28/5/2023

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

CASE NO.: ***2023/2212***

On Sunday 28 May 2023

Before the Honourable Thompson AJ

In the matter between:

[redacted] *Applicant*

and

MEMBER OF THE EXECUTIVE COUNCIL

GAUTENG DEPARTMENT OF HEALTH *First Respondent*

HEAD OF DEPARTMENT

GAUTENG DEPARTMENT OF HEALTH *Second Respondent*

ORDER

AFTER *having read the papers filed of record and after having considered the matter*

T
28/5/2023

IT IS ORDERED THAT

1. *The identity of the Applicant may not be disclosed by any person to any third party who has to perform any act, whether administrative or medical in nature, in terms of this order.*

2. *Save as provided for in this order, the identity of the Applicant shall remain undisclosed and no person involved in this matter shall share or disseminate any portion of this order or application in any manner whatsoever, save for educational and/or training purposes, in which event any and all information which may lead to the identity of the Applicant being disclosed shall be redacted in a manner that renders such information completely unreadable.*

3. *Upon having been satisfied that the provisions of Section 2(1)(b)(i) and (iv) of the Choice of Termination of Pregnancy Act 92 of 1996 ("the Act") being applicable and having been complied with, it be and hereby is declared the applicant,* [redacted] *is entitled to access a termination of pregnancy in terms of the Act as read with the practice guidelines relating to the termination of pregnancies, should she so wish.*

4. *The respondents are directed and ordered, subject to the Applicant being found to be medically fit and suitable for an invasive medical procedure to be performed on her, to terminate the applicant's pregnancy by no later than Monday, 29 May 2023.*

28/5/2023

5. *In order to give effect to paragraph 4 of this order, the applicant shall present herself at Hillbrow Community Health Centre at 06:30am, or so soon thereafter as reasonably practically possible, on Monday, 29 May 2023.*

6. *The respondents will cause the applicant to be transported to Jubilee District Hospital, a public hospital in Temba located at 92 Jubilee Road, Temba Rural, Temba, or such other medical facility as may be appropriate and/or necessary and available to the respondents in order to ensure compliance with the order in paragraph 4 hereof.*

7. *Should the Applicant not present herself for the termination of the pregnancy as contemplated by this order on 29 May 2023, this order shall lapse and have no force or effect.*

8. *No order as to costs.*

By order

The Registrar

Counsel for Applicant: ***Letlhogonolo Mokgoroane***

Counsel for Respondents: ***TN Mlambo***

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

Case No.:
HCGS2 14975

In the matter between:

MNN Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL

GUATENG DEPARTMENT OF HEALTH First Respondent

HEAD OF DEPARTMENT

GAUTENG DEPARTMENT OF HEALTH Second Respondent

NOTICE OF MOTION: URGENT APPLICATION

PLEASE TAKE NOTICE THAT the applicant intends to apply to this Honourable Court on Friday, 26 May 2023 at 16h00 or as soon after that as counsel may be heard, for an order –

1. Dispensing with the requirements of forms and services provided for in the Uniform Rules of Court in terms of Rule 6(12)(a) to the extent necessary and hearing this matter as one of urgency.

2. Declaring that:

   2.1. The first and second respondents are under a statutory and constitutional duty to ensure the provision of termination of pregnancy services.

   2.2. The first and second respondent have failed in their duty to ensure the timeous provision of termination of pregnancy services for MNN.

3. Compelling the second respondent to instruct a medical practitioner within its employ to perform a termination of pregnancy procedure and any other care which may be necessary in the circumstances on the applicant, on or before Saturday, 27 May 2023.

4. Ordering those respondents who oppose the relief sought by the applicant to pay the applicants' costs jointly and severally, the one paying the other to be absolved.

5. Granting the applicants further and/or alternative relief.

KINDLY TAKE NOTICE FURTHER that the annexed founding affidavit of **MNN,** together with its annexures, and the supporting affidavits of **PROFESSOR ELNA MCINTOSH** and **KHANYISA MAPIPA** and annexures, filed together the main affidavit of MNN, will be used in support of the application.

KINDLY TAKE NOTICE FURTHER THAT the applicants have appointed the office of **SECTION27**, as set out below, as the address referred to in Rule 6(5)(b) at which it will accept notice and service of all process in these proceedings.

TAKE NOTICE FURTHER THAT in the event that you intend to oppose this application, you are required to:

1. Notify the Applicant's attorney in writing by **17h30** on **Friday, 26 May 2023**; and

2. File your answering affidavit(s) by **18h30** on **Friday, 26 May 2023**.

TAKE NOTICE FURTHER THAT if no such Notice of Intention to Oppose is given, application will be made to this Honourable Court for an order in terms of the Notice of Motion on Friday, 26 May 2023 at 19h00.

DATED at SANDTON on this 26 day of MAY 2023



SECTION27

Applicants' Attorneys

First Floor South Point Corner Building

87 De Korte Street

Braamfontein

Johannesburg

Tel: 011 356 4100

Email: mapipa@section27.org.za

Stevenson@section27.org.za

TO: **THE REGISTRAR OF THE ABOVE HONOURABLE COURT**

Johannesburg

AND TO:

MEMBER OF THE EXECUTIVE FOR HEALTH OF THE GAUTENG PROVINCE

First Respondent

Department of Health

45 Commissioner Street Johannesburg

Per email: nombuso.fale@gauteng.gov.za

AND TO:

HEAD OF DEPARTMENT OF THE DEPARTMENT OF HEALTH IN GAUTENG

Second Respondent

Department of Health

45 Commissioner Street

Johannesburg

Per email: arnold.malotana@gauteng.gov.za
nomsa.mmope@gauteng.gov.za
sikhonjiwe.masilela@gauteng.gov.za
hlengiwe.goba@gauteng.gov.za

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO.: HCGS214975

In the matter between:

MNN	Applicant
and	
MEMBER OF THE EXECUTIVE FOR HEALTH OF THE GAUTENG PROVINCE	First Respondent
HEAD OF DEPARTMENT OF THE DEPARTMENT OF HEALTH IN GAUTENG	Second Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

MNN

do hereby make oath and say that:

1. I am a [redacted] year old female currently residing at [redacted], Johannesburg.

MNN
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2. I have been advised by my attorneys to keep my name anonymous and that once I have signed this affidavit my name will be redacted from the papers and its annexures that would form part of the court file. Only my initials will remain. My attorneys will make available to the court the non-redacted version, should the court require it.

3. The facts contained herein are, unless indicated by context, within my own personal knowledge and are to the best of my knowledge and belief both true and correct. Where I make legal submissions, I do so on the advice of my legal advisors.

4. In instances where I rely on information provided to me by others, I believe such information to be true and correct and attach, where possible, a confirmatory affidavit deposed to by such person.

THE PARTIES

5. The first respondent is a **MEMBER OF THE EXECUTIVE FOR HEALTH OF THE GAUTENG PROVINCE**, with offices at the Department of Health, 45 Commissioner Street, Johannesburg, care of the State Attorney, Pretoria, at 316 Thabo Sehume Street, Pretoria. The MEC is a member of the Provincial Executive constitutionally responsible for the effective implementation of the provisions of the Choice on Termination of

Pregnancy Act 92 of 1996 (CTOPA) as well as the National Health Act 61 of 2003.

6. The second respondent is the **HEAD OF DEPARTMENT OF THE DEPARTMENT OF HEALTH IN GAUTENG** with offices at the Department of Health, 45 Commissioner Street, Johannesburg, care of the State Attorney, Pretoiria, at 316 Thabo Sehume Street Pretoria. The Head of the Department is the accounting officer of the Gauteng Department of Health and bears a range of responsibilities under section 25 (2) of the National Health Act and the CTOPA.

URGENCY

7. I am advised that a party who seeks urgent relief is obliged to explain in full the reasons which, it is averred render the application urgent. I am advised further that two primary considerations underpin the question of urgency. They are first, that in the light of the explanation furnished, the urgency is not self-created and second, that if the application is heard in the ordinary course on the normal motion court roll, the applicant will be deprived substantially of the relief it seeks.

8. As a result of the unlawful actions of the respondents and their flagrant disregard of the rights of the applicant, each passing hour represents an infringement on the rights of the applicant.

