments of our Constitutional Court since its inception will show its heavy dependence on the German Court, when considering foreign law in its reasoning[41]. Furthermore we have seen that in effect the right to life and dignity provisions in the German Constitution are identical to ours. This notwithstanding, the

[41] For example in Carmichele v Minister of Safety And Security 2001 (4) SA 938 CC at 961 F, Justices Ackerman and Goldstone stated: "Our constitution is not merely a formal document regulating public power. It also embodies, like the German Constitution, an objective normative value system. As was stated by the German Federal Constitutional Court: 'The jurisprudence of the Federal Constitutional Court is consistently to the effect that the basic right norms contain not only defensive subjective rights for the individual but embody at the same time an objective value system which, as a fundamental constitutional value for all areas of the law, acts as an allguiding principle and stimulus for the Legislature, Executive and Judiciary.' The same is true of our Constitution. … It is within the matrix of this objective normative value system that the common law must be developed."

Constitutional Court came to a fundamentally different conclusion to that of the German Court, and failed to give reasons for this.

To grasp the extent of this failure it is instructive to highlight some of the findings of the German Court, all of which were accessible to the Constitutional Court before its ruling.

The Constitutional Court had before it the two German decisions dealing with the matter, one in 1975 and the other in 1993[42].

These decisions could not be clearer about the fact that unborn children are human life worthy of dignity, and as such the state must protect them.

I highlight some extracts from the headnote of the 1993 judgment. There we read:

- *"The Basic Law (the German Constitution) requires the state to protect human life, including that of the unborn. This obligation to protect is based on Article 1, Paragraph 1 of the Basic Law (Human dignity shall be inviolable…- see footnote 32); its object, and following from that, its extent are more precisely defined in Article 2, Paragraph 2 (Every person shall have the right to life… - see footnote 32). Even unborn human life is accorded human dignity. The legal system must create the statutory prerequisites for its development by granting the unborn its independent right to life. The right to life does not commence first with the mother's acceptance of the unborn. (This is the first paragraph of the Headnote.)*
- *The unborn is entitled to legal protection even vis-à-vis its*

[42] 39 [BVerfGE] 1 (First Senate) (F.R.G.) 1975 and 88 [BVerfGE] 203 (Second Senate) (F.R.G.) 1993.

mother. Such protection is only possible if the legislature fundamentally forbids the mother to terminate her pregnancy and thus imposes upon her the fundamental legal obligation to carry the child to term.

- *The right to life of the unborn may not be surrendered to the free, legally unbound decision of a third party, not even for a limited time, not even when the third party is the mother herself.*
- *The state's obligation to protect human life also encompasses protection from threats to unborn human life which arise from influences in the family or from the pregnant woman's social circle, or from the present and foreseeable living conditions of the women… .*
- *Moreover, the state's mandate to protect human life requires it to preserve and to revive the public's general awareness of the unborn's right to protection.*
- *The state's obligation to protect human life requires that the involvement of the physician, which is necessary in the interests of the woman, simultaneously serve to protect the unborn."*

Having clearly set out the constitutional status of the unborn, the German Court then also highlights the rights of the pregnant woman and the responsibility of the state (and indeed the woman's wider community), to provide a legal framework and support structure for the pregnant woman and the child she is carrying. (The quote hereafter by Professor Kommers, succinctly sums up this community-centred approach to the pregnant woman and her child, as opposed to the approach in American law.)

Thus for example, the court decided that a woman must not be

subjected to burdens "which demand such a degree of sacrifice of her own existential values that one could no longer expect her to go through the pregnancy." Furthermore on certain conditions it also allowed a woman to decide to have an abortion in the first 12 weeks of the pregnancy. Central to these conditions was compulsory counselling geared towards convincing her to see the pregnancy to term. Obviously throughout the pregnancy, cognizance had to be taken of various rights of the pregnant woman, including her right to life and the protection of and respect for her human dignity.

Other examples of the required legal framework and support structures for the pregnant mother prescribed by the court included:

- legislated social assistance;
- legislation ensuring that such women would not lose their jobs, or be disadvantaged in the workplace, or undergo serious financial hardship, as a result of having the child;
- legislation preventing landlords from terminating leases because of the arrival of a child;
- compulsory counselling provided by the state; and
- the criminalisation of any person trying to make money out of the plight of the pregnant woman.

As Professor Kommers writes in the same article cited hereafter, what emerges clearly in the German judgments is that all the main combatants harboured no doubts "about their constitutional duty to protect the life of the unborn. Rather, the struggle centred on how best to achieve this goal."

Later he writes: "In Germany, the contestants did not question the

state's duty to protect the life of the fetus at all stages of pregnancy. On this question, the most non-religious Social Democrat could agree with the most religious Christian Democrat."

We also presented the Constitutional Court with the argument that there are profound moral similarities between post Nazi Germany and post apartheid South Africa, which should give our courts pause for reflection when deciding on the foreign jurisdiction they should have regard to when dealing with gestating human life.

Furthermore we argued that the German court's approach was in line with *ubuntu*. In this regard, in amplification to that highlighted above, the Constitutional Court was also alerted to the following:

a. The conversational approach in Germany, as opposed to the winner/loser approach, as is the case in America, was consistent with the underlying values of a process driven by *ubuntu*.

b. The German court facilitated an inclusive conversation, not least of all by listening to all and attempting to craft a response which displayed a sensitivity to the whole of society and avoiding a simplistic dualistic approach involving the stock "pro and con arguments";

c. There was an honest "owning" of and grappling with the difficult questions which the issue raises, once again consistent with *ubuntu*;

d. There was a refusal by the state, and the wider community, to abdicate responsibility, not least of all by delegating it to the medical profession or burdening and isolating the pregnant woman in distress;

e. The contrasting image of the human person in American constitutional law (where a woman is seen as alone, isolated and independent, and bounded by little more than self-interest), with German constitutional law with its strong community orientation and integrated human solidarity;

f. The German approach to gestating life would be the one most consistent with the type of society envisaged by the Constitution. A society grounded in *ubuntu* which is caring, nurturing and supportive of women in distress whilst at the same time displaying an inclusivity when it comes to the life and dignity of all human life, inclusive of gestating human life.

Furthermore the Constitutional Court was referred to the academic article by Professor Kommers, referred to above, (***The Constitutional Law of Abortion in Germany: Should Americans pay attention?*** 1994 Notre Dame Law School NDL Scholarship) where he contrasts the approach of the court in the USA with that of Germany. More particularly the Constitutional Court was alerted to the following extract by him at page 31 where he makes the following observation when comparing the American approach to abortion and the rights of the woman to the German approach:

> ***"The image of the human person in American constitutional law is that of an autonomous moral agent unconnected to the larger community in any meaningful sense. It is the image of a woman alone, isolated and independent, and bounded by little more than self-interest. German constitutional law, by contrast, has a strong community orientation, and it tells the story of human solidarity, a story that tries to join public virtue***

to liberty, one that speaks of social integration and the wholeness of life."

