




# 7 Covid-19 and its impact on infant abandonment in South Africa

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## Abstract\*\*

The COVID-19 pandemic has had a devastating impact on millions of people around the world.<sup>1</sup> Not only has its impact been direct through sickness and the loss of life but also indirect through unemployment, the closure of schools and an increase in poverty. Existing problems were exacerbated by the pandemic as countries who already faced humanitarian crises were particularly vulnerable to the effects of the pandemic.<sup>2</sup> One such existing problem faced in South Africa is the number of infants that are unsafely abandoned annually. In 2010, this number was an alarming 3 500 babies according to Blackie.<sup>3</sup> One of the leading causes of child abandonment in South Africa is poverty. Poverty, in turn, is an indirect result of the pandemic, therefore, a rise in the number of infants abandoned may be safely assumed with no official statistics of the number of infants abandoned since the start of lockdown. Further, the lack of a legal and safe method of infant relinquishment as an existing problem and leading cause of infant abandonment was further exacerbated by the pandemic as desperate mothers had no other option but to unsafely abandon their infants. This chapter focusses on the impact of COVID-19 on the existing problem

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\*\* This chapter is based in part on the author's thesis *The Legal Regulation of Infant Abandonment in South Africa* (2020 thesis UJ).

1 Chricaden "Impact of COVID-19 on people's livelihoods, their health and our food systems" 2020 <https://www.who.int/news/item/13-10-2020-impact-of-covid-19-on-people's-livelihoods-their-health-and-our-food-systems> (18-01-2022).

2 Ibid.

3 Blackie "Child Abandonment and adoption in the context of African ancestral beliefs in contemporary urban South Africa" 2014 National Adoption Coalition of South Africa: Fact Sheet on Child Abandonment at <https://fliphtml5.com/zzjr/atap/basic> (21-01-2022).

of infant abandonment in South Africa, with the proposed solution being baby savers. The approach to this challenge in other jurisdictions is also considered. The proposed amendment of the Children's Act through the inclusion of specific provisions pertaining to baby savers is also included. Lastly, the rights that are infringed upon through the non-recognition of a safe method of infant relinquishment, such as, the right to life and human dignity is also addressed under a discussion on constitutionality.

### 1 COVID-19 and its impact on children in SA with a specific look at infant abandonment

Reports indicate that the COVID-19 pandemic, although not directly impacting on children in the form of infections and hospitalisations, had an indirect impact that posed a clear and present danger to children.<sup>4</sup> The effects of the pandemic on children are reported to be emotional abuse, physical abuse including sexual violence, and neglect and this leads to a perpetual cycle of violence and poverty with childhood victims becoming adult perpetrators or further victims of violence.<sup>5</sup> One effect of the pandemic that goes unmentioned is the rise in the number of children that are abandoned by their parents or care-givers due to increased economic pressure, the closure of businesses, the lack of income and any form of assistance. The number of unsafe infant abandonment cases were already at an all-time high in South Africa prior to the COVID-19 pandemic with the last official statistics reporting an alarming rate of 3 500 infants abandoned in 2010.<sup>6</sup> A study published in 2016, indicates that many infant deaths

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4 World Vision "COVID-19 Aftershocks, a perfect storm: Millions more children at risk of violence under lockdown and into the 'new normal'" 2020; World Vision "COVID-19 Aftershocks: Secondary impact threatens more children's lives than the disease itself" at <https://www.wvi.org/publications/report/coronavirus-health-crisis/Covid-19-aftershocks-perfect-storm> (21-01-2022).

5 UCT Press Release "Government cuts support to families" 2021 <https://icts.everlytic.net/public/messages/do-print-pdf/hBj8PnB2rfniLLQN/tAySWePoFsCzs64l/NJNLKwdYB1w2LbEM> (18-01-2022).

6 Blackie (n 3). This number was obtained by adding the figures provided by Child Welfare Organisations in South Africa. Blackie (n 3) at 7 states "Child Welfare South Africa estimate the number of children to be abandoned in 2009/2010 at 2750, a marked increase from previous years (this number excluded Johannesburg and Cape Town metropolitan areas). Cape Town Child Welfare reported between 500 to 600 babies and children abandoned between 2009 and 2010, and Johannesburg Child Welfare (one of the largest child protection organisations in the

in South Africa are as a result of abandonment<sup>7</sup>. The researchers found that 454 children under 5 years of age were killed in 2009.<sup>8</sup> Only eight out of a total of 241 neonates (referring to a child that is 28 days old or younger) were more than six days old when they died.<sup>9</sup> These findings were underestimates because of the difficulty in distinguishing between infanticide (the killing of an infant within the first year of life) and other causes of death during infancy.<sup>10</sup> Importantly, 84.9% of neonaticides (the killing of an infant in the first 28 days of life) was as a result of abandonment and these abandoned neonates were found to be at full term.<sup>11</sup> Due to a lack of resources in underdeveloped countries, data is difficult to obtain and deaths are, therefore, often inadequately identified and reported.<sup>12</sup> However, researchers found that “a child born in South Africa is at the highest risk of being killed during its first six days of life.”<sup>13</sup> The situation worsened with the outbreak of the COVID-19 pandemic in 2020 when a national lockdown was announced and implemented on 27 March 2020. At the start of the lockdown there were fears that COVID-19 and the resultant lockdown would have a devastating impact particularly on women and children and these fears were realised. Between April and December 2020, 83 infants were unsafely abandoned and only 34 survived. In 2021, between the months of January and September, 60 infants were unsafely abandoned and only 26 were found alive.<sup>14</sup> Albeit much less than the 3500 infants that were abandoned in 2010, it must be borne in mind that these numbers were taken from a few newspaper publications and, therefore, only represent a few of the known and reported cases. Some of the leading causes of child abandonment will now be looked at to determine how these relate or could be exacerbated by the COVID-19 pandemic.