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9. This application has been brought by way of urgency on the basis that the harm is ongoing. No effective relief would be obtained if this application was brought in the normal course and set down on the ordinary motion roll. At that point, any redress afforded to the applicant would be substantially undermined by the unlawful conduct of the respondents during the interim period and would leave the applicant in an untenable situation.

Urgency is not self-created and not substantial redress

10. On or about 24 April 2023, I approached Hillbrow Community Health Centre (Hillbrow CHC) and was provided with an ultrasound scan which determined that I was, at the time 16 weeks and 2 days pregnant. By my calculations, that means that I am currently 20 weeks and 5 days pregnant. According to section 2(1)(b) of CTOPA the statutory limit for a lawful termination of pregnancy in the second trimester is 20 weeks and 6 days. I have exactly one day to obtain a lawful termination of pregnancy.

11. On my follow up visits to Hillbrow CHC on or about 2 May 2023 and on or about 25 May 2023, I requested a termination of pregnancy (TOP). On or about 2 May 2023, calculating from the gestational age given on my visit to Hillbrow CHC, I was 17 weeks and 3 days and still eligible for a TOP under section 2(1)(b) of the CTOPA. On or about 25 May 2023, calculating from the gestational age provided on my visit to the clinic on or about 24 May 2023, the gestational age of my pregnancy was 20 weeks and 4 days,

MNN

and I was still eligible for a TOP under section 2(1)(b) of the CTOPA. On both occasions my request for a TOP was denied.

12. On my visit to Hillbrow CHC on or about 2 May 2023, I was advised by the healthcare provider who attended to me that a TOP is impossible for me due to the positioning of the foetus, which they explained was a breeched position. I now understand, upon the advice of a medical expert in sexual and reproductive rights, Professor Elna McIntosh that a TOP is indeed possible for a foetus in a breeched position and that the responsibility lay on the healthcare provider at Hillbrow CHC to refer me to an obstetrician who could assist in repositioning the foetus. I attach an unsigned confirmatory affidavit of Professor Elna McIntosh annexed as "**FA1**". A copy of the signed confirmatory affidavit will be made available to the court at the hearing of this matter.

13. On my visit to Hillbrow CHC on or about 25 May 2023, I was advised that I could not obtain a TOP without parental consent. I was instructed to return home and obtain such consent and then return to the clinic with my parent.

14. I am advised that this is a material misrepresentation of the law. In terms of section and section 5(2) and (3) of the CTOPA only requires my consent for a TOP.

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15. It is worth mentioning that my first visit to Hillbrow CHC was on or about 13 April 2023. I approached the clinic because I suspected that I was pregnant. My last proper menstrual cycle was on or about 24 January 2023. In my February 2023 and March 2023 menstrual cycle, I spotted, meaning that I had a very light period. This being unusual, I attended at Hillbrow CHC for a pregnancy test.

16. It is my understanding from the expert evidence provided by Professor McIntosh that when I first approached Hillbrow CHC, the gestational age of my pregnancy was approximately 10 week and that had I been assisted with an ultrasound scan on my first visit, it would have still been possible for Hillbrow CHC to assist me with a medical TOP, given that they are a designated first trimester TOP facility.

17. I have done everything in its power to bring this application to this court as quickly as possible. I state however that in bringing this application on an urgent basis, the applicant is mindful of the need to strike a balance between the urgency of the application and the need for the respondents to have a proper opportunity to place their opposition to the application properly and fully before the Court.

18. I have no substantial redress in due course as I would be outside of the 20 week period to lawfully terminate my pregnancy.

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19. I am also approaching this court because I do not want to go and do an unsafe termination as that has life-impacting implication for me, the worst of which is death. I made also suffer life-threatening haemorrhage, sepsis, peritonitis, trauma to the vagina, cervix, uterus and abdominal organs, chronic genital and reproductive tract infections and secondary infertility. Many will require major surgical interventions, including hysterectomy.

PURPOSE OF THE APPLICATION

20. This is an application concerning the right to access to TOP services within the public healthcare system – in particular, the Gauteng public healthcare system – and the collective failure of the respondents to ensure that access to termination of pregnancy services is available in a manner that protects and promotes a woman or girl's fundamental right to bodily autonomy, psychological, social and economic health, while taking into consideration the time sensitive nature of TOP.

21. The law places various conditions and limits to accessing this right, including gestational age of the pregnancy (in other words, the number of weeks of a woman or girl's pregnancy). It is for this reason that the speedy and timeous provision of TOP services is paramount.

22. The first and second respondent have failed to safeguard women and girls from the obstructive treatment of TOP patients often perpetuated by

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medical professionals under the employ of the second respondent, in an effort to deny a woman or girl her rights and entitlements under sections 12 (2)(a) and 27(1)(a) of the Constitution, as well as various sections in the CTOPA. This failure has directly resulted in my precarious position, where I find myself 20 weeks and 5 days pregnant, with essentially one day left to lawfully terminate my pregnancy in accordance with section 2(1)(b) of the CTOPA.

STANDING

23. I bring this application in my personal capacity. In terms of section 5(2) and (3) of the CTOPA, I am entitled to request and obtain a termination of pregnancy without parental consent or consultation.

24. Section 129(2) of the Chilldren's Act 35 of 2005 provides that:

> *"(2) A child may consent to his or her own medical treatment or the medical treatment of his or child if – the child is over the age of 12 years..."*

25. As such it is generally accepted that a minor beyond the age of 12 years may consent to a TOP, as a medical treatment. I confirm that I am beyond 12 years of age. I annexed my birth certificate as "**FA2**"

ADQ MNN

FACTUAL BACKGROUND

26. On 13 April 2023, I approached Hillbrow Community Health Care Centre (Hillbrow CHC), a community clinic designated by the first respondent in terms of section 3 of the CTOPA to provide terminations of pregnancy until the 12th week of the gestation period of a woman or girl's pregnancy. In this regard, I attach a printout of the Gauteng government's web page listing all first trimester (0 to 12 weeks) TOP facilities as annexure "**FA3**".

27. I approached Hillbrow CHC because I suspected that I may be pregnant, given the very low flow of my menstrual cycle in the preceding two months. I requested a pregnancy test, which was provided to me. The test determined that I am indeed pregnant. I was advised, by the healthcare provider assisting me to return on or about 24 April 2023 for an ultrasound scan.

28. On 24 April 2023, I attended at Hillbrow CHC for the ultrasound scan. I was advised by the healthcare provider who assisted me that the scan determined that I was, at the time, 16 weeks and 2 days pregnant. In this regard, I attach a copy of the ultrasound scan as annexure "**FA4**".

29. During this visit, the healthcare provider assisting me voiced concerns regarding the size of the foetus given the gestational age of the pregnancy

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as well as the position in which the foetus was located. They described this position as the breeched position. Consequently, they dispensed folic acid and other prenatal vitamins to me. I was advised to return to the clinic on or about 2 May 2023 for a follow-up.

30. On 2 May 2023, I returned to Hillbrow CHC. On this visit, I requested a TOP. Given that this was a week and a day after my previous appointment, I estimate that I was, at the time, 17 weeks and a day pregnant and still within the legal limit to obtain a second trimester TOP.

31. Given that Hillbrow CHC is not designated to perform second trimester TOPs, I am advised that in terms of section 44(2) of the National Health Act 61 of 2003 as well as the National Clinical Guideline for the implementation of the Choice on Termination of Pregnancy Act ("Guideline"), the healthcare providers at Hillbrow CHC were obligated to refer me to an appropriate public health establishment which is capable of providing the necessary treatment or care. Such establishment would be any of the designated second trimester TOP facilities in Gauteng. I attach the relevant portions of the Guideline as annexure "**FA5**".

32. On my visit to the Hillbrow CHC on or about 2 May 2023, I was advised by the healthcare provider who assisted me that due to the foetus being in a breeched position, it was impossible for me to obtain a TOP.

MNN
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33. This, I am now advised, is in fact incorrect. In this regard, I refer to Professor Elna McIntosh's expert affidavit annexed hereto as "**FA6**". In brief, as explained by Professor McIntosh, a TOP is possible on a pregnancy where the foetus is breeched, however, such a complication cannot be handled by a midwife or a nurse or any other medical professional and must be referred to an obstetrician for further assessment and correction of the foetal position. No such referral was provided to me.

