THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 531/2015

In the matter between:

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	**FIRST APPELLANT**
THE MINISTER OF HEALTH	**SECOND APPELLANT**
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	**THIRD APPELLANT**
THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	**FOURTH APPELLANT**

and

ESTATE LATE ROBERT JAMES STRANSHAM-FORD	**RESPONDENT**

and

DOCTORS FOR LIFE INTERNATIONAL NPC	**FIRST AMICUS CURIAE**
DONRICH WILLEM JORDAAN	**SECOND AMICUS CURIAE**
CAUSE FOR JUSTICE	**THIRD AMICUS CURIAE**
CENTRE FOR APPLIED LEGAL STUDIES	**FOURTH AMICUS CURIAE**
JUSTICE ALLIANCE OF SOUTH AFRICA	**FIFTH AMICUS CURIAE**

Neutral citation: *Minister of Justice and Correctional Services v Estate Stransham-Ford* (531/2015) 2016 ZASCA 197 (6 December 2016)

Coram: LEWIS, SERITI, WALLIS and DAMBUZA JJA and SCHIPPERS AJA

Heard: 4 November 2016

Delivered: 6 December 2016

Summary: Applicant suffering in terminal stages of cancer – sought an order that medical practitioner could administer a lethal agent at his request or provide him with a lethal agent that he could administer himself – applicant dying before court granting order – claim ceased to exist – court not entitled to grant order – law in relation to physician administered euthanasia and physician assisted suicide – not appropriate case in which to develop the common law of murder and culpable homicide.

ORDER

On appeal from: Gauteng Division, Pretoria of High Court (Fabricius J sitting as court of first instance)

Reported as *Stransham-Ford v Minister of Justice and Correctional Services and Others* [2015] ZAGPPHC 230*;* 2015 (4) SA 50 (GP):

1 The appeal is upheld and the order of the court below is set aside.

2 The respondent is ordered to pay the costs incurred by the fourth appellant in applying for the order granted by this court on 30 May 2015 and in thereafter procuring and lodging the evidence of Dr David Cameron in his affidavit sworn on 17 October 2016.

JUDGMENT

Wallis JA (Lewis, Seriti and Dambuza JJA and Schippers AJA concurring)

[1] 'There's nothing certain in a man's life except this: That he must lose it.'[1] Death draws the final curtain on all our lives. How that occurs, and the manner in which we should approach death, has provided grist to the mill of philosophers, poets, politicians, social commentators and comedians down the ages and it is doubtful that any conclusion common to all humankind will ever be reached. Whether we think Socrates was

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[1] The quotation is frequently attributed to Aeschylus *Agamemnon* but it does not appear there. More prosaically Benjamin Franklin wrote to Jean Baptiste Le Roy in 1789 and said: 'But in this world nothing can be said to be certain, except death and taxes.' There are similar earlier statements.

correct to say that 'death may be the greatest of all human blessings',[2] or that Dylan Thomas was right to urge us, when faced with death, to 'rage, rage against the dying of the light',[3] is a matter of personal philosophy and morality on which views diverge and always will. The law injects itself into this debate largely as a result of the enormous strides modern medicine has made in its ability to prolong life and postpone death. This has changed our understanding of death itself. It can no longer be viewed as simply the cessation of the heart beating and the lungs breathing, because these can be maintained artificially, so the medical profession now asks whether the brainstem is dead in the sense of showing no activity.[4] Welcome though these advances of medical science are in most circumstances, in some they can lead to the process of dying being protracted, painful and burdensome.

[2] These developments have generated a debate in various societies around the world, whether it is permissible for persons so burdened to be assisted to bring their lives to an end. More narrowly, it is whether they can invoke the assistance of medical practitioners to this end. One possibility is that the patient should be permitted to obtain a prescription for lethal drugs that they may use to terminate their own lives. This is commonly referred to as physician assisted suicide (PAS). The other possibility is that the medical practitioner should be permitted at their request to administer such lethal drugs to them. This is referred to as voluntary euthanasia or physician administered euthanasia (PAE). I use the expressions PAS and PAE in this judgment specifically to refer to the