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Gauteng province) reported rescuing an average of fifteen babies a month over this period. It is widely believed that many child abandonments go unreported, yet these estimated numbers point to a total of over 3500 babies and children who were abandoned over this twelve month period (Weekend Post 27/08/2010).”

7 Abrahams, Mathews, Martin *et al* “Gender differences in Homicide of Neonates, Infants, and Children under 5 y in South Africa: Results from the cross-sectional 2009 National Child Homicide Study”.

8 Abrahams *et al* (n 7) 2.

9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid.

13 Ibid.

14 Grabham Director of Door of Hope Children’s Mission. Informal collection of news reports.

## 2 The leading causes of infant abandonment

There are many causes of child abandonment in South Africa, some of which include gender based violence, gender inequality, poverty, HIV/AIDS, rape and restrictive legislation.<sup>15</sup> Restrictive legislation and poverty will now be discussed as they are the most prominent reasons for child abandonment in South Africa. Gender based violence is discussed separately in a preceding chapter.

### 2.1 Restrictive legislation

South African laws are both restrictive and reactive. Restrictive in that it does not provide for a safe alternative to unsafe abandonment and reactive in that it places the focus on the act of abandonment instead of on prevention. The problem with this approach is that it places the lives of children in imminent danger. Section 305(3)(b) of the Children's Act<sup>16</sup> regulates the abandonment of children in South Africa, by declaring it an offence to abandon a child.

“(3) A parent, guardian, other person who has parental responsibilities and rights in respect of a child, caregiver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or caregiver or other person—

- (a) abuses or deliberately neglects the child or
- (b) abandons the child.”

Further, the concealment of birth of an infant is dealt with by section 113 of the General Law Amendment Act<sup>17</sup> and defined as:

“113. Concealment of birth of newly born child—

- (1) Any person who, without a lawful burial order, disposes of the body of any newly born child with intent to conceal the fact of its birth, whether the child died before, during or after birth, shall be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding three years.

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<sup>15</sup> Blackie (n 3).

<sup>16</sup> Act 38 of 2005.

<sup>17</sup> Act 46 of 1935.

- (2) A person may be convicted under subsection (1) although it has not been proved that the child in question died before its body was disposed of.
- (3) The institution of a prosecution under this section must be authorised in writing by the Director of Public Prosecutions having jurisdiction.”

South African law saw the introduction of the crime of concealment of birth by way of various statutes from the year 1845.<sup>18</sup> Hoctor and Carnelly state that all these statutes were founded upon similar English legislation.<sup>19</sup> A charge of concealment of birth as contained in section 113 of the General Law Amendment Act, is applied if a mother hides the body of an infant. This does not include the act of exposure of an infant because the elements of this crime involve “concealing” or “disposing” of the child’s body as opposed to abandoning the child’s body in an open field, toilet or alongside the road as we see in news articles.<sup>20</sup> It also does not include abandoning a child that is still alive.

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18 Hoctor *Snyman’s Criminal Law* (2020) 382.

19 Hoctor and Carnelly “The purpose and ambit of the offence of concealment of birth—*S v Molefe* 2012 (2) SACR 574 (GNP)” 2012 *Obiter* 732; Rosenberg *The Legal Regulation of Infant Abandonment in South Africa* (2020 thesis UJ) at 421 fn 122 “Ordinance 10 of 1845 borrowed from the Offences Against the Person Act of 1861, South Africa’s enactment of the Infant Life Protection Act of 1907 also emulated the English Infant Life Protection Act of 1872. Further, the creation of the crime of exposing of an infant which only happened in later years in South Africa in terms of s 258(d) of the Criminal Procedure Act 51 of 1977 and which is also governed by s 113 of the General Law Amendment Act 46 of 1935.”

20 In *Rex v Dema* 1947 1 SA 599 (E) when the accused’s child died shortly after birth she placed the child in a wooden box in the front of her bed. The court, making use of s 113 of the General Law Amendment Act 46 of 1935 held that the word “disposes” requires some degree of permanence and merely placing a body in a place that is easily locatable and in full view does not amount to disposing. Therefore, the court found the accused not guilty of the crime of concealment of birth. According to Stevens “Assessing the interpretation of the elements of ‘dispose’ and ‘child’ for purposes of establishing the offence of concealment of birth—*S v Molefe* 2012 (2) SACR 574 (GNP)” repository.up.ac.za/handle/2263/41050 (22-05-2022), placing the body of a child in a bag next to a rubbish bin in a street will not amount to concealment of birth because it does not satisfy the element of “dispose” in terms of s 113 of the General Law Amendment Act because it lacks the measure of permanence that is required. Stevens also refers to other examples that will lack the measure of permanence required such as leaving the body of the child at the entrance of a hospital, in a public toilet or next to the road.

## The Impact of Covid-19 on the Future of Law

In most cases, however, it is a challenge to ascertain whether a child was alive or dead at the moment of “disposal” and, therefore, the police will open a case of concealment of birth.<sup>21</sup> Thus, concealment of birth does serve as an alternative offence to murder or attempted murder.<sup>22</sup> The difficulty with the prosecution of this crime is that many babies are abandoned out in the open such as on the street,<sup>23</sup> in a field,<sup>24</sup> in the bushes<sup>25</sup> and in a mall.<sup>26</sup> This results in the director of public prosecutions being unable to prosecute this crime successfully because the element of “disposal” and “concealment” is, in most cases, absent.<sup>27</sup>

Section 239(2) of the Criminal Procedure Act provides:

“239. Evidence on charge of infanticide or concealment of birth.—

(1) At criminal proceedings at which an accused is charged with the killing of a newly born child, such child shall be deemed to have been born alive if the child is proved to have breathed, whether or not the child had an independent circulation, and it shall not be necessary to prove that such child was, at the time of its death, entirely separated from the body of its mother.

