Christian Lawyers’ Association v. Minister of Health

2004 (10) BCLR 1086 (T)

Country: South Africa
Region: Africa
Year: 2004
Court: High Court - Transvaal Provincial Division
Health Topics: Child and adolescent health, Informed consent, Sexual and reproductive health
Human Rights: Freedom from discrimination, Right to bodily integrity, Right to family life, Right to health, Right to liberty and security of person, Right to privacy

Facts

Christian Lawyersâ€™ Association (â€œplaintiffâ€•) submitted an action seeking to find unconstitutional sections of t Choice on Termination of pregnancy Act 92 of 1996 (â€œthe Actâ€•). The sections enabled women under the age of 18 to terminate their pregnancy without restrictions such as parental consent, parental consultation, required counselling, or a waiting period (collectively called â€œparental consent or controlâ€• by the Court).

The plaintiffs stated in the exception that pregnant girls are unable to make an informed decision regarding terminating their pregnancy without parental consent or control as they are unable to â€œappreciate the need for and value of parental careâ€• and to give consent.

Decision and Reasoning

The Court held the Act constitutional and rejected the exception.

The Court noted that the Actâ€™s foundation is on informed consent and that informed consent is based on capacity. The Act allowed for termination of pregnancies only when the women are able to provide informed consent. The Court noted informed consent is fundamentally on the right to self-determination, which is captured in the legal concept of capacity. Thus, the Court interpreted the Act to mean that women must have capacity to provide informed consent to terminate their pregnancies. The Act notes that is it a medical practitioner or registered midwife that determines whether the minor has capacity.

The Court found that the premise of the exception that women under 18 years of age cannot consent automatically removed them from the scope of the Act. Procedurally, the evidence stated in an exception must be taken as true. Here the plaintiffs stated that women under the 18 years of age cannot consent by themselves to ending their pregnancies, i.e. they lack capacity. As the Act only applies to women that have capacity, the plaintiffâ€™s requested remedy to amend the Act were inappropriate.

The Court further analyzed the South African position in comparison with the United States of America, Canada, Germany and the European Union on the issue and determined that South Africa has the most explicit constitutional articulation and protection of the right to choose to terminate pregnancy. The Court noted that abortion is solidly protected in the Constitution with no State interest within the first trimester of the pregnancy. The Court found the Act supported the constitutional rights, in support of the best interests of pregnant girls and the legislative decision to allow a flexible criteria for capacity and not one fixed on a specific age as reasonable.

Decision Excerpts

â€œThe plaintiff's approach is however a rigid approach to maturity which is blind to the fact of life that there will be women below that age who are in fact mature, much as there will be those above that age (or any fixed age) who are in fact immature. It fails to recognise and accommodate individual differences. This in my respectful view is a major flaw or weak link in the plaintiff's caseâ€• (P. 29)

â€œThe plaintiff's claims A, B and C complain about the legislative failure to impose stricter or additional control on the termination of pregnancies of girls under 18. It should however, never be permissible for a girl under 18 years to have her pregnancy terminated because, on the plaintiff's case, she is never capable of meeting the threshold required for termination imposed by section 5(1) of that Act, which is "informed consent". The

plaintiff therefore complains about the failure of the Act to impose stricter regulation on something which the Act does not permit at all. The Act cannot possibly impose stricter control on something it prohibits altogether.â€• (P. 32)

â€œCompared to the foreign jurisdictions referred to above, it is clear that ours is the most explicit provision concerning the right The specific provisions of section 12(2)(a) and (b) of our Constitution guarantee the right of every woman to determine the fate of her pregnancy. The Constitution of this country in explicit language affords "everyone" the right to bodily integrity including the right "to make decisions concerning reproduction" and "to security in and control over their body." This is quite clearly the right to choose whether to have her pregnancy terminated or not, for short, [*51] the right to termination of pregnancy. Her freedom of choice protected under the explicit provisions of section 12(2)(a) and (b) is moreover reinforced by the following constitutional rights: the right to equality and protection against discrimination on the grounds of gender, sex and pregnancy (section 9), the inherent right to dignity and to have her dignity respected and protected (section 10), the right to life (section 11), the right to privacy (section 14) arid more importantly the right to have access to reproductive health care (section 27(1)(a)).â€• (PP. 50-51)

â€œThe argument that the provisions of the Act [*56] which are under attack are unconstitutional because they do not cater for the interest of the child is unsustainable. The legislative choice opted for in the Act serves the best interest of the pregnant girl child (section 28(2)) because it is flexible to recognise and accommodate the individual position of a girl child based on her intellectual, psychological and emotional make up and actual majority. It cannot be in the interest of the pregnant minor girl to adopt a rigid age-based approach that takes no account, little or inadequate account of her individual peculiarities. However even if the plaintiff was to establish that the age-based control or regulation is in the interest of the child, that would not be enough, the plaintiff has to go further and establish that the legislative choice adopted in the Act (which is based on informed consent) is in fact unjustifiable and unconstitutional.â€• (PP. 55-56)