As I argued at the outset, one of the possible explanations for the Constitutional Court not to have given reasons for its ruling, is that our submissions did not warrant reasons. Given the past and present reliance on German Constitutional jurisprudence, not least of all because of a shared evil history, and the virtually identical provisions on life and dignity in the two respective Constitutions, surely at the very least the Constitutional Court should have given reasons as to why it came to a diametrically opposed view on unborn children to that of the German Court?

The fact that it did not, unerringly points to it taking a policy decision behind closed doors which it could not substantiate inter alia without opening a pandora's box, touched on by me in the final chapter.

Chapter 15 – Does the Emperor have no clothing?

In the build up to the interview of Justice Mogoeng Mogoeng by the Judicial Services Commission for the position of Chief Justice, the vitriolic attacks on him within certain portions of the legal profession and much of the media sounded alarm bells within me. It was difficult to find anyone in the circles in which I moved in Cape Town who had not been caught up in what can only be described as a feeding frenzy of venom against Justice Mogoeng Mogoeng.

As has been the case for many years when confronted with such a situation, I found myself reminded of the following words penned in 1925 and recorded in the autobiography of ZK Matthews, "Freedom For My People".

"You may be tempted into facile views of the difficulties around you … You may be tempted to cut yourself off from the rest of your people, or on the other hand to an unthinking advocacy of what the mob clamours for. But I am sure you will examine all things with clarity of intellectual vision, free from passions unless it be a moral passion for the good, and when you have thought things through to present your views with temperate courage."

Was this feeding frenzy once again a case of an unthinking advocacy of what the mob clamours for, albeit in this instance a very educated and erudite mob?

After some research and reflection I made the following submission to the JSC, some five or so days before the interview. I highlight some portions of my submissions.

I quote:

"It is with a measure of disquiet that I have read some of the submissions concerning the suitability of Justice Mogoeng as the future Chief Justice.

Firstly, if the submissions were to be accepted one needs to ask the question how it is that he was appointed a judge in the first place. And yet Justice Mogoeng has gone through the rigorous process following on from an application for appointment as a judge when he was appointed as a High Court judge, a judge of the Labour Appeal Court and most recently his appointment as a justice of the Constitutional Court.

However my main concern relates to the criticism aimed at Justice Mogoeng as a result of his personal faith as a Christ follower. In this regard my first problem is that much of this criticism presupposes an objective interpretation of the Bill of Rights devoid of subjective influence. This is unattainable.

It would be disingenuous to submit that there is even one judge in the land whose personal faith position, be that atheist, secular humanist, Christian, Jew or Muslim does not in some way impinge on their judgments. Furthermore it would be naïve to believe that no part of any such faith position is in conflict with the present understanding or application of the bill of rights. That must be a constant tightrope walking act by all justices and judges when faced with such a conflict – options open to them would include recusing themselves, resigning or declaring what the law is, even if they find it distasteful."

Looking back at that feeding frenzy, it is difficult not to be cynical about how the same man has become the darling of that feeding pack. There can be no doubt that central to this change was the abusive rule

of Mr Zuma, and that Justice Mogoeng led a court which unashamedly sought to bridle this abusive rule. Of course the feeding pack also allowed its politically correct enslavement colour how they judged Justice Mogoeng in the first place. It is not he who has changed[43].

The danger of this noble endeavour by the Constitutional Court to protect South Africans from larceny on a grand scale, is that like what happened to me with the death penalty judgment in 1995, we are distracted from carefully and dispassionately analysing what is happening in the Constitutional Court. And thus in 1995, blinded by the outcome in the death penalty matter, I failed to see the undeclared subjective nature of the reasoning of the court, and the dangerous precedent that set.

As mentioned in my submissions to the JSC, I readily acknowledge the inevitability of personal views of the world and of moral issues impinging on the judgments of Constitutional Court justices. The danger lies in not declaring them, or not even being aware of them.

About the only real safeguard against this danger is at least to give clear and detailed reasons for decisions of a moral nature, particularly when the court is conscious of deeply held convictions on the issue, as Chaskalson P was in the death penalty matter. In the death penalty matter there are clear examples of undeclared or unexpressed assumptions (see footnote 7). However, one is able to extrapolate these and engage with them precisely because the various justices have sought to explain their reasoning, their conclusion.

[43] A comparison of Addendum 1 and Addendum 3 will reveal that although Justice Mogoeng Mogoeng was part of the bench in our first application for direct access, where it was decided that it was not in the interests of justice to hear the matter "at this stage", he was not part of the bench which dismissed our second application without giving reasons other than that "it bears no reasonable prospects of success".

Given the enormous power of the eleven women and men on the Constitutional Court, our scrutiny of their use of their power must be relentless. Although his motivation was self-centred, there was wisdom in Mr Zuma's observation a few years ago that the Constitutional Court justices were not God!

In the death penalty matter Justice Kriegler, although admitting that constitutional adjudication involved a measure of making value judgments, emphasised that judges are lawyers "not sages" and that their discipline is the law, "not ethics or philosophy and certainly not politics."

Notwithstanding this lack of training and expertise, since its inception it has made pronouncements on profound moral issues about which there are deeply held convictions in South Africa, often at variance with one another.

These include the death penalty as a sentence, whether non-life is worth more than handicapped life, the nature of marriage, parental responsibilities in the raising of children, the wrongfulness of adultery, and of course the value that must be attached to the life of an unborn child.

Common to all these issues and any other profound moral choice that will come before it, is that the Bill of Rights is silent on them. The eleven men and women have been given the power to use concepts such as dignity, freedom and equality to decide these issues. Their decisions are final. They are not bound by anyone or anything when they make a decision, including whether or not to give reasons for their decision[44].

[44] See footnote 7.

The logical conclusion of the approach in the street naming matter, clearly seen by Justices Cameron and Froneman, is that if all else fails in their determination to remould South Africa in their own image, they can simply turn to *ubuntu* and give it whatever definition suits them.

And so *ubuntu* is of great assistance in doing away with the brutality of the death sentence, or of finding against a movement rooted in an evil past. However it can choose to have no regard to it when Debra, Shelley and Roslyn and millions of past and future unborn children, plead with it to treat such human life with dignity and not merely as the contents of a woman's uterus.

But even in such an event, the giving of reasons serves as a restraining factor against a dictatorial use of its powers. Thus although it is clear in their dissenting judgment that the precedent set by the judgment of the majority deeply worried them in the street naming matter, at least Justices Cameron and Froneman had reasons to engage with.

The nakedness of the Emperor for me is not so much the ruling concerning unborn children, but of not providing reasons for its ruling. It takes away the only protection against a tyrannical imposition of a moral society in the subjective image of the justices of the Constitutional Court. It disempowers South Africans enormously, and dangerously.