(2) At criminal proceedings at which an accused is charged with the concealment of the birth of a child, it shall not be necessary to prove whether the child died before or at or after birth.”

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21 Rosenberg (n 19) 431.

22 See s 258 of the Criminal Procedure Act.

23 <http://www.iol.co.za/pretoria-news> (30-07-2021); <http://www.risingsunlenasia.co.za> (17-08-2021).

24 <http://www.roodepoortrecord.co.za> (04-08-2021).

25 <http://algoafm.co.za> (14-08-2021); <http://www.dailyvoice.co.za> (18-08-2021).

26 <http://lowvelder.co.za> (20-08-2021).

27 See *S v Molefe* 2012 2 SACR 574 (GNP) at par 9 where Rabie J held that there was no compliance with the element of “dispose” which is necessary for the offence of concealment of birth. That disposing required some measure of permanence and not placing the child’s body in full view of everyone; In *Rex v Emma Madimetse* 1919 TPD 59-60 Wessels J doubted whether this was a case of concealment of birth because he stated “had she told her mistress that she had given birth to a child, there could be no concealment of birth”, however, the court refused to accept the evidence of the accused on her statement to her mistress and, therefore, decided that to throw a child into a sanitary bucket is *per se* concealment of birth.

In terms of this section, an accused may still be charged with infanticide if it is proved that the child breathed prior to dying and again it is emphasised that a charge of concealment of birth is warranted despite uncertainty as to when the child died. In addition, in terms of section 258 of the Criminal Procedure Act, exposing an infant is declared a competent verdict in lieu of one of murder or attempted murder.<sup>28</sup>

These laws only function once the crime is committed, once the infant is unsafely abandoned and, therefore, do not provide an adequate solution in preventing the act of abandonment and possibly the death of an infant. This restrictive legislation, according to Blackie, is one of the causes of child abandonment because it does not provide the mother with a further option such as safe relinquishment. The proliferation of infant abandonment will continue if preventative measures are not adopted to curb this practice.<sup>29</sup> Only punishing the action does not safeguard the lives of infants. Such laws would be justified if used in conjunction with an option for safe relinquishment, in that instance, if a mother still opts to unsafely abandon her child, her prosecution for these crimes is warranted. The goals of deterring crimes of this nature and of retribution through punishment are not attained because few women are ever successfully prosecuted.<sup>30</sup>

The effects of existing restrictive legislation that fails to provide a safe alternative to unsafe infant abandonment was exacerbated by the pandemic as women who found themselves in desperate situations with a lack of support and resources during the national lockdown

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28 “258. Murder and attempted murder.—If the evidence on a charge of murder or attempted murder does not prove the offence of murder or, as the case may be, attempted murder, but—the offence of culpable homicide; the offence of assault with intent to do grievous bodily harm; the offence of robbery; in a case relating to a child, the offence of exposing an infant, whether under a statute or at common law, or the offence of disposing of the body of a child, in contravention of section 113 of the General Law Amendment Act, 1935 (Act 46 of 1935), with intent to conceal the fact of its birth; the offence of common assault; the offence of public violence; or the offence of pointing a firearm, airgun or airpistol in contravention of any law, the accused may be found guilty of the offence so proved.”

29 Rosenberg (n 19) 492 “As experienced in the Netherlands where a baby box was opened in June 2014 after the *Raad voor Strafrechtstoepassing en Jeugdbescherming* (Council for the administration of criminal justice and the protection of juveniles) advised the government to focus their efforts on preventing the act of abandonment rather than prosecuting the act. Advies vondelingenkamer en babyhuis, 30 June 2014, see [www.rsj.nl/english](http://www.rsj.nl/english) (10-11-2019).”

30 Rosenberg (n 19) 492.

turned to the only option they thought they had, which was to unsafely abandon their infants.

### 2.2 Poverty

According to Statistics South Africa, more than six out of ten children between the ages of 0–17 years old were multi-dimensionally poor in 2015.<sup>31</sup> This means that children experience poverty in one or more of the following areas of their lives: health, housing, nutrition, protection, education, information, water and sanitation.<sup>32</sup> In 2015, 80% of children were deprived in at least two of these areas. This was the situation prior to the COVID-19 pandemic. After lockdown, in another survey conducted by Statistics South Africa, the percentage of respondents receiving no income increased from 5.2% to 15.4% after the sixth week of the national lockdown.<sup>33</sup> Of the majority of the respondents who indicated that their primary sources of income was in the form of salaries or wages, this number was 76.6% prior to lockdown and declined to 66.7% by the sixth week of lockdown, indicative of the fact that less respondents were now receiving an income at all than prior to the national lockdown.<sup>34</sup> This decrease in income resulted from the shutting down of businesses, and due to the reduced demand for goods and services.<sup>35</sup> The national lockdown also resulted in an increase in the amount of people claiming from the Unemployment Insurance Fund (UIF), taking loans and for those who had savings and investments, accessing and exhausting these.<sup>36</sup> Since the start of lockdown, 7% of respondents reported experiencing hunger. This increased from 4.3% and this indicates greater food insecurity in the country as a result of

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31 Statistics South Africa “South Africa’s poor little children” at <http://www.statssa.gov.za/?p=13422> (15-09-2021); Full report Child Poverty in South Africa: A Multiple Overlapping Deprivation Analysis, Report 03-10-22 dated 22 June 2020 at <https://www.unicef.org/esa/media/6551/file/UNICEF-South-Africa-Multidimensional-Child-Poverty-Analysis-2020.pdf> (15-09-2021).