34. On 25 May 2023, desperate, I returned to Hillbrow CHC to again, request a TOP. On this occasion, I was advised that minors seeking TOPs must obtain parental consent and must be accompanied by the parent to the clinic.

35. I am now advised that this is a material misrepresentation of the law and that in terms of section 5(2) and (3) of the CTOPA, the only consent required for a TOP is mine and that I cannot be refused a TOP simply because I refuse to consult my parents.

36. On or about 25 May 2023, I approached SECTION27 for legal assistance. I consulted with my attorney, Khanyisa Mapipa, who attempted to find various solutions to assist me. These solutions include:

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36.1. Consulting telephonically, Dr Palesa Makoko, a medical practitioner at Leratong Hospital, a designated public healthcare facility in Krugersdorp, Gauteng. Dr Makoko advised Ms Mapipa that Leratong cannot assist with my TOP. The reasons provided were that:

36.1.1. Doctors who perform TOPs are not on call during the day, over weekends and are only on call at night. Given that some of the nursing staff that work over the weekend conscientiously object to performing TOPs, even in the case of an emergency, they will refuse to assist the patient suffering from a TOP related complication during the day and the patient could bleed out and die.

36.1.2. The next available date for a TOP is Monday, 29 May 2023, however by that date, the gestational age of my pregnancy would be beyond the 21 week limit as set out in the CTOPA.

36.1.3. Given my age and the father is beyond 18, the case would have to be treated as a statutory rape case which would

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necessitate counselling, evidence collection and reporting the matter to the police, all of which cannot be done in the two days left before I reach the gestational age limit.

36.2. Consulting telephonically with the deputy-director of maternal and child health at the Gauteng Department of Health, Mr Masilela Sikhonjiwe. Mr Sikhonjiwe echoed the Dr Makoko's sentiments and added that the only way I can be assisted is if I obtain an assessment of my mental state by one of the Gauteng Department of Health's psychiatrists and should that doctor deem me to be a danger to myself, then a case can be made that the continuation of the pregnancy endangers my life and therefore qualifies me for a third trimester TOP under section 2(2) of the CTOPA.

36.3. Calling and texting the CEO of Chris Hani Baragwanath Hospital, to no avail.

36.4. Consulting telephonically with Professor McIntosh and persons from IPAS, an international non-governmental organisation that seeks to expand access to TOPs and contraceptive use.

MNN

36.5. Drafting and sending a letter of demand to the respondents, for a response at or before 12h00 today. A copy of this letter as well as proof of delivery and receipt is attached as annexure "**FA7**".

37. I attach Ms Mapipa's confirmatory affidavit as annexure "**FA8**".

APPLICABLE LEGISLATIVE FRAMEWORK

38. Section 27(1)(a) of the Constitution of South Africa, 1996 provides for the right to access health care services, which expressly includes the right to reproductive health care services.

39. Section 12(2)(a) of the Constitution makes provision for the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.

40. The Choice on Termination of Pregnancy Act, 1996 ("CTOPA"), gives effect to the aforementioned constitutional rights. Section 2(1)(b) of the CTOPA provides that:

MNN

"2. Circumstances in which and conditions under which pregnancy may be terminated

(1) A pregnancy may be terminated –

...from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that:

i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or

(ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality; or

(iii) the pregnancy resulted from rape or incest; or

(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman." (our emphasis)

41. Section 44(2) of the National Health Act, 2003 provides that where a public healthcare facility is not capable of providing the necessary treatment or care, the public healthcare facility in question is obliged to refer the patient to an appropriate public health establishment which is capable of providing the necessary treatment or care.

42. Section 10(1)(c) of the CTOPA provides that:

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"Any person who prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 year."

43. The National Clinical Guideline for the Implementation of the Choice on Termination of Pregnancy Act, interprets the actions stipulated under section 10(1)(c) as a refusal to care, including a failure by a health care professional to refer a woman to a colleague or facility capable of providing her with the abortion. It further states that this is a chargeable offence.

44. Section 5(2) and (3) of the CTOPA provides that:

> *"5. Consent.*
>
> *...(2) Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.*
>
> *(3) In the case of a pregnant minor, a medical practitioner or a registered midwife or registered nurse, as the case may be, shall advise such minor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them."*

MNN

INTERNATIONAL LAW

45. The Committee on Economic, Social, and Cultural Rights adopted a General Comment 22 on Sexual Reproductive Health(**SHR**), aiming to assist State parties with the implementation of their international obligations.

46. The General Committee 22 affirms that the right to sexual and reproductive health is an integral part of the right to health that has enjoyed longstanding recognition based on already existing international human rights instruments.

47. Furthermore, General Comment 22 contains four key components: it (a) adopts a life-cycle approach, therefore not reducing sexual and reproductive health to 'maternal health', (b) recognises that sexual and reproductive health and rights (**SRHR**) are indivisible from and interdependent with other human rights, (c) rejects all forms of coercive practices in SRHR and (d) recognises the particularly gendered experiences in SRHR, stating that due to women's reproductive capacities, the realisation of women's right to sexual and reproductive health is essential to the realisation of the full range of their human rights.

48. General Comment 22 determines that states have an obligation to repeal or eliminate laws, policies, and practices that criminalise, obstruct, or

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undermine individual's or particular groups' access to SRH facilities, services, goods, and information. This is considered to be a 'core obligation'—one that is deemed two-fold in this analysis.

49. General Comment 22 affirms that states are under an 'immediate obligation' to eliminate discrimination against individuals and groups, and to guarantee their equal right to SRH.

50. The General Committee outlines that the realisation of women's rights and gender equality requires states to repeal or reform any discriminatory laws, policies, and practices in this area.

51. The CEDAW Committee has also previously recommended taking steps toward the decriminalisation of abortion, requiring countries to modify or repeal the existing abortion legislation in line with obligations assumed international law.

52. General Committee 22 explicitly addresses states' obligation to remove all barriers interfering with women's access to reproductive health services.

53. General Committee 22 establishes that the duty to respect requires states to refrain from interfering with individuals' right to exercise their sexual or reproductive health. Examples include limiting or denying access to health

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services and information, such as laws or practices that require third-party authorisation for access to abortion or contraception, among others.

54. The obligation to fulfil, requires states to take measures to eradicate practical barriers to the full realisation of the right to SRH, such as disproportionate costs and lack of physical or geographical access to sexual and reproductive health care.

55. The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol) is the first human rights instrument in the world to explicitly set forth the reproductive rights of women to medical abortion.

56. Article 14(2)(c) of the Protocol recognises the right to medical abortion when pregnancy results from sexual assault, rape or incest, or when the continuation of a pregnancy endangers the health or life of the mother, or when there is danger to the life of the foetus.

57. Article 26 of the Protocol enjoins states parties to adopt all necessary measures, including budgetary measures, to fulfil the rights guaranteed by the Protocol. State obligations arising from article 14(2)(c) require implementation at the state level – not just in terms of merely recognising the grounds for abortion, but also establishing the infrastructure, including

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the dissemination of health information and provision of healthcare services for the termination of pregnancy under safe conditions.

58. South African ratified the International Conviction on the Elimination of Discrimination against Women (CEDAW), in particular article 7 which provides that states shall take all appropriate measures to eliminate discrimination against women

CONCLUSION

59. These restrictions by the respondents are a violation of the obligation of the state to guarantee the right to SRH.

60. The CTOPA envisages abortion as the fundamental right of every woman and girl to decide whether or not to have an early, safe, and legal termination of pregnancy, and abortion services are seen as integral to universally accessible reproductive health services, which the state has a duty to provide in an environment that recognizes and respects women's and girl's choice.

61. The applicant seeks to be given her constitutional and statutory obligation to be given a safe and legal abortion.

62. Accordingly, the Applicant's pray for the relief set out in the accompanying notice of motion.

[redacted]

DEPONENT

SIGNED and SWORN to before me at JOHANNESBURG on this 26th day of May 2022, the deponent having acknowledged that he knows and understands the contents of this affidavit, that he has no objection to taking the prescribed oath and that he considers the oath to be binding on his conscience.

