IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case No. CCT 74/14

In the matter of the application for the recognition of a wrongful life claim between:

C J H Applicant

(on behalf of her minor son, M)

and

THE KINGSBURY FOETAL ASSESSMENT

CENTRE(PTY)LTD Respondent

APPLICANT'S PRACTICE NOTE

A. Nature of the proceedings:

1. The respondent successfully excepted to the wrongful suffering (life) claim brought in the court a *quo.* This application is for leave to overturn the judgment a *quo* and in so doing to develop the common law of delict to recognise claims for wrongful suffering.

B. Issues to be argued:

2. Reasons for the necessity to develop the common law to recognise a claim for wrongful suffering in our law will be argued under the topics of:

2.1. Wrongfulness and a legal duty of care;

2.2. The sanctity of life argument;

2.3. The determination of damages;

2.4. The approach of international jurisdictions and foreign academia; and

2.5. South African law and academia.

C. Relevant portions of the record: 3

3. The Applicant is of the opinion that this Honourable Court is required to read the following portions of the record:

3.1. The Applicant's particulars of claim;

3.2. The Respondent's exception to the Applicant's pleading;

3.3. The court *a quo's* judgment.

D. The estimated duration of argument:

4. The estimated duration of argument is three hours.

E. Summary of argument:

5. This is a test case for the development of the common law to recognise a claim for wrongful suffering taking into consideration the relevant provisions of the Children's Act, the Bill of Rights, and C173 of the Constitution.

6. There are three stumbling blocks to the recognition of a wrongful suffering claim currently raised in the South African

4

case law, namely a legal duty of care towards the fetus, the 'sanctity of life' argument, and the impossibility of measuring damages.

7. The Supreme Court of Appeal's approach that a court cannot be called upon to determine whether a child should have been born at all, is untenable, as this approach denies the very essence of the law and the function of the courts. Difficult questions and questions of public policy have to be decided with reference to the rights guaranteed and entrenched in the Constitution and the courts are required to develop the common law accordingly.

8. *In cesu,* the wrongfulness of the defendant's negligent omissions towards M, was that its failure to properly inform M's mother that M suffered from Down Syndrome, precluded her from making an informed decision on whether or not to abort the fetus. The aforesaid obligation to inform the mother properly was a duty owed to M, mediated through his mother. When considering the developments in modern medicine and medical technology, such as *in vitro* fertilsation, *in utero* fetal surgery, genetic modification and such like, the duty of care owed by the

medical practitioner, is ultimately, and on a proper analysis of whose rights are most affected, a duty of care owed to the child whose well-being is forseeably at risk as a result of any negligence in the carrying out of the type of assessment to which the fetus which became M, was subjected by the respondent.

9. The provisions of the Choice of Termination of Pregnancy Act 92 of 1996 have already eroded the sanctity of life argument. The rights to human dignity, bodily and psychological integrity and not to be treated in an inhumane and degrading way, read together with C 7(2) which obliges the state to respect, protect, promote and fulfill the rights in the Bill of Rights, and the limitations of C 36, must be balanced against any right to life in an impaired and disabled state such as that in which M unfortunately finds himself. The reality of the situation is that M both exists and suffers due to the negligence of the defendant.

10. The assessment of damages is *"a/ways* a *practical exercise in approximation. There can never be an exact equivalence between* a *personal injury and money"* (per Kirby J). By awarding damages in a wrongful suffering action the court is not

6

endorsing a claim that such disabled individual would be better off not having been born, but rather that such disabled individual would be better off with access to resources.

11. Internationally, some of the more advanced and progressive jurisdictions recognise a claim for wrongful suffering. The majority of both local and international academia favours the recognition of such a claim.

12. When considering the sections of the Bill of Rights and the Children's Act, a claim for wrongful suffering ought to be recognised, thereby attributing wrongfulness to the respondents' conduct and creating a duty of care to the M.

F. List of authorities on which particular reliance will be placed during argument:

The applicant places particular reliance on all of the authorities listed in her written submissions, to the extent that they are dealt with in the written submissions.

7

R.P. Hoffman (SC)

P. van den Heever

N.C. Lawrenson