32 Statistics South Africa (n 31).

33 Statistics South Africa “Loss of income resulting from the COVID-19 pandemic may lead to higher levels of food insecurity SA” 2020 at <http://www.statssa.gov.za/?p=13327> (15-09-2021); Full report “Results from Wave 2 survey on the impact of the COVID-19 pandemic on employment and income in South Africa” at [http://www.statssa.gov.za/?page\\_id=1854&PPN=Report-00-80-03&SCH=72638](http://www.statssa.gov.za/?page_id=1854&PPN=Report-00-80-03&SCH=72638) (15-09-2021).

34 Statistics South Africa (n 31).

35 Ibid.

36 Ibid.

the pandemic.<sup>37</sup> Lastly, 18.7% of respondents indicated that they could not pay their debt.<sup>38</sup> It was stated that:

“Before the pandemic, 59% of South Africa’s children lived in households with an income below Stats SA’s poverty line of R1 183 per person per month, while 30% of children lived below the food poverty line of R585 per month or R20 a day. This meant that a third of children lived in households with not enough money to meet their daily energy requirements. In 2018, child hunger affected 2.1 million children (11%) nationally, of whom 197 000 lived in the Western Cape.”<sup>39</sup>

The COVID-19 pandemic and resultant hard lockdown measures implemented to curb its spread merely worsened an already existing and growing problem. In April 2020, 47% of households reported running out of money for food and 15% of households reported child hunger.<sup>40</sup> The closure of schools, the rise in food prices and the suspension of the National School Nutrition Programme (NSNP), which provides nutrition to more than nine million children during school terms, saw an increase in child hunger.<sup>41</sup> Children who were fed by Early Childhood Development Centres were left without a daily meal as these centres were closed.<sup>42</sup> In May 2020, the government introduced five mechanisms to mitigate the effects of lockdown, namely social grant top-ups, the COVID-19 Social Relief of Distress (SRD) Grant and the Temporary Employer/Employee Relief Scheme (TERS), COVID-19 Caregiver Allowance as well as emergency food assistance.<sup>43</sup> These

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37 Ibid.

38 Ibid.

39 Hendricks, Hall, Goieman *et al* Children and COVID-19 Advocacy Brief “Nutrition and food security” 2 at [http://www.ci.uct.ac.za/sites/default/files/image\\_tool/images/367/Projects/Current\\_Projects/Covid-children/pdfs/Advocacy%20Brief\\_Nutrition\\_02\\_08.pdf](http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Projects/Current_Projects/Covid-children/pdfs/Advocacy%20Brief_Nutrition_02_08.pdf) (21-01-2022); Sambu “Child Health: Nutrition” in Shung-King, Lake, Sanders, Hendricks (eds) South African Child Gauge 2019, Children’s Institute, University of Cape Town at [http://www.ci.uct.ac.za/sites/default/files/image\\_tool/images/367/Child\\_Gauge/South\\_African\\_Child\\_Gauge\\_2019/ChildGauge\\_2019\\_final\\_print%20%28sm%29.pdf](http://www.ci.uct.ac.za/sites/default/files/image_tool/images/367/Child_Gauge/South_African_Child_Gauge_2019/ChildGauge_2019_final_print%20%28sm%29.pdf) (21-01-2022).

40 Hendricks *et al* (n 39) 2.

41 Ibid.

42 Ibid.

43 Hendricks *et al* (n 39) 2; Van der Berg, Patel, Bridgman “Hunger in South Africa during 2020: Results from Wave 3 of NIDS-CRAM” at <https://cramsury.org/wp-content/uploads/2021/02/10.-Van-der-Berg-S.->

mechanisms helped alleviate child hunger because between July and August these numbers declined; however, in November 2020, a rapid rise in the number of households experiencing child hunger was again reported due to the discontinuation of the COVID-19 Caregiver Allowance as well as a discontinuation of the social grant top-ups and, thus, food insecurity continued well into 2021, with one in seven households still reporting food insecurity in April 2021.<sup>44</sup> This food insecurity was also more likely in households that were single female-headed.<sup>45</sup>

Prior to the COVID-19 pandemic, poverty was already seen as one of the leading causes of infant abandonment with women unable to provide for the needs of their infants. With the rise in poverty and food insecurity during the national lockdown, many more women abandoned their infants than prior to this period. From April to December 2020, 83 infants were unsafely abandoned, these numbers only reflect those cases that are known and that are reported in the news. Of this number, 49 infants were reportedly found dead.<sup>46</sup> The numbers of infants unsafely abandoned continued into 2021 as the national lockdown persisted with 60 infants being unsafely abandoned between the months of January and early September and 34 of these infants being found dead.<sup>47</sup>

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Patel-L.-Bridgman-G.-2021-Hunger-in-South-Africa-during-2020-Results-from-Wave-3-of-NIDS-CRAM-1.pdf (21-01-2022).

44 Hendricks *et al* (n 39) 2; Van der Berg, Patel, Bridgman “Food Insecurity in South Africa- Evidence from the NIDS-CRAM Wave 5” at <https://cramsurvey.org/wp-content/uploads/2021/07/13.-Van-der-Berg-S.-Patel-L-and-Bridgman-G.-2021-Food-insecurity-in-South-Africa-%E2%80%93-Evidence-from-NIDS-CRAM-Wave-5.pdf> (21-01-2022).

45 Hendricks *et al* (n 39) 3; Crush, Caesar, Haysom “The State of Household Food Security in Cape Town, South Africa”, *Hungry Cities Report 2018* at <https://hungrycities.net/wp-content/uploads/2018/09/HCP12.pdf> (21-01-2022).