At the outset I said that one option for not giving reasons was that the submissions before them simply did not warrant them. We have seen that the submissions before them included reasoning by Constitutional Court justices presiding in the death penalty matter, powerful and unambiguous arguments by the German Constitutional

Court and compelling submissions by retired Constitutional Court justice Laurie Ackermann and one of the leading scholars in jurisprudence, Professor Kommers.

Added to this is the sheer number of lives devastatingly affected by the issue, not only the millions of past and future unborn children, but also their traumatised mothers, fathers and grandparents. Here it needs to be stressed that in the name of the right of a woman to control her own body, we as a society are in effect abandoning these women and failing in our duty as a society, as required by amongst other things *ubuntu*, to care for and support them and their unborn children. The description by Professor Kommers in this regard warrants repeating:

> ***"The image of the human person in American constitutional law is that of an autonomous moral agent unconnected to the larger community in any meaningful sense. It is the image of a woman alone, isolated and independent, and bounded by little more than self-interest. German constitutional law, by contrast, has a strong community orientation, and it tells the story of human solidarity, a story that tries to join public virtue to liberty, one that speaks of social integration and the wholeness of life."***

Added to this was the argument of the massive dehumanisation effect of these sheer numbers on us as a society.

This all notwithstanding, not only did the Constitutional Court not deem it as urgent as an enquiry into the Nkandla debacle, it also did not see fit to give any reasons for its final ruling.

The probabilities suggest that the justices of the Constitutional Court who made this decision behind closed doors, made a policy decision and thought it best or safest not to give reasons. And as already mentioned, possibly their thinking was that Debra, Shelley and Roslyn had no power base, so it was safe not to give reasons.

If this is the case, then indeed, the Emperor has no clothing!

Chapter 16 – "But let justice roll down like waters … ."

In a chilling response by the Minister to Debra, Shelley and Roslyn wanting the court to affirm the life and dignity of unborn children, he argued that if the court did this it would "no doubt contribute to an increase in the number of orphaned and vulnerable children in South Africa.[45]"

Throughout the battle for unborn children, I have wondered whether this reasoning of the Minister lies at the heart of the seeming indifference in South Africa as a whole to the plight of unborn children. I am not convinced that the Minister thought through the moral consequences of his argument. That in effect it opened up the door to a sort of social Darwinism so eagerly used by Adolf Hitler.

Have we really become a society so brutalised by the all pervasive violence in our country for hundreds of years? So much so that the highest court in our land, and in terms of the Constitution, the guardian of the society we want to become, is satisfied with the Minister of Health using this utilitarian and objectification of human life argument when dealing with the lives of unborn children!

Part of Debra's response to this argument of the Minister was that "from (her) perspective… there are no "unwanted children", only vulnerable children waiting to be loved by a caring community." Surely, if *ubuntu* is to mean anything that the justices in the death penalty and street naming matters says it means, this response of Debra is the right one? Not the cold and callous approach in the Minister's reasoning.

[45] Page 51, paragraph 68 of the papers in Case No 37801/2015, referred to in footnote 23.

The awful truth might be that perhaps the Minister's reasoning mirrors what we feel but dare not admit. Perhaps that is the reason why much of the church, in all its forms, and indeed other faith communities and civil society as a whole, have remained silent, to repeat an earlier picture, in the face of the equivalent of some 4 250 Jumbo jets, each carrying 400 unborn children, crashing during the period 1998 to the present day - **some 212 jumbo jets per year, or more than one every two days**.

Perhaps overwhelmed by our social problems in our country, we simply do not have the resources and energy to cope with the horror of millions of unborn children being killed. This would explain the feedback I received from a friend who, when trying to convince his local bishop to support the application, was told that the institutional church simply was too tired and punch drunk by the many issues it was facing to join this battle.

So we refuse to acknowledge that unborn children are human life worthy of dignity. And so the Constitutional Court makes a policy decision without furnishing reasons. For furnishing reasons would force them to say why they believe the Minister's reasoning is correct, which in their guts they must surely know is not correct. Engaging with these issues rationally also would open them, indeed us as a society, to an awful truth about ourselves and our society.

So, as people such as Hitler and Verwoerd have done in the past, by commission or omission we diminish the value of part of humanity. We describe them as the contents of a woman's uterus. This frees us to continue with programmes which serve our particular ideology, be that a fascist ideology, a nationalist ideology, a feminist ideology or a utilitarian ideology.

This utilitarian approach to human life, making some human life worth more than other human life, opens the door to something like the Gauteng Health Department's treatment of people with mental health problems, referred to in chapter 4. This is so much more when the Constitutional Court gives its stamp of approval to unborn children being no more than "the contents of a woman's uterus" without reasons. This is especially stark after giving lengthy reasons why convicted murderers must be treated with dignity.

This evil of objectifying human life is nothing new in world history. Thus for example we see in Amos 1 v 13, written some 2700 years ago, the prophet pronouncing God's judgment on Ammon, "because they ripped open the women with child in Gilead, that they may enlarge their territory." This is no different in substance to the Minister's callous and utilitarian argument.

It is a tragedy that when making its ruling the Constitutional Court did not for a moment pause to reflect on some words by Professor Lourens du Plessis written in 1990: "Potentiality or expectation is characteristic of fetal life. Birth is the fulfilment of one of the most vital expectations of the fetus. With the post natal human being the element of potentiality, however, remains – vividly so at infancy and as a rule less saliently in old age. Birth is not the beginning of life: it is simply a drastic switch in lifestyle."

Cry the beloved country, indeed, cry. But more, let us rage. Let us also roll up our sleeves and love in practical ways all pregnant mothers in crisis, and their unborn children, regardless of what the Constitutional Court says, or in this case does not say. Central to Martin Luther King's reliance on love, as opposed to violence, as a weapon, was to shame the oppressor or those who remained silent,

into working for justice.

This issue presents the greatest moral challenge at present facing not only the church in South Africa, but all South Africans, irrespective of their religious convictions. If we are to regain our soul as a nation we need to face this issue with humility, compassion, and not least of all, with a contrite heart.

We need to roll up our sleeves and in very practical and non-judgemental ways love these mothers and their unborn children. Perhaps then Parliament and the Constitutional Court will be shamed into action.

Unlike the Constitutional Court's failure to give reasons for its refusal to affirm the life and dignity of unborn children, I have been transparent about my reference point for fighting for the dignity and value of unborn human life. Furthermore, although it is a Christian reference point, I am of the view that people of all faiths, including secular faiths, will be challenged by what Christian theologian, Richard Hays, argues the framework and motivation for such a rolling up of sleeves should be.

Firstly, Luke 10 verses 25 – 37, popularly known as the parable of the Good Samaritan. Here Jesus is responding to a lawyer's attempt to restrict the definition of who our neighbour is. To define the unborn child as the contents of a woman's uterus, or to frame the question in terms of the viability of the unborn child, likewise is to narrow the scope of our moral concern and obligation. **The response of Jesus to the lawyer is a revolutionary response calling on us to become neighbours to all who are helpless and in need. The**

effect of the decision of the Constitutional Court in the unborn child matter, is to narrow the scope of our compassion.