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[2] As quoted in Plato's *Apology* 29a.
[3] Dylan Thomas 1914 – 1953 *Do not go gentle into that good night*.
[4] This is of course the language of the layman. In *S v Williams* 1986 (4) SA 1188 (A) at 1194D-H this court expressly refrained from deciding whether the traditional view that cessation of heart beat and breathing or the medical view of brain death was the correct position in law.

conduct described above and nothing else. They are to be distinguished from the refusal or withdrawal of treatment or life support or other conduct that is lawful in South Africa, but which in certain jurisdictions is regarded as passive euthanasia and may be illegal. In doing so I am aware that there are those who regard these distinctions as sophistry and treat virtually any action, ranging from refusal of treatment by the patient to the administration of lethal drugs by a physician, as different manifestations of euthanasia.

[3] Legal issues arise because such actions by medical practitioners have long been treated in various different societies as criminal. The intended purpose of this litigation was to determine whether that should be the case in South Africa. Its ostensible subject was Mr Robert (commonly known and referred to as Robin) Stransham-Ford, who was dying of cancer. He approached the High Court of South Africa, Gauteng Division, Pretoria claiming an order that a medical practitioner could either end his life by administering a lethal substance, or provide him with the lethal substance to enable him to administer it himself, and that in either event such medical practitioner would not be subject to prosecution or disciplinary steps by the relevant professional body. To that end he sought an order that the common law in relation to the crimes of murder and culpable homicide should be developed in terms of s 39(2) of the Constitution. He claimed this relief as a matter of right, sourced in the Bill of Rights under the Constitution.

[4] In circumstances that will be explored later in this judgment, Fabricius J heard the application as a matter of urgency on 29 April 2015. On 30 April 2015 he granted the following order:

"1. IT IS DECLARED THAT:

1.1 The Applicant is a mentally competent adult;

1.2 The Applicant has freely and voluntarily, and without undue influence requested the Court to authorise that he be assisted in an act of suicide;

1.3 The Applicant is terminally ill and suffering intractably and has a severely curtailed life expectancy of some weeks only;

1.4 The Applicant is entitled to be assisted by a qualified medical doctor, who is willing to do so, to end his life, either by administration of a lethal agent or by providing the Applicant with the necessary lethal agent to administer himself;

1.5 No medical doctor is obliged to accede to the request of the Applicant;

1.6 The medical doctor who accedes to the request of the Applicant shall not be acting unlawfully, and hence, shall not be subject to prosecution by the Fourth Respondent or subject to disciplinary proceedings by the Third Respondent for assisting the Applicant.

2. This order shall not be read as endorsing the proposals of the draft Bill on End of Life as contained in the Law Commission Report of November 1998 (Project 86) as laying down the necessary or only conditions for the entitlement to the assistance of a qualified medical doctor to commit suicide.

3. The common law crimes of murder or culpable homicide in the context of assisted suicide by medical practitioners, insofar as they provide for an absolute prohibition, unjustifiably limit the Applicant's constitutional rights to human dignity, (s 10) and freedom to bodily and psychological integrity (s 12(2)*(b)*, read with s 1 and 7), and to that extent are declared to be overbroad and in conflict with the said provisions of the Bill of Rights.

4. Except as stipulated above, the common law crimes of murder and culpable homicide in the context of assisted suicide by medical practitioners are not affected.'

On 4 May 2015 Fabricius J handed down his reasons for making that order[5] and on 2 June 2015 he granted leave to appeal to this court. The Estate of Mr Stransham-Ford (the Estate) has resisted the appeal on the basis that it was entitled to step into his shoes for that purpose.

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[5] They are reported as *Stransham-Ford v Minister of Justice and Correctional Services and Others* [2015] ZAGPPHC 230; 2015 (4) SA 50 (GP).