46 Information compiled by Nadene Grabham Director of the Door of Hope Children’s Mission Johannesburg; this was also accurately predicted by the National Adoption Coalition of South Africa (NACSA) Wilson “Opinion: The impact of COVID-19 and the lockdown on child protection and adoption” at <https://www.news24.com/parent/family/parenting/opinion-the-impact-of-Covid-19-and-the-lockdown-on-child-protection-and-adoption-20200409> dated 9 April 2020 (16-09-2021).

47 Information compiled by Nadene Grabham Director of the Door of Hope Children’s Mission Johannesburg.

### 3 Baby safe havens and baby savers as a possible solution to unsafe infant abandonment in South Africa with a brief look at baby savers in other countries

#### 3.1 What are baby safe havens and baby savers?

Baby safe havens allow mothers to relinquish their children safely to designated providers such as staff on duty at police stations, fire stations as well as hospitals instead of abandoning their children in unsafe locations.<sup>48</sup> Similarly, a baby saver also functions as an alternative to unsafe infant abandonment by allowing the mother to leave her infant in a box-like structure also referred to as a safe. Once a baby is placed inside, an alarm is triggered to alert someone on the other side that an infant has been placed therein.<sup>49</sup> Baby savers can be attached to a wall of a child and youth care centre or a place of safety. Alternatively, a baby saver can be erected independently and not at a wall attached to a child and youth care centre or place of safety. In this instance, the baby saver's alarm will notify first responders and emergency medical workers to collect the baby from the saver within a few minutes.<sup>50</sup> Both of these mechanisms are aimed at saving the lives of infants who would otherwise be discarded in unsafe locations that could lead to their deaths. Furthermore, an advantage of using a designated safe-haven provider or baby saver is the protection of the mother's identity. The mother is not obliged to leave any identifying information. This is, in many instances, the main reason why mothers feel secure in making use of this option.<sup>51</sup> These options serve as a last resort where women are unable to obtain pregnancy counselling or pregnancy counselling is unsuccessful.

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48 Boniface and Rosenberg "The Challenges in Relation to Undocumented Abandoned Children in South Africa" 2019 *Journal of South African Law* 49.

49 Boniface and Rosenberg (n 48) 49; *Odievré v France* 42326/98 Strasbourg 13-02-2003 (2004) 38 *European Human Rights Reports* 43 referred to as "tours" or collectively known as Foundling Homes in 1638, later abolished and replaced with the open office system in France. In South Africa, these hatches or safes have been opened by various missions such as the Door of Hope Children's Mission in Berea, Johannesburg which opened the first modern day baby saver.

50 Boniface and Rosenberg "The potential effects of the legalisation of baby safes and anonymous birth on the parental responsibilities and rights of unmarried fathers in South Africa" 2017 *Journal of Contemporary Roman Dutch Law* 254.

51 Boniface and Rosenberg (n 48) 49.

Various baby savers have already been established throughout South Africa, one such saver and the very first modern day saver in South Africa was established by the Door of Hope Children's Mission in Berea, Johannesburg in 1999. Without any legal backing provided to the establishment of baby savers, their existence is not known by desperate women seeking to relinquish their infants. When legalising these savers, certain provisions should be put in place in order to ensure their proper functioning. Many countries around the world have implemented baby savers and baby safe havens such as China, India and Namibia. Each of these countries and their laws will now be briefly discussed.

### 3.2 Baby savers in China

China installed their first baby saver, referred to as a "baby safety island" in a children's home in Shijiazhuang City, Hebei Province in June 2011.<sup>52</sup> Thereafter these baby savers were expanded in 32 locations across China between August 2013 and December 2014.<sup>53</sup> This has resulted in 1400 abandoned babies being rescued through these baby savers.<sup>54</sup> Wang states that the goal behind the installation of these baby savers are "[p]utting life and children's best interests first" and this method is chosen as it improves the survival rate of abandoned babies.<sup>55</sup>

China's laws recommend that each "baby safety island" should be installed closest to the nearest children welfare institute to enable babies to be cared for quickly after relinquishment.<sup>56</sup> They also require various facility standards that need to be observed to ensure the safety of the infant that is relinquished.<sup>57</sup> These standards include incubators, beds and blankets, alarms, fans, air conditioners and signage that will allow women to locate these baby safety islands with ease.<sup>58</sup> They also have a procedure to accept babies, an inspection system and a medical

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52 Wang "Development and Challenge of Protection Measures for Abandoned Babies in China" in conference proceedings of 14<sup>th</sup> Asian Congress of Health Promotion in Kumamoto, Japan April 2018, 37–39; Rosenberg "Mechanisms adopted in curbing unsafe infant abandonment: A comparison between Namibia and South Africa" 2021 *African Human Rights Law Journal* 734 940.