Secondly, Acts 4 verses 32 – 35. Here we have a picture of the early Jerusalem church. Central to her witness to Jesus is the church's practices of economic sharing and caring for the needy.

Hays writes: "How does this story illuminate the issue of abortion? It suggests that the community should assume responsibility for the care of the needy. Thus, within the church, there should be no justification for abortion on economic grounds or on the ground of the incapacity of the mother to care for the child. The community assumes responsibility and creates whatever structures are necessary to provide for mother and child alike. **Sharing, not abortion, is the answer. This is what it means for the community to live out the power of the resurrection…. The church's confusion on the issue of abortion is a symptom of its more fundamental unfaithfulness to the economic imperatives of the gospel."**

Commenting on a closely related point he writes: "… we should take responsibility not only for sharing resources but also for calling men to accountability. The fact that abortion is usually treated as a 'women's issue' shows how disastrously the general culture has allowed males to abdicate responsibility for children. As **Hauerwas rightly observes, '[A]bortion often is the coercive method men use to free themselves from responsibility to women.' "**

Thirdly, he refers to various passages calling on us to imitate Christ (eg Philippians 2 verses 1- 13). He writes: "How does this paradigm

illuminate the issue of abortion? **It suggests that we should act in service to welcome children, both born and unborn, even when to do so is obviously difficult and may cause serious hardship."**

He then emphasises that this call to imitate Christ is addressed to the community of faith, not just individuals. He writes: "Thus, this word about welcoming children cannot be addressed just to the individual pregnant woman, as though the church could simply say to her ,'You must imitate Christ by suffering for the sake of this child.' Instead, this call is a charge laid upon the church as a whole… The community must welcome her, bear her burden, and so fulfil the law of Christ. If it were so, there would almost never be any need for a Christian woman to seek an abortion. If this proposal sounds impractical, that is merely a measure of how far the church has drifted from its foundation in the New Testament."

As a young student Amos 5 verses 21 – 24 had a profound effect on me.

As I reflect again on these verses, the question I ask of myself, and indeed of all fellow Christ followers is, if we continue to remain silent and unresponsive to the desperate need of millions of unborn children at risk and their mothers in crisis, will our worship be acceptable to the Lord? And to my fellow South Africans who do not share my allegiance to Christ and His radical call to discipleship, how can we hope to begin to rebuild a caring and compassionate society when we are indifferent to the desperate plight of millions of the most helpless and vulnerable of all of human life?

As a nation we would be well advised to heed the words of Professor Forstchen in his review on the film "Downfall", which exposes the evil

of Adolf Hitler: “The true form of evil rarely looks evil on the surface, it seduces us with fair face as it leads, sometimes an entire nation, into damnation.”

ADDENDUM 1

CONSTITUTIONAL COURT OF SOUTH AFRICA
CASE CCT 138/15

In the matter between:

DEBRA LINDE	FIRST APPLICANT
SHELLEY LOOTS	SECOND APPLICANT
ROSLYN MATTHEE	THIRD APPLICANT

and

MINISTER OF HEALTH OF THE REPUBLIC OF SOUTH AFRICA	RESPONDENT

ORDER DATED 09 SEPTEMBER 2015

CORAM: Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J.

The constitutional court has considered this application for direct access. It is concluded that the application should be dismissed as it is not in the interest of justice to hear it at this stage.

Order;

1. The application is dismissed.
2. There is no order as to costs

ADDENDUM 2

CONSTITUTIONAL COURT OF SOUTH AFRICA
CASE CCT 258/17

In the matter between:

LINDE, DEBRA	FIRST APPLICANT
LOOTS, SHELLEY	SECOND APPLICANT
MATTHEE, ROSLYN	THIRD APPLICANT

and

MINISTER OF HEALTH OF THE REPUBLIC OF SOUTH AFRICA	RESPONDENT

APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE that the Applicants hereby make application for leave to appeal to the Constitutional Court against the order by Modiba J, in the South Gauteng High Court, heard on 24 October 2016 and handed down on 15 September 2017, dismissing the application of the Applicants (judgment attached hereto as "Annexure A"). The application dealt only with the constitutional matter of whether or not gestating human life is life as envisaged in section 11 of the Constitution and must be accorded dignity in terms of section 10 of the Constitution, and certain consequential relief (Notice of Motion attached hereto as "Annexure B").

BE PLEASED TO TAKE NOTICE FURTHER THAT the Applicants found their application for leave to appeal against the dismissal of the application on the grounds that Modiba J misdirected herself in the following respects:

1. It is respectfully submitted that the learned judge erred in not finding that without articulating a constitutional foundation for protecting gestating human life, as asked for in prayers 1 and 2 of the Applicants' Notice of Motion, all measures, including section 2 of The Choice On Termination of Pregnancy Act 92 Of 1996 (hereafter "the Act)", having an impact on gestating human life, and indeed on the rights of the pregnant woman, will be arbitrary, relative, irrational and variable.

2. It is respectfully submitted that at the outset in setting out the order sought by the Applicants the learned judge erred by not making reference to the fact that central to the relief sought was striking a balance between the rights of the pregnant woman and of the gestating human life in her, thereby in effect casting the application as one where there must be a winner and a loser, which was not the case argued by the Applicants.

3. In framing the order in this manner, the learned judge erred by not having due regard to the declarator sought leading to a national conversation concerning balancing the interests and rights of the pregnant woman and the gestating human life in her.

4. The learned judge erred in deciding that the application is an abstract application where the Applicants "fail to articulate the nature of the impact they contend the relief they seek will have on girls, women, fathers, gestating human lives and on South African society".

5. In holding this it is respectfully submitted the learned judge misconstrued on whose behalf the Applicants primarily were acting, namely gestating human life.

6. In holding that the Applicants set forth no factual basis for the relief sought and merely relied on abortion statistics and their "life values and personal experiences", it is respectfully submitted the learned judge misconstrued on whose behalf the Applicants were acting, namely gestating human life.

7. It is respectfully submitted that the learned judge erred in requiring the Applicants to advance "evidence on the impact a woman's decision to terminate her pregnancy has on the gestating human life", when such impact is self-evident, more particularly the death of an average figure of 73 614 (a figure not disputed by the Respondent) gestating lives per annum.

8. It is respectfully submitted that the learned judge erred in not applying the authority cited by her, *Savor and Others v National Director of Public Prosecutions and Another*, that even if the challenge of the Applicants was an abstract challenge, merely on the face of it, the effect of the definition of "termination of a pregnancy" ("the separation and expulsion, by medical or surgical means, of the contents of the uterus of a pregnant woman") in the Act, read with section 2 of the Act, would be the death of an average figure of 73 614 gestating human lives per annum, particularly in the absence of any articulated constitutional protection of the gestating human lives.

9. Alternatively, it is respectfully submitted that the learned judge erred in not holding that it is self-evident that such separation and expulsion of the gestating human life from the mother's uterus will

have profound physical effects for the average annual figure of 73 614 gestating human lives.