Abongile Dee-Dee Qolohle
Commissioner of Oaths
Practising Attorney RSA
90 Rivonia Road, Sandton, 2196

COMMISSIONER OF OATHS

MNN

FA 1 27

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: HCGS214975

The matter between:

MNN	First Applicant
and	
MEMBER OF THE EXECUTIVE FOR HEALTH OF THE GAUTENG PROVINCE	First Respondent
HEAD OF DEPARTMENT OF THE DEPARTMENT OF HEALTH IN GAUTENG	Second Respondent

---

CONFIRMATORY AFFIDAVIT

I, the undersigned,

ELNA MCINTOSH

do hereby make oath and state that:

1. I am an adult, female citizen of South Africa and a specialist in Sexual Health where I have practiced as an advisor, educator, researcher, and therapist.

2. The facts contained in this affidavit fall within my personal knowledge except where the context indicates otherwise, and are, to the best of my knowledge, true and correct.

3. I have read the founding affidavit deposed to by **MNN** and I confirm its contents insofar as they relate to me.

MNN
ADQ

Dr. ELNA MCINTOSH

Signed and sworn to before me at Johannesburg on the 26th day of May 2023, the deponent having acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath and that the deponent considers the prescribed oath to be binding on the deponent's conscience.

COMMISSIONER
NAME:
ADDRESS:
DESIGNATION:

Ntengile Dee-Dee Qolohle
Commissioner of Oaths
Practising Attorney RSA
90 Rivonia Road, Sandton, 2196

FA 2 27

PARTICULARS FROM THE POPULATION REGISTER

BIRTH CERTIFICATE

CHILD — IDENTITY NUMBER: [redacted]
SURNAME: [redacted]
FORENAMES: [redacted]

GENDER: FEMALE — DATE OF BIRTH: [redacted]
PLACE OF BIRTH: [redacted]
COUNTRY OF BIRTH: SOUTH AFRICA

MOTHER: — ID NUM/TRAVEL DOC: [redacted]

MAIDEN/SURNAME: [redacted]
FORENAMES: [redacted]

DATE OF BIRTH: [redacted]
PLACE OF BIRTH: [redacted]
COUNTRY OF BIRTH: [redacted]

FATHER: — ID NUM/TRAVEL DOC: [redacted]

SURNAME: [redacted]
FORENAMES: [redacted]

DATE OF BIRTH: [redacted]
PLACE OF BIRTH: JOHANNESBURG
COUNTRY OF BIRTH: SOUTH AFRICA

ENDORSEMENTS:
NONE

2022 -08- 24

REGIONAL OFFICE SOWETO

REGIONAL OFFICE JOHANNESBURG

2022 -08- 24

DEPARTMENT OF HOME AFFAIRS

FA3

gauteng.gov.za

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Termination of Pregnancy (Abortion)

View all information about Termination of Pregnancy (Abortion) on this page and get in touch to let us know how we can help.

Description

This service is offered to all women who wish to terminate a pregnancy. The service aims to reduce deaths caused by illegal abortions. Women are advised to report early in their pregnancy if they wish to terminate, preferably in the first three months. Termination during the first three months (12 weeks) of pregnancy is available from the following health facilities:

- Carletonville hospital
- Leratong hospital
- Chris Hani Baragwanath hospital
- Tembisa hospital
- Pholosong hospital
- Thelle Mogoerane hospital
- Bertha Gxowa Hospital
- Dr Yusuf Dadoo Hospital
- Kalafong hospital
- Jubilee hospital
- Odi hospital
- Charlotte Maxeke Academic hospital
- South Rand hospital
- Kopanong hospital
- Heidelberg hospital
- Sebokeng hospital
- Chiawelo clinic
- Zola CHC
- Hillbrow CHC
- Lenasia South CHC
- Kgabo CHC
- Laudium CHC
- Shoshanguve CHC
- Dark City CHC
- Johan Heyns

Available Services

Visit listed facilities — In Person

v show more

Related Services

No Related Services

Services

- Area of Interest
- Audiences
- Life Events

Media

- News
- Announcements
- Warnings
- Images
- Videos
- Projects
- Events
- Publications
- Exam Papers
- Surveys

Our Organisation

- Departments
- Institutions
- Partners
- Municipalities

Provide Feedback

General enquiries

Contact number:

011 355 2500

Email address:

sacr.communications@gauteng.gov.za

Address:

35 Rissik Street (Corner Fox Street), Surrey House, Johannesburg Gauteng 2107

Connect with us



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FA 4 22

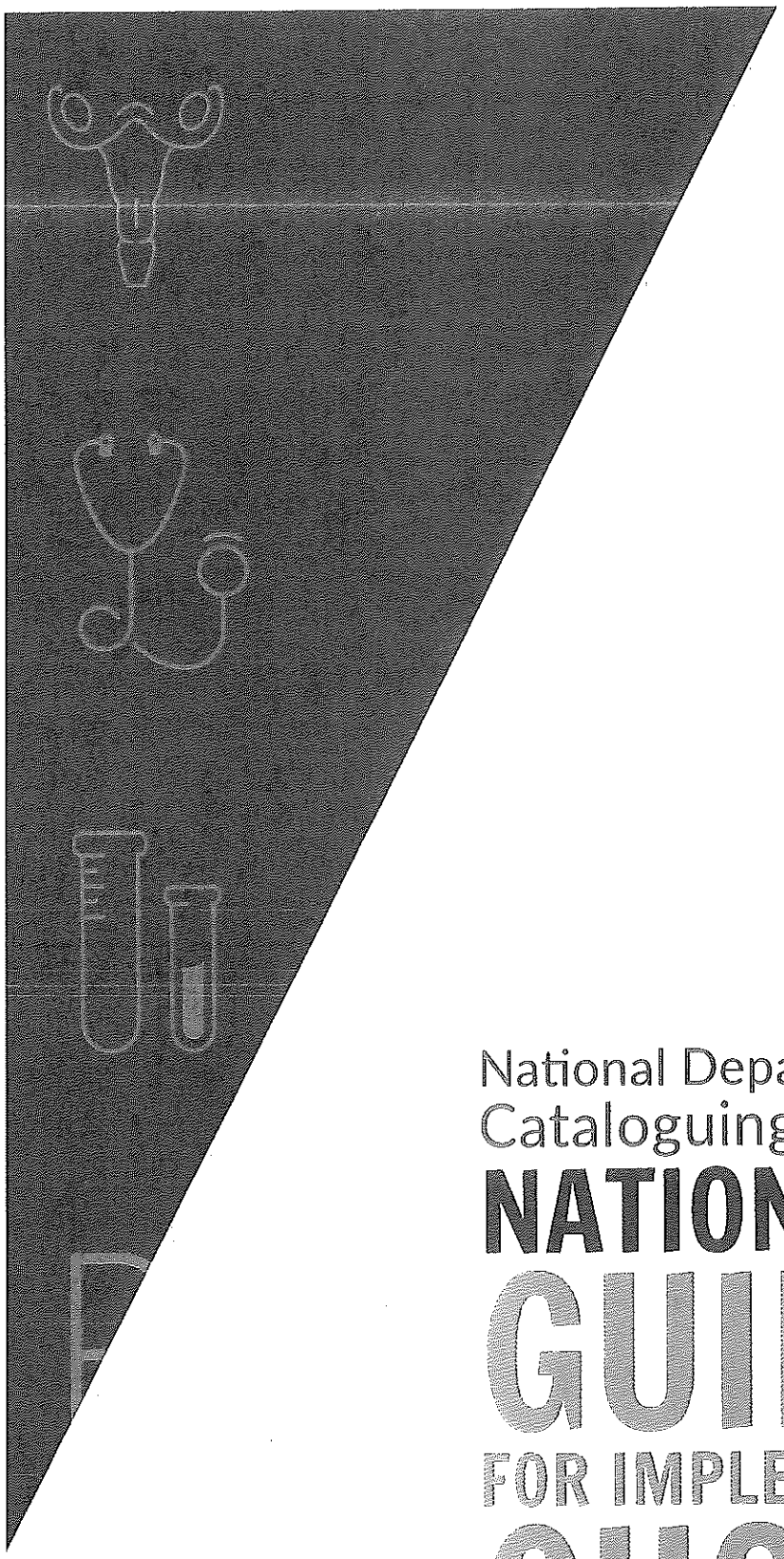
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health
Department:
Health
REPUBLIC OF SOUTH AFRICA

2030 NDP

NATIONAL CLINICAL GUIDELINE FOR IMPLEMENTATION OF THE CHOICE ON TERMINATION OF PREGNANCY ACT

ED. 1



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NATIONAL CLINICAL GUIDELINE FOR IMPLEMENTATION OF THE CHOICE ON TERMINATION OF PREGNANCY ACT

ED. 1

2.3 Obstruction to Access

OBSTRUCTION TO ACCESS

Obstruction to access refers to **any person or act which prevents an individual from accessing any part of a quality and lawful TOP service, in a timely manner.** This includes any person in or around a health facility, clinical or non-clinical, ranging from facility support personnel to illegal providers.