53 Wang (n 52) 37; Rosenberg (n 52) 940.

54 This number was recorded in 2018 see Wang (n 52); Rosenberg (n 52) 940.

55 Wang (n 52) 37; Rosenberg (n 52) 940.

56 Wang (n 52) 37.

57 Ibid.

58 Ibid.

treatment procedure.<sup>59</sup> Importantly, it is noted that the survival rate of abandoned babies was less than 50% prior to the establishment of the baby safety islands and after implementation this increased to 70% and that this mechanism did not cause a proliferation of infant abandonment as the numbers of abandoned babies did not show a significant increase from the average in previous years.<sup>60</sup> Despite this positive report, Wang suggests that these baby safety islands still face some challenges as most of the children abandoned suffer from disabilities and disease; and middle-sized cities with floating populations<sup>61</sup> have seen a rise in the number of abandoned infants and many members of the public are still conflicted about the use of the baby safety island.<sup>62</sup>

### 3.3 Baby savers in India

India introduced a baby saver in the form of “the cradle” in 1978, which consists of a basket left outside of the home with an alarm system attached to it. This was introduced by the Delhi Council for Child Welfare due to an increase in female infanticide, children being abandoned close to hospitals and parks, social stigmas and poverty.<sup>63</sup>

### 3.4 Baby safe havens in Namibia

More recently, our neighbouring country, Namibia, has introduced baby safe haven laws through section 227 of the Child Care and Protection Act<sup>64</sup> that commenced on 30 January 2019 and provides for the procedure for dealing with abandoned children left with approved authorities. Section 227(1) reads as follows:

“parent, guardian or care-giver of a child who abandons the child may not be prosecuted under section 254<sup>65</sup> for such abandonment

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59 Ibid.

60 Ibid.

61 A group of people that reside in a given place for a limited amount of time and cannot be considered as part of the official census, this is especially the case in the South China area, Xiamen, Fujian Province, Nanjing Province and Jiangsu Province. See Wang (n 52) 37–39.

62 Wang (n 52) 37.

63 Bhalla “The Present Situation and Issues Relating to Children being Abandoned in baby boxes/cradle in India” in conference proceedings of 14<sup>th</sup> Asian Congress of Health Promotion in Kumamoto, Japan dated April 2018 46–50; Rosenberg (n 52) 940.

64 Act 3 of 2015.

65 s 254 “(1) Subject to the provisions of section 227(1), a parent, guardian or other person who has parental responsibilities and rights in respect

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if the child— (a) is left within the physical control of a person at the premises of a hospital, police station, fire station, school, place of safety, children’s home or any other prescribed place; and (b) shows no signs of abuse, neglect or malnutrition.”

Subsection 2 provides that anyone who finds an abandoned child must report such finding to the police or to a designated social worker who will then place the child in a place of safety and start an investigation.<sup>66</sup> In terms of subsection 5, a social worker who has been notified of an abandoned child must provide an opportunity for someone to reclaim the child by publishing information pertaining to the child in a national newspaper as well as a local one.<sup>67</sup> In addition to this, the social worker must cause for an announcement on at least one national radio station.<sup>68</sup> In respect of reclaiming a child, section 227(6) gives the person 60 days from the date on which the child was abandoned.<sup>69</sup> However, in this instance, the social worker will conduct an investigation because the child will be treated as one in need of protective services in terms of section 131(1)<sup>70</sup> and in terms of section 139.<sup>71</sup> An abandoned child may

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of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely or temporarily, commits an offence if that parent or care-giver or other person—(a) abuses or deliberately neglects the child; or (b) abandons the child, and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding ten years or to both such fine and such imprisonment. (2) A person who is legally liable to maintain a child commits an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance and is liable on conviction to a fine not exceeding N\$50 000 or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment.”

66 “s 227(4); In terms of s 139, a social worker has 45 days within which to investigate the circumstances surrounding the child and to compile a report that must be submitted to the children’s court” see Rosenberg (n 52) 734.

67 Rosenberg (n 52) 946.

68 Ibid.

69 Ibid.

70 “Child in need of protective services (1) In this Chapter, a child is in need of protective services, if that child—(a) is abandoned or orphaned and has insufficient care or support.”

71 Section 139 of the Child Care and Protection Act 3 of 2015 reads as follows: “(3) For purposes of an investigation made under this section, a designated social worker may—

(a) question any person who may have relevant information in order to establish the facts surrounding the circumstances giving rise to the concern;

not be made available for adoption immediately after abandonment as a period of 60 days must expire before such a child may be placed for adoption.<sup>72</sup> The 60 days start running after the date of the newspaper publication or the radio broadcast, whichever is the latest, and also providing that no one has claimed responsibility for the child.<sup>73</sup>

Namibia enacted these laws because of the rise in the number of babies reportedly abandoned on a monthly basis.<sup>74</sup> In Windhoek, Namibia in 2008, 13 fetuses were found abandoned according to staff at Gammams Water Care Works.<sup>75</sup> Namibian police suggest the problem is a “significant” one.<sup>76</sup> Hubbard states that between 2003 and 2007,

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- (b) evaluate the child’s family circumstances;
  - (c) evaluate the child’s environmental circumstances;
  - (d) identify sources who may verify any alleged neglect, maltreatment or abuse of the child;
  - (e) identify the level of risk to the child’s safety or well-being;
  - (f) identify actual and potential protective and supportive factors in the home and broader environment to minimise risk to the child;
  - (g) make an assessment of the child’s developmental, therapeutic and other needs;
  - (h) request entry into any premises in order to obtain relevant information;
  - (i) enter and search any premises without a warrant if there is good reason to believe that the delay involved in obtaining a warrant would prevent the obtaining of relevant information which is critical to the investigation, but search of a building or structure used as residence, may not be carried out without a warrant, unless the owner or occupier of the residence, has consented to the search or the designated social worker on reasonable grounds believes that a warrant will be granted if applied for and that delay in obtaining such warrant would defeat the objects of the search;
  - (j) be accompanied by a member of the police; and
  - (k) recommend any appropriate protective measures or intervention as provided for in this Act.”; Rosenberg (n 52) 946 n 44.

72 s 227(7); Rosenberg (n 52) 946–947.

73 s 227(7); Rosenberg (n 52) 946–947.