10. It is respectfully submitted that the grounds for this application as set out in paragraphs 8 and 9 above are buttressed, when dealing with the issue of the right to an abortion, by the learned judge's own dependence on a woman's right to reproductive choice, which when applied to a pregnant woman, can only mean the death of the gestating life within her.

11. It is respectfully submitted that the learned judge erred by not accepting the unchallenged abortion statistics provided by the Applicants as adequate evidence of the fundamental impact the lack of an articulated constitutional value of gestating human life and the Act has on the lives of hundreds of thousands of gestating human lives, namely the termination of their lives.

12. It is respectfully submitted that the learned judge erred in not having regard to the Respondent's Answering Affidavit where he in effect concedes that a decision for an abortion means the termination of the life of the gestating human life, more particularly:

"51. An important consideration that the applicants failed to address adequately, or at all, in their founding papers is what impact more restrictive abortion laws would have on the child born in circumstances where he/she was a result of an unwanted pregnancy. From statistics received ...more than 3500 babies were abandoned in South Africa in 2010. Placing further restrictions on the ability to terminate a pregnancy is therefore likely to cause the statistic to increase even further. ...

68. Save to point out that the relief sought by the applicants will

no doubt contribute to an increase in the number of orphaned and vulnerable children in South Africa if the relief sought by the applicants is granted, ….".

13. It is respectfully submitted that the learned judge erred in her application of the passage cited in *Zantsi v Council of State*, more particularly in that in the present matter without the declarator sought in prayer 1 of the Notice of Motion, the balancing act referred to in prayers 2 – 4 of the Notice of Motion is not possible.

14. It is respectfully submitted that the learned judge erred by not having due regard to the fact that the observations, in what the learned judge refers to as *Christian Lawyers 2*, (2005 (1) SA 509) which are germane to the present matter were *obiter*.

15. It is respectfully submitted that the learned judge erred in failing to distinguish the present application from, what the learned judge referred to as the *Christian Lawyers 1* (1998(4) SA 1113) case, where at 1123 G it was found that: *"It is convenient at this stage to point out that the plaintiffs have framed the 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 they are competing rights and that a balance must be struck between the rights of woman and that the 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 plaintiff must stand or fall in the case pleaded by them."

16. It is respectfully submitted that the learned judge erred by not having regard to the effect of the absolutist approach taken in *Christian Lawyers 1* by the plaintiff, on the judgment handed down in that matter.

17. It is respectfully submitted that the learned judge erred by not finding that in the present matter if the relief sought was granted there would not be the effects and anomalies on pregnant women highlighted in *Christian Lawyers 1*, and that full cognisance could be taken of the rights of the pregnant woman highlighted in that judgment in the balancing process which would follow the declarator sought by the Applicants.

18. It is respectfully submitted that the learned judge erred in approaching the present matter also in absolutist terms and in not having due regard to the balancing of rights which would flow from the primary relief sought by the Applicants, more particularly that the granting of prayers 2, 3, 4 and 5 would initiate a process involving a nationwide conversation, involving lay people and experts across the spectrum culminating in an Act of Parliament which seeks to address the said balancing act within the context of a caring and supportive community and state.

19. It is respectfully submitted that in doing this the learned judge erred by prematurely focusing on the rights of the pregnant woman, which rights would be addressed during the process following the declarator sought. The absolutist approach of the plaintiff in *Christian Lawyers 1* did not permit of this separation.

20. In addition to not having due regard to this distinguishing feature between *Christian Lawyers 1* and the matter of the Applicants, the learned judge erred in finding that the Applicants provided no compelling reason that the above Honourable Court should depart from the finding in both the *Christian Lawyers* matters, more particularly in that the above Honourable Court, and the judges in the *Christian Lawyers* matters, either had no regard or inadequate regard to the following:

a. The Applicants never questioned a woman's right to an abortion.

b. When it comes to interpreting and applying the Constitution to the declarator sought, regard must be had to:

i. The inextricably intertwined core values of life and dignity of all human life, particularly the need to defend the dignity and life of the most defenceless and innocent of human life;

ii. When interpreting and applying these core values, judges need to make normative value choices;

iii. No part of the law or life in South Africa can exist beyond the reach of constitutional values, even the most intimate spaces;

iv. When making these value choices, judges must seek to help bring about the type of society envisaged by the Constitution;

v. Central to this exercise must be a deep mindfulness of our past where inter alia some human life was made more important than other human life;

vi. A building block for this new society and a crucial lens through which the Constitution must be interpreted, is *Ubuntu*;

vii. Central to *Ubuntu* is recognising the innate humanity of all human life within a context of communality as opposed to the rampant individualism of non African jurisdictions;

viii. Repeated and deliberate attacks on the dignity of one human life compromises the dignity of all in South African society;

ix. *Ubuntu* demands the nurturing and valuing of all human life;

x. Although other jurisdictions must be considered, our courts when making a value choice must at the end of the day use our own indigenous value systems as a premise from which to proceed;

xi. The Constitution is silent about the constitutionality of abortion. It is thus for our courts to make a constitutional normative value choice in this regard as was done in *S v Makwanyane* and Another (hereafter, "the death penalty matter");

xii. No human life must be allowed to be variable;

xiii. No arbitrary measures must be permitted when it comes to the sanctity of all human life;

xiv. There are profound moral similarities between the post Nazi Germany and the post apartheid South Africa, which should give our courts pause for reflection when deciding on the foreign jurisdiction they should have regard to when dealing with gestating human life.

21. The learned judge erred by finding that the development of German abortion law was driven by the unification process between East and West Germany whereas it primarily was driven by what transpired during the Nazi period where some human life

was considered worth more than others and arbitrary measures were used to decide on the fate of human life.

22. The learned judge in *Christian Lawyers 1* erred by in effect asserting that one of the reasons not to apply German jurisprudence on the issue, is that South Africa did not share the oppressive history of Germany.

23. It is respectfully submitted that the learned judge erred in holding that for her to make a normative value judgment concerning whether constitutional value ought to be attached to gestating human life, as opposed to the extent and reach of this value and the balancing of rights which would follow, (where evidence clearly would be needed), she required evidence.

24. In the demand for evidence to enable it to make a normative value judgment, the above Honourable Court erred in not having due regard to the approach of the Constitutional Court *inter alia* in the death penalty matter and in *H and Fetal Assessment Centre* matter.

25. In her approach to interpreting and applying the Constitution in a normative manner, the learned judge erred in not having due regard to the Constitutional Court decision in *Carmichele v Minister of Safety and Security* that like the German Constitution, our Constitution contains not only defensive subjective rights for the individual, but also an objective normative value system applicable to even the most intimate areas of our lives.

26. The learned judge erred by not finding that central to that objective normative value system is the sanctity of all human life, including gestating human life.