[5] The appeal must succeed and the order granted by Fabricius J must be set aside for three inter-related reasons. Firstly, Mr Stransham-Ford had died on the morning of 30 April 2015 two hours before an order was made.[6] As a result his cause of action ceased to exist and no order should have been made thereon. His death did not result in a claim passing to his estate and the estate had no interest in further pursuing this litigation or any locus standi to do so. Secondly, there was no full and proper examination of the present state of our law in this difficult area, in the light of authority, both local and international, and the constitutional injunctions in relation to the interpretation of the Bill of Rights and the development of the common law.[7] Thirdly, the order was made on an incorrect and restricted factual basis, without complying with the Uniform Rules of Court and without affording all interested parties a proper opportunity to be heard. Viewed overall, the circumstances of the case were such that it was inappropriate for the court below to engage in a reconsideration of the common law in relation to the crimes of murder and culpable homicide.

Background and litigation history

[6] Robert Stransham-Ford was an advocate. On 19 February 2013 a prostate biopsy confirmed the presence of adenocarcinoma. The cancer was aggressive and by January 2015 had spread to lymph glands elsewhere in his body. On 13 March 2015 an ultrasound biopsy confirmed the presence of lymphoma. On 15 March 2015 he was admitted to Victoria Hospital in Cape Town suffering from severe

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[6] In para 3 of his reasons Fabricius J recorded, slightly inaccurately, that Mr Stransham-Ford died on the day that he made his order. A more accurate statement would have been that he died before any order was given.

[7] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34*;* 2016 (1) SA 621 (CC) (*Mighty Solutions*) para 39.

abdominal pain. On 18 March 2015 at Groote Schuur Hospital an attempt was made to insert stents in the ureters leading from his kidneys to his bladder in an endeavour to relieve the obstruction. On 25 March 2015 Dr Cameron Bruce took over his care and was the doctor who cared for him until his death. Mr Stransham-Ford was at this time resident in Cape Town with his former wife and daughter, where he remained until his death. His former wife and his administrative assistant from his legal practice provided his daily care. From 25 March 2015 Dr Bruce attended upon Mr Stransham-Ford at his former wife's home on nine occasions. In addition a palliative care nurse, Sister Yvonne Jackman from St Luke's Hospice, visited Mr Stransham-Ford on a regular basis. As already mentioned he died on 30 May 2015 at about 8.00 am.[8]

[7] The application was launched on 17 April 2015 (a Friday) as an urgent application with foreshortened periods, requiring the respondents to deliver answering affidavits by Wednesday, 22 April 2015, and selecting 28 April 2015 as the date for hearing.[9] The Minister of Justice and Correctional Services (the Minister), the Minister of Health, the National Director of Public Prosecutions and the Health Professions Council of South Africa (HPCSA) were cited as respondents. The Minister delivered an answering affidavit deposed to by the Acting Chief Director: Legal Services and the HPCSA delivered an answering affidavit by the chairperson of its Medical and Dental Professional Board, Dr Letitia Moja. These were dated 24 April 2015 (a Friday). Mr Stransham-Ford replied on Sunday, 26 April 2015.

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[8] This summary of Mr Stransham-Ford's condition is taken from the founding affidavit read in the light of Dr Bruce's clinical notes and explanations of those notes.

[9] The practice in the High Court in Pretoria is that urgent applications are dealt with in a separate court on a separate roll commencing on Tuesday in each week.

[8] The order sought by Mr Stransham-Ford read as follows:

'2. Declaring that the Applicant may request a medical practitioner registered as such in terms of the Health Professions Act 56 of 1974 ("the medical practitioner"), to end his life or to enable the Applicant to end his life by the administration or provision of some or other lethal agent;

3. Declaring that the medical practitioner who administers or provides some or other lethal agent to the Applicant, as contemplated in prayer 2 *supra,* shall not be held accountable and shall be free from any civil, criminal or disciplinary liability that may otherwise have arisen from:

3.1 the administration or provision of some or other lethal agent to the Applicant;

3.2 the cessation of the Applicant's life as a result of the administration or provision of some or other lethal agent to the Applicant;

4. To the extent required, developing the common law, by declaring the conduct in prayers 2 and 3 *supra*, lawful and Constitutional in the circumstances of the above matter.'

This order was significantly different from the one ultimately granted by Fabricius J.