In line with the CTOP Act (Section 10, Offences and penalties), obstruction to access refers to all of the following:

1. Any provider who is not a registered medical practitioner, registered midwife, or registered nurse and has completed the prescribed training course and who performs the termination of a pregnancy (as per Chapter 5)
2. Any person or act preventing a lawful termination of pregnancy or obstructing access to a facility for the lawful termination of pregnancy (see "Refusal to care" below)
3. When the TOP takes place at a facility not approved to provide TOP services (as per Chapter 2.2)

As per the CTOP Act (Section 10, Offences and penalties), any person who obstructs access to TOP, as outlined above, shall be found guilty of an offence and liable on conviction to a fine or imprisonment for a period not exceeding 10 years.

REFUSAL TO CARE

Refusal to care includes any person or act preventing a lawful termination of pregnancy or obstructing access to a facility for the lawful termination of a pregnancy.

This refers to individuals who prevent a lawful termination of pregnancy or obstruct access to a facility for a lawful termination of pregnancy based on personal beliefs, usually religious or spiritual in nature.

According to Section 15 (1) of The Constitution of the Republic of South Africa, 1996, *"everyone has the right to freedom of conscience, religion, thought, belief, and opinion."* Access to TOP under the CTOP Act is, similarly, regarded as a constitutional right. Although Section 15 of the Constitution implicitly accommodates provider refusal to provide TOP services, this creates harm and additional barriers for patients who are entitled to receive comprehensive SRH&R care.

A provider that refuses to provide TOP services, and thus exercises Section 15 of the Constitution, should not be a detriment to the individual seeking a TOP. Given stewardship obligations within the public service, public servants must acknowledge their fiduciary duties.



SECTION 15 OF THE CONSTITUTION:

"FIDUCIARY DUTY MEANS THAT A CLINICIAN SHOULD NEVER GIVE HIGHER PRIORITY TO HER OR HIS OWN CONSCIENCE THAN TO THE PATIENT'S NEEDS."

Only the direct TOP provider can refuse care (no other health care or support staff member can refuse care). As such, a direct TOP provider who refuses care based on personal beliefs must refer the individual to a colleague or facility that is able to offer such services. The individual's right to information and access to health care services, including TOP, should always be provided for.

In the case of a direct provider's refusal to care, the following standard protocol should be exercised:

1. *Section 36 of the Constitution imposes a duty to, at a minimum, provide the individual with information about where the individual can obtain a TOP and refer the individual accordingly.*

2. *A register of TOP services refused should be kept in each facility, noting:*

    - the clinical details of the individual
    - the referral process
    - the name of the clinician who refused services

3. *A health care professional's refusal to care cannot violate the right of other health care professionals who are willing to provide TOP services:*

    - Health care professionals who are not willing to provide TOP services must inform their Facility Manager in writing when applying for a position in the facility.
    - Facility Managers must confirm whether a staff member is fit to provide TOP services when appointing staff.
    - Each staff member who exercises a refusal to treat must be handled individually. TOP service provision should never be handled in a group, or as a group action.
    - Refusal to treat only applies to individual trained health care professionals and not to groups, institutions, support personnel, or complementary services.

4. *In non-emergency cases, health care professionals who refuse to provide a TOP service must still:*

    - Explain their refusal to the individual in a manner that is non-judgemental and does not stigmatise.
    - Explain to the individual their right to request a safe TOP.
    - Refer the individual to a facility/provider who will conduct the TOP.
    - Update the facility register to note the refusal to treat.

REFUSAL TO CARE FOR OTHER HEALTH CARE PROFESSIONALS

Ancillary staff (e.g. reception, ward clerks, janitorial, catering, etc.) and other health care professionals involved in the general care of a patient (e.g. pharmacist) ***may not*** refuse to provide general or standard care to an individual under any circumstances.

Thus, conditions of unlawful violation of the CTOP Act includes the following and would be found chargeable of offence:

- If a direct provider is found to be denying an individual access to safe TOP services by failing to provide the TOP service and failing to provide referral to a colleague or facility that will provide the TOP service and/or obscuring other health care workers to provide safe TOP services, the health care professional has unlawfully violated the CTOP Act.

- If a health care professional refuses to assist and is not directly involved in performing the TOP, the health care professional has unlawfully violated the CTOP Act.

OBLIGATIONS IN EMERGENCY SETTINGS

All health care professionals must provide emergency care when continuation of a pregnancy poses a serious danger to the life or health of the individual or the foetus, regardless of gestational age.

Section 36 of the Constitution limits the right to refuse treatment or care to when there is a medical emergency and maternal life or health is in danger. A health care professional can therefore not legally or ethically object to the rendering of care in cases of life- or health-endangering emergencies associated with TOP procedures.

According to the law, health care professionals, regardless of their religious or moral objections, have a duty to perform a TOP procedure if the individual will suffer *adverse health consequences* if the TOP is not promptly carried out. When an individual faces a risk to their health because a health care professional refuses to provide a TOP, the individual's right to health is jeopardised.

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FA 6 38

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case No: HCG821497/5

In the matter between:

MNN Applicant

and

MEMBER OF THE EXECUTIVE COUNCIL,
GAUTENG DEPARTMENT OF HEALTH First Respondent

HEAD OF DEPARTMENT:
GAUTENG DEPARTMENT OF HEALTH Second Respondent

EXPERT AFFIDAVIT

I, the undersigned,

DR ELNA NORAH MCINTOSH

do hereby make oath and state that:

MNN
ADQ

1. I am an adult female sexual health advisor, educator, researcher, and therapist and I practice as such at 15 Lebensrau Place, Hurlingham Manor, Sandton, Johannesburg.

2. The facts contained herein are, unless indicated by the context, within my own personal knowledge and are to the best of my knowledge and belief both true and correct.

3. I respectfully submit that, by my training and experience, I am duly qualified to express views and opinions as an expert sexual health advisor. I hold the following qualifications: a degree in nursing from the B G Alexander Nursing College (Johannesburg), a Master's degree in Public Health from the Anne Latsky Nursing College (Johannesburg), a PhD in Human Sexuality from the Institute for Advanced Study of Human Sexuality (University of Johannesburg). Furthermore, I have been practising as a sexual health advisor, educator, researcher, and therapist for over 35 years.

4. I am the president and founding member of the South African Society of Sexual Health Advisors, Educators, Researchers, and Therapists (SASSERT). My function in this role is to provide leadership for DISA Health Care / SASSERT Foundation through advocacy in health, education, and public policy for people seeking sexual and reproductive health care and training in the community. Additionally, I serve as a board member of Pinkdrive, where my portfolio focuses on Medical Ethics. I also work as a consultant for John Hopkins University. In addition to that, I hold positions as a part-time senior lecturer at the University of Pretoria in the School of Health Systems and Public Health and as a part-time lecturer at the University of South Africa in the School of Advanced Psychology.

5. I am a lifelong member of the South African Sexual Health Association, a member of the American College of Sexologists, and I held an Associate Professorship at the Institute for Advanced Study of Human Sexuality in San Francisco, California. Furthermore, I am a member of the International Society

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for the Study of Women's Sexual Health and a lecturer for the International Association of Physicians in AIDS Care.

6. A copy of my CV is attached as **Annexure "A".**

7. I have been requested to provide an expert opinion as a sexual health advisor on the abortion case of the applicant.

8. The expert opinion I am providing is based on the following aspects: the definition of breech pregnancy, the possibility of terminating a breech pregnancy, the process to be followed when a woman with a breech pregnancy requests a termination, and, finally, what should be done by health care providers at Hillbrow Clinic.