27. The above Honourable Court erred in making in effect the value judgement that the right to reproductive choice includes the right to an abortion without the benefit of evidence, notwithstanding her finding regarding her not being able to make a normative value judgement without evidence, and notwithstanding that the constitution is silent on abortion.

28. The above Honourable Court erred in finding in effect that the right of a person to reproductive choice includes the right to an abortion, thereby effectively finding that abortion is a means of contraception, notwithstanding the Act asserting that abortion is not a form of contraception.

29. It is respectfully submitted that the learned judge erred in not having due regard to what transpired in Germany, where no party disputed or required evidence for the normative value judgement that gestating human life was human life worthy of constitutional protection and that the German conversation about how to balance out the conflicting rights presupposed an acknowledgment by all the contestants that the state has a duty to protect the life of the foetus at all stages of pregnancy and that the state has a compelling interest in this regard.

30. It is respectfully submitted that the learned judge erred in not finding that this conversational approach in Germany was consistent with the underlying values of a process driven by *Ubuntu*.

31. The learned judge erred in not having due regard to the implicit and foreshadowed balancing act contained in the words of the late Chief Justice Mahomed in the death penalty matter: *"[268] In the*

first place, (the death penalty) offends section 9 of the Constitution, which prescribes in peremptory terms that 'every person shall have the right to life'. What does that mean? What is a 'person'? When does 'personhood' and 'life' begin? Can there be a conflict between the 'right to life' in section 9 and the right of a mother to 'personal privacy' in terms of section 13 and her possible right to the freedom and control of her body?....[269] It is, for the purposes of the present case, unnecessary to give to the word 'life' in section 9 a comprehensive legal definition which will accommodate the answer to these and other complex questions. Whatever be the proper resolution of such issues, should they arise in the future, it is possible to approach the constitutionality of the death sentence by question with a sharper and narrower focus ....";

32. It is respectfully submitted that the learned judge erred in not having any regard to the scholarly contribution of retired Constitutional Court justice, L Ackerman, in **Human Dignity: Lodestar for Equality in South Africa** (2012, Cape Town: Juta Publishers), referred to by the Applicants in their submissions, more particularly:

a. That German dignity jurisprudence is singularly important for a proper understanding of dignity and its application to gestating human life under the South African Constitution;

b. His argument that *"certain aspects of human dignity pre-date birth and that the Constitution (and not the scientist) must ultimately determine when the various aspects of human dignity, guaranteed by the Constitution, begin and cease"*.

c. His argument that *"human dignity accrues to human life, regardless of the stage of development of this life and that gestating human life is developing as a human being and not towards being a human being"*.

d. His caution that if the constitution does not protect human beings as a species, and not merely as individual human beings, there will be the ever present danger of relativising the concept of human dignity and the right to life flowing from it, resulting in human dignity being launched on a slippery slope that has no non-arbitrary restraints.

33. The learned judge erred by not having due regard to the academic article by the scholar, Donald Kommers (***The Constitutional Law of Abortion in Germany: Should Americans pay attention?*** 1994 Notre Dame Law School NDL Scholarship).

34. It is respectfully submitted that the learned judge erred in not having any regard to various points raised by Kommers, and referred to by the Applicants, about the German conversation which resonates with the principles and processes underpinning *Ubuntu* and a country which shares a similar history to Germany when it comes to undermining the dignity and value of human life. These include:

a. A deep concern for all of human life;

b. A desire to be inclusive, not least of all by listening to all and attempting to craft a response which displays a sensitivity to the whole of society and avoiding a simplistic dualistic approach involving the stock "pro and con" arguments;

c. Eschewing a winner and loser approach to an issue which strikes deeply at the belief systems of the people of South Africa;

d. An honest "owning" of and grappling with the difficult questions which the issue raises;

e. A refusal by the state, and the wider community, to abdicate responsibility, not least of all by delegating it to the medical profession or burdening and isolating the pregnant women in distress;

f. Contrasting the image of the human person in American constitutional law, where a woman is seen as alone, isolated and independent, and bounded by little more than self-interest, with German constitutional law with its strong community orientation and integrated human solidarity;

g. Taking a strong stand against the commercialization of abortion.

35. It is respectfully submitted that in the absence of evidence the above Honourable Court erred in finding that the Act was legislated without discord as opposed to rather analyzing the *ex facie* provisions of the Act to discern whether it is consistent with the broad inclusive engagement about the issues which would be raised by a balancing of the rights of the pregnant woman with that of the gestating human life in her.

36. The learned judge erred in not finding that absent the declarator sought in prayer 1 of the Notice of Motion, any constitutional debate about the rights of the pregnant woman to an abortion, or indeed any limits placed on her in this regard, as for example by the Act, would be irrational and meaningless.

37. The learned judge erred in not finding that if the relief as sought was not granted the result would be that the Act remains unchanged without the benefit of an inclusive national conversation.

38. The learned judge erred in not finding that the present *status quo* is merely a reflection of the American winner take all approach to an issue of profound moral importance to all South Africans and is inimical to the inclusive process central to *Ubuntu*.

39. It is thus respectfully submitted that the above Honourable Court erred in not finding that the German approach to gestating life would be the one most consistent with the type of society envisaged by the Constitution. A society grounded in *Ubuntu* which is caring, nurturing and supportive of women in distress whilst at the same time displaying an inclusivity when it comes to the life and dignity of all human life, inclusive of gestating human life.

Interests of justice

40. Given that the nature of the relief sought will by necessity require the above Honourable Court to make a critical and life and death normative value judgement affecting millions of future gestating human lives, it is difficult to conceive of a matter requiring more urgent and definitive direction from this Honourable Court.

41. Furthermore, the declarator sought will have a profound moral effect on South Africa as a nation when it comes to affirming the infinite worth and value of all human life, and thus is of paramount importance to all South Africans.

42. There have already been significant delays in the present matter, which was initiated on 27 October 2015, including a delay of some

11 months between the matter being argued and judgment being handed down. Furthermore, there was an application for direct access to the above Honourable Court made on 3 July 2015. This application was refused on 9 September 2015, the order stating that it was dismissed "as it is not in the interests of justice to hear it at this stage".

43. In addition, given the nature of the declaratory relief sought, it is respectfully submitted that there would be no disputes of fact involved. Such disputes of fact only will emerge when it comes to the practical implementation of the declarator, that is, when it comes to dealing with and accommodating the competing rights involved when reviewing the Act and other existing germane law.

44. There are now three High Court decisions which have pronounced on the constitutional issues involved.

45. Furthermore, it is respectfully submitted, the above Honourable Court in the matter of **H and Foetal Assessment Centre** has, **in effect**, by highlighting the rights contained in section 12 of the Constitution, assumed that gestating human life is not life as envisaged in the Constitution and thus need not be considered when the decision to abort is taken by the pregnant woman. If this is a correct interpretation of the said case, it is respectfully submitted that this decision was arrived at without the issue specifically being argued before the above Honourable Court, which may have a significant impact on the decision of other courts in the land.