74 Rosenberg (n 52) 940.

75 Lewis “Baby dumping on the rise in Namibia” 2013 <https://www.voanews.com/africa/baby-dumping-reported-rise-namibia> (2020-02-06); National Planning Commission with support from UNICEF “Children and adolescents in Namibia 2010 a situation analysis” 2010, [https://www.unicef.org/sitan/files/SitAn\\_Namibia\\_2010.pdf](https://www.unicef.org/sitan/files/SitAn_Namibia_2010.pdf) (2020-02-06) 57; Hubbard “Baby dumping and infanticide” 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 3 <https://www.lac.org.na/projects/grap/Pdf/monoinfant.pdf> (21-01-2022); Rosenberg (n 52) 749.

76 Hubbard “Baby-dumping and infanticide” 2008 Gender Research and Advocacy Project of the Legal Assistance Centre Windhoek, Namibia 1 6;

23 cases of baby abandonment were reported—this increased from six prior to 2003.<sup>77</sup> This served as reason for the implementation of baby safe haven legislation.

#### 4 Proposals to implement baby savers in South Africa

The following proposals have been made to parliament for the legalisation of baby savers through the insertion of section 316 in chapter 23 of the Children's Act 38 of 2005:

“CHAPTER 23

MECHANISMS FOR SAFE RELINQUISHMENT OF INFANTS:  
BABY SAVERS, DESIGNATED SAFE HAVEN PROVIDERS”

316(1) A Baby Saver or Designated Baby Save Haven Provider may only operate after being certified to comply with the standards prescribed by the Minister in terms of the relevant regulations, by way of a certificate of compliance;

316(2) When making use of Baby Savers or Designated Safe Haven Providers the following provisions must be complied with in order to qualify as Safe Relinquishment of an Infant—

(a) Age of the Child—an infant of one year old or younger may be safely relinquished in a Baby Saver, or to a Designated Safe Haven Provider by any person mentioned in section 316(2)(b);

(b) Relinquishing person is a person who is reasonably deemed to be:

(i) either of the parents; or

(ii) the legal guardian; or

(iii) a person or caregiver acting with the consent of the parents.

(c) Abuse—If an Infant shows any signs of Abuse, in terms of section 1 of the Act, upon being relinquished in a Baby Saver or to a Designated Safe Haven Provider—

(i) The Abuse must be reported to the South African Police Services as prescribed;

(ii) The Relinquishing Person will be prosecuted for Abuse in terms of section 305(3)(a) and (d) of the Act; and

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The Namibian delegation, while presenting the report on the Elimination of All Forms of Discrimination Against Women published in 1995 to the United Nations Committee, conceded that “infanticide is a significant problem in Namibia”; Rosenberg (n 52) 749.

<sup>77</sup> Hubbard (n 76); Rosenberg (n 52) 940.

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(iii) The Relinquishing Person will not enjoy anonymity and confidentiality as guaranteed in section 316(4).

316(3) Immunity from prosecution—a Relinquishing Person who safely relinquishes an Infant in a Baby Saver or to a Designated Safe Haven Provider and the Infant shows no signs of Abuse, will be immune from prosecution for Abuse in terms of section 305(3)(a) and (d) of the Act.

316(4) Anonymity and confidentiality—a relinquishing person is guaranteed absolute anonymity and confidentiality when making use of a Baby Saver or Designated Safe Haven Provider and provided the Infant shows no signs of Abuse in terms of section 316(2)(c).

316(5) Voluntary Provision of Information—A Relinquishing Person has the right to voluntarily disclose Personal Information of the Infant or itself on relinquishing an Infant in a Baby Saver or to a Designated Safe Haven Provider. Such Personal Information of the Relinquishing Person and/or the Infant will be kept confidential in accordance with the provisions of the Protection of Personal Information Act and such information relating to the Infant may only be used to provide the necessary medical treatment to the Infant;

316(6) Termination of Parental Responsibilities and Rights—the parental responsibilities and rights of Parents will be terminated once the 90 days' time period has expired in terms of section 316(7) and in terms of Reg. 56(2)(b)(ii) of the Children's Act 38 of 2005.

316(7) Reclaiming a child—a Relinquishing Person who has safely relinquished an Infant through a Baby Saver or to a Designated Safe Haven Provider may decide to reclaim the Infant within and no later than 90 days from the date on which an advertisement is placed in the local newspaper to notify other interested parties of the relinquishment of the Infant, failing which the Infant will be legally adoptable.

316(8) Reunification—A Parent with parental responsibilities or the Legal Guardian of the Infant shall be reunified with the Infant that was safely relinquished in terms of section 316(2), on success of the prescribed Reunification process.

316(9) Proof—upon reclaiming a Child or Infant the Parent or Legal Guardian wishing to reclaim the Child or Infant will have to provide proof that he or she is the Parent or Legal Guardian,

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this will be at the discretion of the Child Protection Organisation. Proof may be in the form of but not limited to—

- a. A bracelet that was acquired from the Baby Saver or from the Designated Safe Haven Provider where relevant; or
- b. DNA testing; or
- c. Providing a photo of the Infant; or
- d. Clinic card; or
- e. Any other relevant information that provides sufficient proof that he or she is the Parent or the Legal Guardian.

316(10) The Minister must publish regulations prescribing:

- a) the role, purpose and related matters of the national oversight body appointed by the Department to regulate Baby Savers and Designated Safe Haven Providers to ensure compliance with the Act;
- b) The intake protocols in respect of the use of Baby Savers and Designated Safe Havens;
- c) The minimum safety and design requirements that must be adhered to in relation to Baby Savers and safety standards for Designated Safe Havens;
- d) The investigation and reporting of Abuse of an Infant;
- e) The process to be followed by a Relinquishing Person who seeks to reclaim an Infant following Safe Relinquishment in terms of section 316(2); and
- f) The Reunification process.