9. A medical explanation of a breeched pregnancy occurs when the foetus' buttocks, feet, or both are positioned to come out first during birth. In a normal pregnancy, during the last weeks of pregnancy, the foetus usually moves so its head is positioned to come out of the vagina first during birth.

10. I am a midwife and have been trained in terminations of pregnancy (TOP) since 1999. Midwives are not allowed to perform TOPs after 12 weeks, but a gynaecologist can. The applicant can request a gynaecologist to terminate her pregnancy.

11. The process to be followed when a woman with a breech pregnancy requests a termination of pregnancy is that she must be referred to a tertiary institution, such as the Chris Hani Baragwanath Hospital, Rahima Moosa Mother and Child Hospital, the Steve Biko Academic Hospital, and Charlotte Maxeke Johannesburg Academic Hospital. These hospitals are academic institutions equipped to handle complicated cases.

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12. The healthcare providers at Hillbrow Clinic should have assisted the applicant if her last normal menstrual period was on 24 January 2023. According to the applicant's dates, she would have been under 10 weeks at that time. Scans should have been done on the same day she attended the clinic as part of the intake process. Services should have been provided during the first visit, and a procedure should have been scheduled within 1 to 2 weeks. This is especially important in the case of a teenager.

13. On or about Friday, 26 May 2023, I examined the applicant and found that the gestational age of the pregnancy is 20 weeks and 3 days. Further, upon examining the applicant, I found a single cephalic pregnancy. That is to say, I found a single foetus in the normal foetal position with the head of the foetus facing the cervix. In this regard, I attach a copy of the scan as **Annexure "B."**

_____

Dr Elna Norah McIntosh

Signed and sworn to before me at _____ on the _____ day of _____, the deponent having acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath and that the deponent considers the prescribed oath to be binding on the deponent's conscience.

ANNEXURE A

Elna Norah McIntosh

CV

MNM

Personal Details

Known as name	Elna
Gender (EE reporting requirement)	Female
Race (EE reporting requirement)	White
Nationality	South Africa
South African citizenship status	SA by birth
ID / Passport/ Perm residency / Work permit (As per citizenship above)	5807050024085
Do you posses a valid drivers license	Yes – Code 8
e-mail address	disa@icon.co.za
Cellphone number	0836536486
Other contact telephone number	0117871222

Physical Address

Line 1	15 Lebensraum Street
Line 2	Hurlingham Manor
City/Town	Sandton
Province	Gauteng
Country	South Africa
Postal code	2194

Highest Qualification

Highest qualification you've completed (or equivalent)	PhD degree / NQF10
Your level of work experience	30 years
Are you willing to relocate	No
Nature of employment required	N/A

Qualifications

01/03/2003

Internship:

Loyola University Stritch School of Medicine – 1 year internship Sexual Dysfunction clinic – Supervisor – Prof Domeena C. Renshaw

23rd October 2002

Name of academic institution (e.g. University/ College/ School / etc.)	**The Institute for Advanced Study of Human Sexuality (IASHS) www.iashs.edu**
Name of qualification	**PhD – Human Sexuality**
Type of qualification	Post graduate qualification
Status of qualification	Completed

Description of Qualification

The program provides a broad overview of human sexuality. The behavioural, biological, cultural, and social components of sexuality are examined, including the study of the role of sexuality in the arts and public policy. The program is particularly useful for persons entering fields involving the social and behavioral sciences, education, health science and medicine, counseling and therapy, nursing, social work, humanities, and criminal justice and public policy.

- Human rights abrogation or protection can affect the health of individuals, communities, and populations.
- Sexual rights violations are a subset of threats to human dignity. Forced, coerced, and higher risk sexual exposures are highly correlated with adverse sexual and reproductive health outcomes - including STI and HIV.
- Responses that address human rights may improve STI prevention and control, and better human rights contexts for those at risk.

1st November 2000

Name of academic institution .	**The Institute for Advanced Study of Human Sexuality**

I.A.S.H.S.

(IASHS) www.iashs.edu (e.g. University/ College/ School / etc.)	
Name of qualification	**Master's degree in Public Health**
Type of qualification	Post graduate degree
Status of qualification	Completed in standard duration
Description of qualification	**Description** • Epidemiology and Biostatistics • Monitoring and Evaluation • Field Epidemiology and Laboratory Training Programme • Environmental and Occupational Health Track • Health Policy and Management • Health Promotion • Disease Control • Health Research Ethics
Status of qualification	Completed in standard duration

Master's degree ir

Short courses:

- 20 Nov – 1 Dec 1995 Family planning (DoH)
- 3 April – 15 May 1996 Diagnosis management of STI
- January 1996 Advanced training in TOP
- 13 – 15 Feb 2008 Integrated management of TB, HIV, STI in PHC settings
- 9 – 18 August 1993 Industrial Audiometry
- 5 – 7 Feb 2001 FAMSA – Marriage counseling
- 23 – 25 Feb 1994 Technilaw – occupational health
- 28 March 2001 TOP training (6 months)

1/1/1996 - 1/12/1996

Name of academic institution (e.g. University/ College/ School / etc.)	Ann Latsky Nursing College
Name of qualification	Primary Health Care
Type of qualification	Post basic qualification / NQF7
Status of qualification	Completed in standard duration
Description of qualification	Primary health Care Family Planning HIV / STI

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1/06/1986 - 23/06/1987

Name of academic institution (e.g. University/ College/ School / etc.)	Technikon Witwatersrand
Name of qualification	Community Health
Type of qualification	Post basic qualification / NQF7
Status of qualification	Completed in standard duration
Description of qualification	Community health Occupational Health School health

1/1/1982 -22/3/1983

Name of academic institution (e.g. University/ College/ School / etc.)	Helen Joseph Hospital
Name of qualification	Intensive Nursing Science
Type of qualification	Post basic qualification / NQF7
Status of qualification	Completed in standard duration
Description of qualification	Intensive Nursing Science

1/1/1981 -22/2/1982

Name of academic institution (e.g. University/ College/ School / etc.)	Ann Latsky Nursing College
Name of qualification	Midwifery
Type of qualification	Post basic qualification / NQF7
Status of qualification	Completed in standard duration
Description of qualification	Midwifery

17/7/1977 - 15/9/1980

Name of academic institution (e.g. University/ College/ School / etc.)	B G Alexander Nursing college
Name of qualification	General Nursing
Type of qualification	Undergraduate / NQF6



Status of qualification	Completed in standard duration
Description of qualification	General nursing

1/1/1976 - 1/12/1976

Name of academic institution (e.g. University/ College/ School / etc.)	Florida Hoerskool
Name of qualification	Matric
Type of qualification	Matric / Grade12 / A-Level / NQF4
Status of qualification	Completed in standard duration
Description of qualification	English HG Afrikaans HG Maths HG History HG Music HG Biology HG

Work Experience

1985 – Current

Director – DISA Health Care / SASSERT Foundation

FUNCTION
To provide leadership for DISA Health Care / SASSERT Foundation through advocacy in health, education and public policy for people seeking sexual & reproductive health care and training in the community. Responsible for overall strategic planning, revenue generation, financial management, organizational development, staff management, and program operations.

Responsibilities
Strategy and Planning

1. Develops and leads the strategy of the organization within the broad context of the local and national landscape by using performance measurements to guide strategic and operational decision-making.
2. Takes a leadership role in driving a collaborative process with the staff and members that would result in the development of goals, objectives and operational plans for the organization.
3. Oversees preparation of the annual budget and other necessary financial documents. Provides information and justifications for Board of Directors in its budgetary review and approval process.
4. Cultivates a strong partnership with the Board of Directors in setting policies consistent with the mission of the DISA / SASSERT Foundation. Works, as

needed, with all standing and ad hoc committees of the Board.

Organizational Management

1. Leads, motivates and develops staff and board so that they are passionate about what DISA / SASSERT Foundation has achieved and are committed to working effectively toward continual improvement.
2. Ensures the organization has diverse staff with skills appropriate to the needs of the position through people management activities including hiring, separation of employment, on-going staff development, performance management, compensation and benefits.
3. Ascertains that employment policies are adhered to in all employment practices and partners with the Board to implement changes.
4. Ensures that organization has the appropriate systems, physical space, and technology to operate efficiently and effectively.