46. In contrast there are the views referred to above of retired Constitutional Court justice, Justice Ackerman and the German Constitutional Court. In addition, there are the observations

referred to above by the former Chief Justice, Justice Mahomed, foreshadowing a balancing act which presupposes the possible constitutional status of gestating human life.

47. It is respectfully submitted that if one has regard to the cumulative effect of all the above, it is in the interests of justice for the above Honourable Court to give a definitive finding as soon as possible on whether or not gestating human life must receive constitutional recognition and protection.

48. An application for leave to appeal to the Supreme Court of Appeal has been lodged with the South Gauteng High Court. Such application is conditional on the above Honourable Court not granting leave to appeal directly to it. At the time of lodging this application, the South Gauteng High Court had not yet heard the application.

49. Accordingly, it is respectfully submitted that it is in the interests of justice that leave to appeal to the Constitutional Court be granted.

Dated at Johannesburg on this 4th day of October 2017

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TO:

THE REGISTRAR OF THE ABOVE HONOURABLE COURT JOHANNESBURG

AND TO:

THE STATE ATTORNEYS

Defendant's Attorneys

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ADDENDUM 3

CONSTITUTIONAL COURT OF SOUTH AFRICA	CASE CCT 258/17

In the matter between:

DEBRA LINDE	FIRST APPLICANT
SHELLEY LOOTS	SECOND APPLICANT
ROSLYN MATTHEE	THIRD APPLICANT

and

MINISTER OF HEALTH OF THE REPUBLIC OF SOUTH AFRICA	RESPONDENT

ORDER DATED 21 February 2018

CORAM: Zondo DCJ, Cachalia AJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J.

The Constitutional Court has considered this application for leave to appeal. It has concluded that the application should be dismissed as it bears no reasonable prospects of success. The court has decided not to award costs.

Order:

The application for leave to appeal is dismissed.
There is no order as to costs

Sources consulted

Study Bible, 2008. English Standard Version. Crossway, Illinois.

Ackermann, L. 2012. *Human Dignity: Lodestar For Equality In South Africa*. Cape Town: Juta.

Altman, A. 1986. *Legal Realism, Critical Legal Studies, and Dworkin*. Philosophy & Public Affairs, Vol. 15, No. 3, published by Wiley.

Between Capital and Cathedral: Essays on Church – State relationships, 2012 Research Institute For Theology and Religion, University of South Africa, edited by Wessel Bentley and Dion A Forster.

Berkman, J and Mattison III, W.C. 2014. *Searching For A Universal Ethic*. Cambridge: Eerdmans Publishing Company.

Braden, G.D. 1948. *The Search for Objectivity in Constitutional Law*. 57 Yale L.J.

Arthur Chaskalson, 2003. *From wickedness to equality: the moral transformation of South African law*. Oxford University Press and New York University School of Law, I.CON, Volume 1, Number 4.

Chesterton, G.K.1994. *Orthodoxy*. Colorado: WaterBrook Press.

Coertzen, P. 2014. *Constitution, Charter and religions in South Africa*. AHRLJ, 14: 126 – 141.

Davis, D. Richter, A. Saunders, C. 2015. *An Inquiry into the Existence of Global Values Through the Lens of Comparative Constitutional Law*. Oxford: Hart Publishing

Devlin, P. 1965. *The Enforcement Of Morals*. Oxford: Oxford University Press.

Du Plessis, L. *Jurisprudential Reflections on the Status of unborn life*. 1990. TSAR.

Du Plessis, L. 2002. *Re-Interpretation Of Statutes*. Durban: Butterworths.

Dworkin, R. 1978. *Taking Rights Seriously, New Impression with a Reply to Critics*. London: Duckworth.

Guiness, O.S. 1994. *The Dust of Death: The Sixties Counterculture and How It Changed America Forever*. Illinois: IntervarsityPress.

Hays, R. 1996. *The Moral Vision of the New Testament*. New York: Harper Collins.

Hart, H.L.A. 1961. *The Concept of Law*. Oxford: Oxford University Press.

Hauerwas, S. 2001. *The Hauerwas Reader*. Durheim: Duke University Press.

Knight, K. 1998. *The MacIntyre Reader*. Cambridge: Polity Press.

Kennedy, D. 1976. *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev.

King, M.L.1963. *Strength to Love*. Great Britain: Hodder and Stoughton.

Donald Kommers, *The Constitutional Law of Abortion in Germany: Should Americans pay attention?* 1994 Notre Dame Law School NDL Scholarship.

Koopman (2007:107): *Towards A Human Rights Culture In South Africa*. DEEL 48 Nommers 1 & 2 Maart & Junie 2007.

Kunhiyop, S. W. 2008. *African Christian Ethics*. Nairobi: Hippo Books.

Lewis, C.S. 2001. *The Abolition Of Man*. New York: HarperCollins Publishers.

Llewellyn, K.N. 1960. *The Common Law Tradition: Deciding Appeals*. Boston, Little, Brown.

MacCormick, N. 1984. *Dworkin as Pre-Benthamite,* in Cohen, ed. Ronald Dworkin and Contemporary Jurisprudence.

MacIntyre, A.C. 1988. *Whose Justice? Which Rationality?* Notre Dame: University of Notre Dame Press.

Professor John Mbiti (Africa, Christianity and the Bible – Vlog 35 – Dion Forster's blog).

Moltmann, J. 1984.*On Human Dignity Political Theology and Ethics*. London: SCM Press.

Nadasen, S. 1996. *The Search For National Values in a Transforming South Africa*. Journal Of Theology For Southern Africa, Issue No 96: 75 - 83.

Paulinus Ikechukwa Odozor in *"Morality Truly Christian Truly African* (University of Notre Dame Press, Notre Dame, 2014).

Rawls, J. 1973. *A Theory of Justice*. *London*: Oxford University Press.

Schaeffer, F. 1969. *Death in the City*. Chicago: Inter-Varsity Press.

Tanner, M. 1994. *Nietzsche*. Oxford: Oxford Press.

Taylor, C. 2007. *A Secular Age*. Cambridge: Belknap Press.

Thielicke, T. 1966. *Theological Ethics Volume 1*: Foundations. Michigan: Eerdmans.

Thiselton, A. C. 1992. *New Horizons in Hermeneutics*. Michigan: Zondervan Publishing.

Tushnet, M. 1984. *Critical Legal Studies and Constitutional Law*: An Essay in Deconstruction, 36 Stan. L. Rev.

Unger, R. *Critical Legal Studies Movement*. Harvard Law Review 96 (1983)

H Weschler, *"Toward Neutral Principles of Constitutional Law"*. Harvard Law Review 73 (1959), 1, 35

Wolterstorff, N. 2008. *Justice Rights and Wrongs*. Princeton: University Press.

Woolman. 2008. *Constitutional Law of South Africa Second Edition*. Cape Town: Juta Publishers.