[9] In launching these proceedings Mr Stransham-Ford was assisted by attorneys and counsel on a pro bono basis, having been referred to them by an organisation called Dignity SA, that campaigns for the law to be changed to recognise as lawful both PAS and PAE.[10] It was plain both from the prayer for relief and from the grounds advanced in the affidavit that the application raised substantial constitutional issues in an area where public views would be divided and where considerable controversy would attend upon a ruling either way. Mr Stransham-Ford's legal advisers gave a notice in compliance with the provisions of Uniform Rule

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[10] Junior counsel, Mr van Nieuwenhuizen, was a member of the executive committee of this organisation.

16A, which requires a litigant intending to raise a constitutional issue to give notice thereof to the registrar at the time of filing the relevant affidavit.[11] In view of the manner in which the proceedings were brought there was, however, no possibility that the notice would be displayed for the required twenty court days.

[10] Two organisations, Doctors for Life International NPC (Doctors for Life) and Cause for Justice, that espouse a right to life and oppose both euthanasia, whether voluntary as in PAE or involuntary, and any form of PAS, learned of the application, in the case of Cause for Justice because Dignity SA posted on its website a report headed:

'BREAKING NEWS & URGENT APPEAL: WE ARE ON OUR WAY TO COURT'

in which it referred to the application as one by it and Mr Stransham-Ford. This caused Doctors for Life to write to the applicant's attorneys, and Cause for Justice to write to Dignity SA, seeking consent to their intervention as amici curiae and asking that the papers be served on them. They both received a reply from Mr Stransham-Ford's attorneys saying that they represented him only and not Dignity SA, claiming that both organisations lacked any direct and substantial interest 'in our client's human rights, his life or his death' and refusing to make available a copy of the application papers. When in response both organisations indicated that they would seek the leave of the court to be admitted as amici curiae the reply from the attorneys was that they would not consent to this.

[11] Nonetheless both organisations delivered applications to be admitted as amici together with answering affidavits setting out their

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[11] Rules 16A (1)*(a)* and *(b)* provide that:
'(1)*(a)* Any person raising a constitutional issue in an application or action shall give notice thereof to the registrar at the time of filing the relevant affidavit or pleading.
(b) Such notice shall contain a clear and succinct description of the constitutional issue concerned.'

stance in regard to the litigation. They were both represented before Fabricius J. In this court they again applied to be admitted as amici curiae. That was over the opposition of the same attorneys, now representing the Estate. Three further applications were made to be admitted as amici in this court. They were by Mr Donrich Willem Jordaan, an advocate and academic; the Centre for Applied Legal Studies (CALS) and another NGO, Justice Alliance. Unsurprisingly, given their attitude throughout the case, the attorneys for the Estate resisted the admission of Justice Alliance, which submitted that the order of Fabricius J breached the doctrine of the separation of powers and should be set aside. They initially supported that of Mr Jordaan, before withdrawing their consent, and supported the application by CALS. In short they opposed the admission of any amicus who contended that the court below should not have made the order it did and supported the admission of the one amicus that contended that the order was justified.

[12] Notwithstanding the opposition in three cases, the President of this court granted all five applications for admission as amici curiae and all of them submitted heads of argument. After consideration of those heads of argument the court indicated in advance of the hearing that it would permit three of them, Cause for Justice, Justice Alliance and CALS to present oral argument in support of their submissions and that argument was of assistance. In addition, in the course of the hearing the court permitted Doctors for Life to make brief oral submissions for the purpose of drawing attention to the fact that the locus standi of the Estate had been placed in issue by it.

Effect of Mr Stransham-Ford's death

[13] Mr Stransham-Ford made it clear in his founding affidavit that he was bringing the application in his personal capacity. The prayers for relief were couched in terms personal to him and any medical practitioner who assisted him. He explained that the purpose of the application was to have judicial oversight over the process by which he envisaged that his death would be brought about. He asked for a court order 'giving effect to *my* fundamental rights' to human dignity; not to be treated in a cruel, inhuman or degrading way; and bodily and psychological integrity. He sought orders entitling him to seek the assistance of a medical practitioner to end his life or provide him with the means to enable him to end his life. He explained in some detail the onset and progress of his cancer and set out information directed at showing the court that he was of sound mind, understood what he was trying to do and was competent to participate in the proceedings and seek the relief that was set out in the notice of motion.