Fund Development

1. Manages all fund development activities, including grant writing, cultivation and stewardship of donors, event planning, and identifying new resources. Actively seeks and maintains a diverse donor base of individual, business, foundation and government segments.
2. Builds long term relationships with key donor segments based on mission, cultivation and stewardship, program outcomes and sound fiscal management.
3. Leads organization's financial growth in order to maintain healthy cash flow.

Public Relations/Advocacy

1. Promotes DISA's visibility and welfare through participation and membership in community forums and activities that are aligned with DISA's mission and vision.
2. Advocates for the health, education and public policy issues that impact people seeking sexual & reproductive health services.
3. Develops a strategic marketing plan that provides a clear and concise message telling the organization's story. Oversees the execution of marketing and media relations.
4. Represents DISA in all media relations by participating in interviews, developing press releases and all other media type engagements.

Program Development and Implementation

1. Oversees and supports the development, design and delivery of program initiatives, assuring that the goals and objectives are aligned with DISA's overall strategic plan.
2. Oversees and supports the administrative components of all program services, including contract negotiations, contract and grant reporting and contracted work.
3. Provides for quality assurance monitoring of all DISA programs, assuring correction of any deficiencies in

1/10/2008 – Current

Job title Consultant

Company name	Johns Hopkins
Company type	NPO
Industry sector	Health
Country	South Africa
Job type	Communications
Job status	Contract
Duties & accomplishments	• Consult and advise on the SABC 1 TV series InterSEXions • Provide daily content for the Facebook page • Prepare HIV / STI related training material • Assist in the design, implementation, and administration of compensation programs and policies • Develops and documents procedures to ensure that a safersex message is delivered • Reply to queries from Facebook followers daily
Accomplishments	Johns Hopkins communication award 2011 for growing the Facebook page InterSEXions to 23, 500 followers.
Your reason for leaving/ wanting to leave	Contract work

1/1/1998 – Current (Part time position)

Job title	Senior Lecturer – Professor Extraordinaire
Company name	University Pretoria
Company type	Academic Institution
Industry sector	**School of Health Systems and Public Health**
Country	South Africa
Job type	Lecturing post
Job status	Part time
Duties & accomplishments	Lecturing • Supervision of Masters students. • Communicate existing and newly approved policies, processes and procedures to employees.
Your reason for leaving/ wanting to leave	Contract work

1/1/1998 – Current (Part time

Job title	Lecturer
Company name	UNISA
Company type	Academic Institution
Industry sector	**School of Advanced Psychology**
Country	South Africa
Job type	Lecturing post
Job status	Part time
Duties & accomplishments	Lecturing • Supervision of Masters students. • Communicate existing and newly approved policies, processes and procedures to employees.

Software Skills

Excel (Intermediate)
MS Word (Intermediate)
Power Point

Languages

English (Fluent)
Afrikaans (Fluent)
isiZulu (conversational)

Professional Associations and Achievements

- CANSA - Non – executive Board member
- Pinkdrive Board member
- SASHA –Life time member
- ISSWSHS
- WAS – World association of Sexual Health
- Africa Society for Sexual Medicine
- Checkers Woman of the year (2005)
- Johns Hopkins Communications award (2011)

References

First name & surname	Prof Lynn Morris
Company name	NICD
Daytime contact telephone number	011 324 4532
e-mail address	lynnm@nicd.ac.za
Reference type	Personal / Professional
Can we contact the above reference?	Yes
First name & surname	Nolene Kotschan
Company name	CEO of Pinkdrive
Daytime contact telephone number	0834606146
e-mail address	noelene@pinkdrive.org
Reference type	Professional
Can we contact the above reference?	Yes

ANNEXURE B

Elna McIntosh

From:	disa@icon.co.za
Sent:	Friday, 26 May 2023 12:56
To:	disa@icon.co.za; 'Khanyisa Mapipa'
Subject:	Scans
Attachments:	20230526124254000 9OB.JPG; 20230526124326001 0OB.JPG; 20230526124427001 1OB.JPG

LMP – 14/01/2023

1 SINGLE pregnancy
Cephalic presentation

By dates approx. – 18+ weeks
On sonar – 20 weeks 3 days

Prof. Elna McIntosh
SEXUAL HEALTH PRACTITIONER
+27(0) 11 787 1222
+27(0) 11 886 2222
disa@icon.co.za
Emergency – +27 (0) 836536486

DISA

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mindray
DR T Mofokeng
[redacted]
20230526 122527 DP32
26/05/2023 12:42:34
35C50EA AP 91% MI 0.7 TIS 0.3
DP-50
OB2/3
FH5.0M / D14.8
GS4 / FR35
IP5 / DR110
GA(LMP) 17w0d
EDD 03/11/2023
BPD 4.80 cm >97%
GA 20w4d ± 1w5d
EDD 09/10/2023

Primary DR Informing
35C50EA AP 0.7 MI 0.7 TIS 0.3
20230516122324 DF32
29/5/2023 13:43:34
DP-50
C8/2.3
FHS ON /D148
C54 /FR35
IP5 /248110
GAIL(MP) 17.4%
EDD 03/10/2023
GA 20+6 1/52
EDD 09/10/2023

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A00


DR T Mofokeng
[redacted]
20230526 122527 DF32
26/05/2023 12:42:34
35C50EA AP 91% MI 0.7 TIS 0.3
DP-50
OB2/3
FH5.0M / D14.8
GS4 / FR36
IP5 / DR110
GA(LMP) 17w0d
EDD 03/11/2023
1 BPD 4.80 cm >97%
GA 20w4d ±1w3d
EDD 09/10/2023


Measured by DR T Matiakeng
[redacted]
20230526 122527 DP32
35C50EA AP 91% MI 0.7 TIS 0.3
26/05/2023 12:44:06
DP-50
OB2/3
B
FH5.0M / D14.8
G54 / FR35
IPS / DR130
GA(LMP) 17w0d
EDD 03/11/2023
1 BPD 4.61cm >97%
GA 19w6d ±1w3d
EDD 14/10/2023

FA7

+SECTION27
catalysts for social justice

TO: **Mr Arnold Lesiba Malotana**
Acting Head of Department
Department of Health: Gauteng
Per email: arnold.malotana@gauteng.gov.za

AND TO: **Ms Nomsa Mmope**
Director of Maternal and Child Health
Department of Health: Gauteng
Per email: nomsa.mmope@gauteng.gov.za

AND TO: **Mr Masilela Sikhonjiwe**
Deputy Director of Maternal and Child Health
Department of Health: Gauteng
Per email: sikhonjiwe.masilela@gauteng.gov.za

26 May 2023

Dear Messrs and Madam,

LETTER OF DEMAND: ACCESS TO TERMINATION OF PREGNANCY SERVICES

1. SECTION27 is a public interest law centre that seeks to influence, develop, and use the law to protect, promote and advance human rights, particularly the right to healthcare.

2. We act on behalf of [redacted] ("our client"), who has instructed us to address you as follows:

2.1. On or about Thursday, 13 April 2023, [redacted] approached Hillbrow Clinic ("Clinic") on suspicion that she may be pregnant. [redacted] requested a pregnancy test, which was provided to her. [redacted] was advised that she is indeed pregnant and was booked for an ultrasound scan on or about Monday, 24 April 2023.

2.2. On or about Monday, 24 April 2023, [redacted] returned to Hillbrow Clinic for the ultrasound scan. Our client was advised – by the healthcare provider assisting her – that the scan revealed that she was, at the time, 16 weeks and 2 days pregnant. She was further advised that the clinic had concerns regarding the development of the foetus. Our client was advised that the foetus was allegedly underdeveloped for the gestational age of the pregnancy. This, as it was asserted, was due to the positioning of the foetus which was a breech position. Our client was provided with folic acid and other prenatal vitamins on this visit and booked for a follow-up appointment on or about Tuesday, 2 May 2023.

2.3. On or about Tuesday, 2 May 2023, our client returned to the clinic for her follow-up appointment. On this visit, she requested an abortion. She was advised by the healthcare provider assisting her that due to the positioning of the foetus – which was still breeched – an abortion was impossible in her circumstances and as a result she does not qualify for an abortion. Consequently, the clinic declined to refer her to a public health facility designated to provide second trimester abortions.

