

SUMMARY OF JUDGMENT OF DECEMBER 6 2016 SUPREME COURT OF APPEAL OVERTURNING ORDER GRANTING RIGHT TO ASSISTED SUICIDE

The Present Law in SA

- (a) Suicide and attempted suicide are not illegal.
- (b) A patient may decline medical treatment of any sort, and to do so is not attempted suicide. He may refuse surgery, use of life-support machines, medication, artificial feeding etc. Sections 10 and 12 of the Constitution (Dignity and Bodily Integrity) make these rights beyond doubt.
- (c) If the patient lacks mental capacity his relatives may make decisions on his behalf.
- (d) A doctor may prescribe drugs to reduce pain even if the measures may incidentally shorten life.
- (e) However any deliberate mercy-killing is murder.
- (f) Physician-assisted euthanasia (PAE) is murder; the doctor is in the same position of a family member who deliberately administers an overdose with intent to kill. (The court added that the question of whether the consent of the patient could be in any degree a defence to a charge of murder was not an issue argued before the court).
- (g) Physician-assisted suicide (PAS) is more complex. The patient has a right to commit suicide; the question of criminality of a person who assists is a complex question which would depend on the essential criminal law principles of intention and causation in each case; the authorities in case law in SA leave room for argument on this issue.

Should the law in other countries effect our law?

The judgment pointed out that only in the Benelux countries (Netherlands, Belgium, Switzerland, Luxemburg), and Canada, is PAE lawful. In four American States PAS has been permitted by legislation but it is tightly restricted to terminal illness and, as with Switzerland, it requires the patient to be able to administer the lethal drugs. At paragraph 101, the judgment stresses that SA is “a very different country” from those countries. They have sophisticated health care systems and extensive palliative care networks. SA is relatively poor and limited in these facilities. The judge warns that permitting either PAE or PAS in South Africa would first of all require a “proper regulatory framework”.

Other questions which arise in SA

- (a) Does the right to life encompass the right to die? In the UK the House of Lords (Supreme Court) has held that “the right to life is the antithesis of a right to determine the manner and timing of one’s death”. The European Court of Human rights has also rejected the idea that a right to PAE and PAS arises from a constitutional right to life.
- (b) What does the right to dignity encompass? The judgement points out that the unchallenged evidence before the SCA did not “conjure up a spectre of a helpless patient confined to a hospital bed attached to an array of machinery..”
- (c) What are the implications for the medical profession?

(d) What is the effect of section 36 of our Constitution (Limitation of Rights) on this debate?

What role did Dignity South Africa play behind the scenes?

The Court expresses its disquiet over this matter in two places in the judgment. The organisation was not a party to the litigation or an amicus. But on their web-site, says the judgment, (Para 76), they claim that the litigation was brought jointly by it and the Applicant. They also sought to raise funds “for their legal disbursements in their upcoming SCA case”. The court goes on to draw the inference that “the reality appears to be that this organisation was the real and substantial litigant”. The court then remarks, “There is of course nothing amiss in an organisation such as Dignity SA pursuing litigation in the public interest in terms of s.38(d) of the Constitution, provided it does so openly and on the record”.

In the final sentence of the judgment (paragraph 103) the Court remarks, when dealing with costs, “If as one suspects, there is another organisation behind the litigation no doubt it will have to deal with the estate (of the deceased) over the consequences of its actions”.

The SCA’s CONCLUSION:

1. The High Court was wrong first of all for the three reasons given at the outset.
2. The High Court was wrong to say the common law crimes of murder and culpable homicide should be developed to accommodate PAE and PAS.
3. Parliament must decide this huge issue. “It is desirable in my opinion that issues engaging profound moral questions beyond the remit of judges to determine, should be decided by the representatives of the country as a whole.” (paragraph 101)