[14] Having done this Mr Stransham-Ford went on under the general heading 'My current day-to-day life and deterioration' to describe his circumstances and under the heading 'The imminent future' his prognosis of the future course of his cancer. He set out his view of 'my fundamental, basic, human rights' and asked that the common law be developed to give effect to 'my request for assisted dying to ensure my right to dignity'. His aim was that there should be 'juristic oversight' of his request, a theme to which he returned in his replying affidavit. Throughout, the thrust of his affidavits was that he was bringing the application for the purpose of seeking relief personal to him. While he obviously recognised as an advocate that any judgment he secured might have some precedential effect, he did not purport to bring the application

in the general public interest or as a member of a group or class of persons. Had he done so, different allegations would have needed to be made and it is conceivable that he would have had to cite other potentially interested parties, such as organisations representing the aged, persons suffering from disability, specialist branches of the medical profession and medical aid schemes.

[15] Mr Stransham-Ford's death before any order could be made materially affected the application, which was concerned only with his personal situation and sought relief directed at enabling him to die. The need for the court to grant the relief he had sought was overtaken by his death. In blunt terms, no further purpose could be served by granting that relief. That was apparent from the terms of the order granted by Fabricius J. Paragraphs 1.1, 1.3, 1.4 and 1.5 were only pertinent if he was still alive. Indeed they assumed that he was alive. In view of his death, paragraph 1.2 was academic because it related to his state of mind whilst still alive and specifically his state of mind in bringing the application. There was no longer any question of a medical doctor assisting him to die, so that there was no call for the court to hold that a doctor, doing what could no longer be done, would not be subject to prosecution or disciplinary proceedings. In turn the development of the common law crimes of murder and culpable homicide, inasmuch as that development was ordered specifically in relation to a medical doctor assisting Mr Stransham-Ford to die, was no longer relevant or necessary. It is notable in this regard that para 4 of the high court's order stipulated that the existing law in relation to murder and culpable homicide 'in the context of assisted suicide by medical practitioners' would not be affected. There could be no clearer indication that the court's order was tailored to deal with Mr Stransham-Ford's claim and that alone.

[16] We do not know why Fabricius J was not informed of Mr Stransham-Ford's death before he handed down his order. Dr Bruce's notes reveal his disquiet at the fact that, although Mr Stransham-Ford died at about 8.00 am, he was only informed of this after 11.00am. When Dr Bruce arrived at the home, at about 12.15pm, one of the first things he was told was that Mr Stransham-Ford had won his case. Dr Cameron, who gave expert evidence on palliative care on behalf of the HPCSA, also regarded this as strange. It is difficult to avoid the inference that his death was not reported because it was thought that it might affect the judge's decision.

[17] Be that as it may, we were informed from the bar that none of Mr Stransham-Ford's legal team was aware of the fact of his death until after the order was granted. Had they been aware, they would have been under a professional duty to bring that fact to the attention of the judge. In turn, he would have been obliged to call for submissions from the parties as to the proper course to follow. Instead, on the following Tuesday, before he delivered his reasons, his attention was drawn to what had occurred and he was requested by the HPCSA to recall his order. Junior counsel who had appeared on behalf of Mr Stransham-Ford opposed this. Although this is not mentioned in the written reasons, Fabricius J refused to recall the order on the grounds that his judgment had broader societal implications.[12] It would have been preferable had he heeded the warning of Learned Hand J when he said:

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[12] We were informed of this from the bar by counsel who had made the application and counsel for the Estate did not challenge his statement.

'Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant.'[13]

[18] In terms of rule 42(1) of the Uniform Rules an order may be rescinded where it was erroneously sought or granted in the absence of a party and where it was made on the basis of a mistake common to the parties. It may also be rescinded under the common law where it was made as a result of *justus* error. In this case those reasons for rescinding the order were satisfied because it was granted on the erroneous basis that Mr Stransham-Ford was still alive. On the information we have been given that was an error common to the parties (or, in the case of Mr Stransham-Ford, his legal representatives) and the judge. It was *justus*, but nonetheless an error. On those grounds alone the judge was wrong not to rescind his order and thereafter to dispose of the application in the light of the fact that Mr Stransham-Ford was dead, after hearing proper argument and possibly evidence. Had he done that then, for the following reasons, the proper conclusion would have been that the proceedings had terminated on the death of Mr Stransham-Ford and that he no longer had the power to grant an order upholding his claim.