2.4. On or about Thursday, 25 May 2023, our client returned to the clinic and requested, once again, an abortion. On this occasion, she was advised that as a minor (15), she is required to obtain parental consent and must be accompanied by her mother to the clinic. She was, again, denied a referral.

3. We wish to draw your attention to the following constitutional and statutory provisions that are implicated in the circumstances:

3.1. Section 27(1)(a) of the Constitution of South Africa, 1996 provides for the right to access health care services, which expressly includes the right to reproductive health care services.

3.2. Section 12(2)(a) of the Constitution makes provision for the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction.

3.3. The Choice on Termination of Pregnancy Act, 1996 ("CTOPA"), gives effect to the aforementioned constitutional rights. Section 2(1)(b) of the CTOPA provides that:

> *"2. Circumstances in which and conditions under which pregnancy may be terminated*
>
> *(1) A pregnancy may be terminated –*
>
> *...from the 13th up to and including the 20th week of the gestation period if a medical practitioner, after consultation with the pregnant woman, is of the opinion that:*
>
> *i) the continued pregnancy would pose a risk of injury to the woman's physical or mental health; or*
> *(ii) there exists a substantial risk that the fetus would suffer from a severe physical or mental abnormality;or*
> *(iii) the pregnancy resulted from rape or incest; or*
> *(iv) the continued pregnancy would significantly affect the social or economic circumstances of the woman."* (our emphasis)

3.4. Section 44(2) of the National Health Act, 2003 provides that where a public healthcare facility is not capable of providing the necessary treatment or care, the public healthcare facility in question is obliged to refer the patient to an appropriate public health establishment which is capable of providing the necessary treatment or care.

3.5. Section 10(1)(c) of the CTOPA provides that:

"Any person who prevents the lawful termination of a pregnancy or obstructs access to a facility for the termination of a pregnancy shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding 10 year."

3.6. The National Clinical Guideline for the Implementation of the Choice on Termination of Pregnancy Act, interprets the actions stipulated under section 10(1)(c) as a refusal to care, including a failure by a health care professional to refer a woman to a colleague or facility capable of providing her with the abortion. It further states that this is a chargeable offence.

3.7. Section 5(2) and (3) of the CTOPA provides that:

"5. Consent.

...(2) Notwithstanding any other law or the common law, but subject to the provisions of subsections (4) and (5), no consent other than that of the pregnant woman shall be required for the termination of a pregnancy.
(3) In the case of a pregnant minor, a medical practitioner or a registered midwife or registered nurse, as the case may be, shall advise suchminor to consult with her parents, guardian, family members or friends before the pregnancy is terminated: Provided that the termination of the pregnancy shall not be denied because such minor chooses not to consult them."

4. In the circumstances, we assert that Hillbrow Clinic (not being a designated second trimester abortion facility) was legally obligated to provide our client with a referral letter to ensure that she obtains the abortion services that she requested. Refusal or failure to do so is both unlawful and unconstitutional.

5. Further, in terms of section 5 of the CTOPA, our client is legally entitled to obtain an abortion without parental consent. An insistence on parental consent is also unlawful and unconsititutional.

6. In our view the actions of the healthcare providers at Hillbrow clinic delayed access to time-sensitive care for our client:

6.1. Their initial advice on or about Tuesday, 2 May 2023 that an abortion was not possible for our client due to the positioning of the foetus is patently incorrect and misleading. It is our understanding that in the instance of complications of this nature, in a pregnancy where a woman requires an abortion, the nurse or midwife or healthcare provider attending to her, must refer her to an obstetrician for an assessment and correction of the foetal position.

6.2. Their advice on or about Thursday, 25 May 2023 that a minor requires parental consent and to be accompanied by a parent to obtain an abortion is also incorrect; it is contrary to the CTOPA, and amounts to a material misrepresentation of the law.

7. Notwithstanding the above, Hillbrow clinic is only designated to provide first trimester abortion services. When our client was advised of the gestational age of her pregnancy on or about Monday, 24 April 2023, she ought to have been immediately referred to a public health facility designated to provide second trimester abortions, as according to the results of her ultrasound scan, she was already in her second trimester.

8. Given the advanced date of our client's pregnancy, which we estimate to be 20 weeks and 4 days – in light of the assessment done by the clinic on or about Monday, 24 April 2023, returning to the clinic to obtain a referral to the appropriate designated second trimester facility will result in a further delay that will likely place her over the statutory limit to obtain a second trimester abortion of 20 weeks and 6 days. In effect, the actions of the healthcare providers at the clinic as well as any insistence on your part that she, at this stage, revert to the clinic for a referral to the appropriate facility will amount to a denial of her rights under section 27(1)(a) of the Constitution.

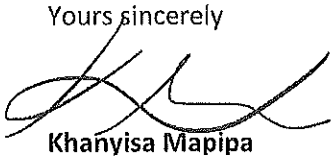
9. As you will appreciate, our client requires access to an abortion as a matter of urgency, given the pressing nature of her condition. Accordingly, we demand that you make arrangements for [redacted] to obtain a termination of pregnancy on or before Saturday, 27 May 2023.

10. Should you fail to comply with our client's demand, we hold instructions to proceed with urgent litigation.

11. We request that you respond to this letter by 12h00 on Friday, 26 May 2023.

12. We look forward to your most urgent response.

Yours sincerely



Khanyisa Mapipa

Attorney

SECTION27

Motheo Brodie

From: Khanyisa Mapipa
Sent: Friday, 26 May 2023 14:53
To: Motheo Brodie
Subject: FW: IN RE: LETTER OF DEMAND - ACCESS TO TERMINATION OF PREGNANCY SERVICES

From: postmaster@GPGonline.onmicrosoft.com <postmaster@GPGonline.onmicrosoft.com>
Sent: Friday, May 26, 2023 12:49 AM
To: Khanyisa Mapipa
Subject: Delivered: IN RE: LETTER OF DEMAND - ACCESS TO TERMINATION OF PREGNANCY SERVICES

Your message has been delivered to the following recipients:

sikhonjiwe.masilela@gauteng.gov.za (sikhonjiwe.masilela@gauteng.gov.za)

Subject: IN RE: LETTER OF DEMAND - ACCESS TO TERMINATION OF PREGNANCY SERVICES

MNN

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Your message has been delivered to the following recipients:

Hlengiwe.Goba@gauteng.gov.za (Hlengiwe.Goba@gauteng.gov.za)

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Your message has been delivered to the following recipients:

nomsa.mmope@gauteng.gov.za (nomsa.mmope@gauteng.gov.za)

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Your message has been delivered to the following recipients:

Malotana, Arnold (gphealth) (Arnold.Malotana@gauteng.gov.za)

Subject: IN RE: LETTER OF DEMAND - ACCESS TO TERMINATION OF PREGNANCY SERVICES

Motheo Brodie

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FA 8

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case no: HCGS214975

The matter between:

MNN	First Applicant
and	
MEMBER OF THE EXECUTIVE FOR HEALTH OF THE GAUTENG PROVINCE	First Respondent
HEAD OF DEPARTMENT OF THE DEPARTMENT OF HEALTH IN GAUTENG	Second Respondent

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CONFIRMATORY AFFIDAVIT

I, the undersigned,

KHANYISA MAPIPA

do hereby make oath and state that:

1. I am an Attorney and currently employed at SECTION27 (Incorporating the AIDS Law Project), situated at 1st Floor South Point Building, 87 De Korte Street, Braamfontein.

2. The facts contained in this affidavit fall within my personal knowledge except where the context indicates otherwise, and are, to the best of my knowledge, true and correct.

3. I have read the founding affidavit deposed to by **MNN** and I confirm its contents insofar as they relate to me.

MNN

KM

KHANYISA MAPIPA

Signed and sworn to before me at Sandton on the 26th day of MAY 2023, the deponent having acknowledged that the deponent knows and understands the contents of this affidavit, that the deponent has no objection to taking the prescribed oath and that the deponent considers the prescribed oath to be binding on the deponent's conscience.

COMMISSIONER OF OATHS
NAME:
ADDRESS:
DESIGNATION:

Nkenge Dee-Dee Qolohle
Commissioner of Oaths
Practising Attorney RSA
90 Rivonia Road, Sandton, 2196

MNN