Op-Ed / Opinion piece

SUBJECT: CONCOURT UNANIMOUSLY AND SHAMEFULLY FINDS THAT UNBORN BABIES LESS THAN 26 WEEKS OLD ARE NOT HUMAN, AND IN EFFECT DEPRIVES MANY TRAUMATISED PARENTS A LEGAL RIGHT TO BURY THEM

Author: Keith Matthee SC

The South African Constitutional Court handed down its judgment in the **Voice of the Unborn Baby** case on 15 June 2022 (Case CCT 120/21). Amongst other things, the court had to decide whether to confirm a finding by the Pretoria High Court last year that certain provisions of the Births and Deaths Registration Act ("BADRA") and related health regulations were unconstitutional for denying parents of babies who die during the first 26 weeks of existence in the womb the right to bury their babies' remains.

The Constitutional Court overturned the High Court's decision and in effect has ruled that unborn babies younger than 26 weeks are not human. (I assume that BADRA uses 26 weeks as the cut-off date based on the flawed reasoning that babies less than 26 weeks are not viable.) The practical effect of this is that already traumatised parents do not automatically have the right to the remains of their babies, so that they can bury them.

In this regard Cause for Justice, an *amicus curiae* (friend of the court) in the litigation, put expert medical evidence before the Court confirming that from the moment of conception the newly formed organism (zygote) is both living and human, i.e., is a living human being. In its judgment it did not deal with this evidence. (All the Constitutional Court needed to do to grasp how fatally flawed their decision is that unborn babies less than 26 weeks old are

not human, is watch the 44 second long fetoscopy of a 9 week old, **let alone a 26 week old**, unborn baby on my website, www.keithmatthee.com.)

The best the Constitutional Court could do was spend the whole of two legalistic sentences to answer the central question in the case – **whether the bodily remains of a child that dies prior to 26 weeks in the womb is a "dead human body"** (i.e., a corpse, as legally defined)? In the Court's view, an interpretation that such remains fall within the meaning of "dead human body", *"**would unduly strain the meaning of the words** … It also would not make sense for the Legislature to refer to a more developed foetus as still-born and a far less developed one as a human body, which ordinarily and plainly refers to people or "the born alive"."*

This is the same court that inter *alia* used the subjective concept of *ubuntu* to decide that vicious convicted multiple murderers were worthy of being treated with dignity (**S v Makwanyane and Another** 1995 (3) SA 391 (CC)). And which also used *ubuntu* to justify a total disregard for clear rules and procedures which had to be followed before a street could be renamed. In the latter matter the majority ruled that **substance must always trump form (City of Tshwane Metropoliton Municipality and Afriforum and Another**, [2016] ZACC 19).

And yet, when it comes to how to treat the remains of unborn children and their already traumatised parents, there is not even a hint of this same *ubuntu* interpretive lens. All there is, is **cold hearted legalism, form**.

The justices of the Constitutional Court are able and have sharp minds, well aware of the previous jurisprudence of their court, not least of all the resort by the justices to a subjective and ill-defined concept such as *ubuntu* when

expedient or when they believed justice required it. Furthermore, they are aware of the politically correct and oppressive culture they are operating in. It is a culture which simply does not tolerate treating all life as sacred when to do so will have a negative impact on that culture enabling the sacrificing of its children on the altar of self (since 1998 we are talking of a number of some 2.5 million unborn children who have been intentionally killed **in effect** with the blessing of the state, inclusive of the Constitutional Court – see footnote 3 of **The Emperor Has No Clothing**, referenced below, for the extrapolation to 2.5 million).

The legalistic and, in effect, callous decision in this matter only makes sense if the justices saw that to affirm the decision of the High Court would open the door to later courts finding that all unborn children are human beings, who must be treated with dignity and respect. And so, the justices forgot all about the lens of *ubuntu* and resorted to legalism, even unashamedly at one point stating that the possible economic implications of affirming unborn babies of less than 26 weeks as human beings also was part of the reason for their decision.

I ask myself the obvious question, if babies less than 26 weeks are not human, **then WHAT (I urge the reader once again to watch the fetoscopy referred to above)?**

Besides the further brutalising and dehumanising of our society, by aiding and abetting the ideology that some human life is more worthy of dignity than other human life, so fundamental to the apartheid regime of the past, in its effect this latest decision by the Constitutional Court is cruel and callous towards already traumatised parents.

Parents whose babies are younger than 26 weeks old, are left with no clearly recognised right to rely on if they want to bury their prematurely deceased child. If a hospital (as has been the norm and reality in most cases up until now) denies parents the bodily remains of their baby, parents would have to somehow persuade or financially remunerate or litigate against the hospital to prevent their baby's remains from being disposed of as medical waste or used for experimentation, so that as parents they can bury their child. Practically speaking, where the unborn baby is less than 26 weeks old, most hospitals usually treat the remains of the baby merely as medical waste without having regard to the wishes of the parents. This makes it almost impossible for traumatised parents to act quickly enough to prevent hospitals from simply incinerating, or worse, their baby.

Knowing full well the reality on the ground, this failure by the Constitutional Court to use its enormous powers to affirm the dignity and worth of all human life, and to affirm the right of traumatised parents to pay their respects to their deceased babies, as opposed to expediently and conveniently leaving the question open as it has done, is a woeful and intentional moral failure by the Constitutional Court. (In any event, the justices of the Constitutional Court cannot simply claim ignorance of this reality on the ground or that they had too little evidence before them. For example, if they were uncertain about anything, they could have of their own accord called for further evidence. They have often done this in the past where politically correct, populist or other considerations prevailed.)

This moral failure by the Constitutional Court as regards unborn human life, also is clearly in evidence in an earlier decision it handed down in February 2018. There, no doubt for the same expedient reasons as above, it did not bother to give reasons for its decision not even to hear oral argument as

regards whether or not to affirm unborn babies as human life worthy of dignity and protection. (In stark and shameful contrast, in the death penalty matter referred to above, the justices collectively gave in excess of 120 pages of reasons as to why the lives of convicted and vicious murderers are worthy of dignity.) The book, **The Emperor Has No Clothing** (available online at no cost at www.keithmatthee.com), in detail sets out the context of this decision by the Constitutional Court.

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In this book the Emperor is the South African Constitutional Court. Given its present huge popularity amongst most South Africans, saying that it has no clothing would seem to be either a brave, or a foolhardy exercise!

Keith Matthee sets out succinctly why he is of the view that the Emperor has no clothing. Central to his reasoning is the recent ruling by the Constitutional Court concerning whether or not unborn human life is human life worthy of dignity.

Given the sheer numbers of unborn children and their mothers in crisis affected by this ruling, as a society we ignore the challenge by the First Applicant in her Foreword at our peril: "At times it is not an easy read, but I believe it is a crucial read if we are to begin to regain our soul as a nation." As Professor Forstchen observes in his review on the film "Downfall", which exposes the evil of Adolf Hitler and his social Darwinism, "The true form of evil rarely looks evil on the surface, it seduces us with fair face as it leads, sometimes an entire nation, into damnation."

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