316(11) Commencement Provision—Section 316(1) to section 316(9) will come into operation on a date fixed by the Minister by proclamation in the Gazette in respect of Baby Savers and Designated Baby Safe Haven Providers respectively.

316(12) Commencement Provision—The above section 316 in respect of Designated Baby Safe Haven Providers will only come into effect once regulations have been published in respect thereof.”

These proposed provisions cover more of the aspects that were omitted in terms of the Namibian legislation such as age of the child, who the relinquishing person can be, immunity from prosecution, and

anonymity.<sup>78</sup> An amendment to section 236 of the Children's Act is also proposed, which deals with when consent to adoption is not required by including the following paragraph: "(g) has safely relinquished an [i]nfant in a Baby Saver or to a Designated Safe Haven Provider and has failed to [r]eclaim the [i]nfant or [c]hild as provided in terms of the prescribed [r]eclaim process."

Furthermore, an amendment to section 305(3) of the Children's Act is proposed to include paragraph (c), (d) as well as an amendment to subsection 4. The proposed section provides instances in which a parent or caregiver will be guilty of child abandonment if they have not safely relinquished an infant either through a baby saver or to a designated safe haven provider or alternatively they have relinquished an infant through a baby saver or to a designated safe haven provider but the infant shows signs of abuse.<sup>79</sup> Subsection 4 also provides that a person will not be guilty of failing to legally maintain a child if the child has been relinquished through a baby saver or to a designated safe haven provider. Therefore, child abandonment will still be a crime in terms of legislation if not done in the prescribed manner and if the child shows signs of abuse. Regulations have also been drafted to provide for the minimum safety standards that each baby saver must observe, the intake protocols of infants through these savers to prevent child trafficking and the compliance certificate that must as a first step be issued to organisations wishing to install savers on their premises as well as recommendations for a national advertising campaign to bring awareness to the existence of these safes and their exact locations. With many countries serving as both good and bad examples, these aspects are not being left to chance or "figuring out" but have purposefully been thought through to protect the best interests of each child left in a baby saver.

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78 See Rosenberg (n 52) 741–744 for a detailed explanation on the shortcomings of Namibia's safe haven laws.

79 "(c) abandons an Infant other than through Safe Relinquishment in a Baby Saver or other than to a Designated Safe Haven Provider provided for in section 316(1);

(d) relinquishes an Infant in a Baby Saver or to a Designated Safe Haven Provider but such Infant shows signs of Abuse in terms of section 316(1) (c);

(4) A person who is legally liable to maintain a child is guilty of an offence if that person, while able to do so, fails to provide the child with adequate food, clothing, lodging and medical assistance unless the Relinquishing Person, has relinquished an Infant in a Baby Saver or in terms of the provisions of Baby Safe Haven laws, then he or she will not be guilty of an offence in terms of this subsection."

## 5 Constitutionality

Section 11 of the Constitution of the Republic of South Africa provides that everyone has the right to life. This is guaranteed to everyone including children. The lack of the provision of a safe alternative to unsafe infant abandonment does not safeguard the child's right to life which forms part of the fundamental rights guaranteed in the Constitution. O' Regan J commented as follows in *S v Makwanyane*:

“The right to life is, in one sense, antecedent to all the other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to live as a human being, to be part of a broader community, to share in the experience of humanity. This concept of human life is at the center (sic) of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.”<sup>80</sup>

The right to life also has a socio-economic element which means that the state will be obligated to meet certain needs in respect of this right, such as shelter, food and education. Sachs J remarked that the state must create conditions to allow all persons to enjoy the right.<sup>81</sup> Therefore, the state is under a duty to legalise a safe method of infant relinquishment, which is in line with the duty to “create conditions to enable *all persons* to enjoy the right”. Furthermore, the right of an infant to human dignity as guaranteed by section 10 of the Constitution is also infringed when an infant is discarded in a dumpster, alongside the road or in a toilet. According to Chaskalson P, the right to life and human dignity are the most important of all the rights as well as the source of all other rights, these two rights must be valued above all others.<sup>82</sup> In addition section 28(2) of the Constitution provides “(a) child's best interests are of paramount importance in all matters concerning a child”. Establishing a baby saver law is placing the child's best interests in a position of paramount importance by safe guarding the child's fundamental rights as guaranteed in the constitution.

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80 *S v Makwanyane* 1995 3 SA 665 (CC) par 326.

81 the *Makwanyane* case (n 80) par 326 and 327.

82 the *Makwanyane* case (n 80) par 144.

Being a party to the United Nations Convention on the Rights of the Child, article 6 is of relevance to South Africa. The article provides that “state parties recognise that every child has the inherent right to life and that state parties shall to the maximum extent possible ensure the survival and development of the child”. Thus, for the child to survive and develop, a safe method of infant relinquishment is necessary to prevent death that results from unsafe abandonment.

## **6 Conclusion**

The COVID-19 pandemic highlighted many existing humanitarian crises experienced by several countries around the world. Our response to these prior to the pandemic was either non-existent or slow. With an increase in poverty causing more desperation for mothers and restrictive legislation failing to ease the pressure, the need for a safe method of infant relinquishment became even more apparent. The implementation of baby savers and baby safe havens in many countries around the world, all with a common goal of protecting the child’s right to life and best interests, serves as an example to South Africa. As a first step, baby savers should be legalised in South Africa to allow organisations to both open these savers and advertise their existence. Safe haven laws should be implemented in future as staff at hospitals and fire stations as well as police stations will require specialised training on procedures to be followed when receiving an infant and this specialised training will take time to implement. The pandemic has shown us that in the area of infant abandonment, South Africa was ill prepared to prevent unsafe abandonments and, with clear solutions, there exists no justification for such ill preparedness.