[19] Some causes of action are extinguished by the death of a party to litigation and are not transmissible to the estate of the deceased person.[14] This is reflected in the provisions of rule 15(1) of the Uniform Rules, which provides that 'No proceedings shall terminate solely by reason of the death . . . of any party unless the cause of such proceedings is thereby

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[13] Learned Hand J in *Spectator Motor Service Inc v Walsh* 139 F 2d 809 at 823 (1944).
[14] The authorities show that there is a close correlation between the non-transmissibility of those claims on death and an inability to cede them during life.

extinguished'. Obvious examples of causes that are extinguished by the death of a party are an action for divorce, or a custody dispute between the parents of minor children. A marriage is terminated by death and the contest over custody ends when the one parent dies. While many claims, especially those of a pecuniary nature will be transmissible to the estate of a deceased litigant that is not true of all such claims. A claim for damages for pain and suffering and loss of the amenities of life is not transmitted to the deceased's estate unless the proceedings have reached the stage of *litis contestatio*.[15] A claim for damages for defamation is so personal to the person defamed that the action dies with the claimant and does not pass to their heirs unless *litis contestatio* has been reached.[16] The principle in these cases is summed up in the maxim *actio personalis moritur cum persona* (a personal action dies with the person).[17]

[20] The nature of the relief claimed by Mr Stransham-Ford makes it clear that this was a personal action. The purpose of the litigation was to obtain a court order enabling him to die in a manner of his own choosing. His death extinguished his claim for relief. There can be few starker examples of a cause being extinguished by the death of the claimant. As the cause of action was extinguished that brought an end to the application.[18] There was no longer any claim capable of being adjudicated

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[15] *Executors of Meyer v Gericke* (1880) Foord 14; *Hoffa NO v S A Mutual Fire & General Insurance Co Ltd* 1965 (2) SA 944 (C) at 952F; *Government of the Republic of South Africa v Ngubane* 1972 (2) SA 601 (A) (*Ngubane*) at 606G-H.

[16] *Pienaar and Marais v Pretoria Printing Works Ltd and Others* 1906 TS 654 at 656, followed in *Jankowiak and Another v Parity Insurance Co Ltd* 1963 (2) SA 286 (W) at 289E-H and *Ngubane* at 607H. The appeals against orders dismissing exceptions in *South African Associated Newspapers Ltd and Another v Estate Pelser* 1975 (4) SA 797 (A) and *Argus Printing and Publishing Co Ltd and Others v Esselen's Estate* 1994 (2) SA 1 (A) were presumably brought to free the appellants of the burden of costs orders made against them that would have been transmitted to the estates.

[17] *Willenburg v Willenburg and Another* (1908) 25 SC 775 at 777.

[18] Any questions of costs would, if necessary, be dealt with separately.

and no claim to pass to his estate. As there was no longer a claim before it, there was nothing left on which the court could pronounce.

[21] I have given consideration to whether the fact that the arguments advanced on behalf of Mr Stransham-Ford engaged constitutional issues detracts from these principles. In my view they do not. Constitutional issues, as much as issues in any other litigation, only arise for decision where, on the facts of a particular case, it is necessary to decide the constitutional issue. Dealing with the situation where events subsequent to the commencement of litigation resulted in there no longer being an issue for determination, Ackermann J said in *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others*:[19]

'A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.'

At the time that Fabricius J delivered his judgment there was no longer an existing controversy for him to pronounce upon. The case was no longer justiciable.

[22] Since the advent of an enforceable Bill of Rights, many test cases have been brought with a view to establishing some broader principle. But none have been brought in circumstances where the cause of action advanced had been extinguished before judgment at first instance. There have been cases in which, after judgment at first instance, circumstances have altered so that the judgment has become moot. There the Constitutional Court has reserved to itself a discretion, if it is in the interests of justice to do so, to consider and determine matters even

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[19] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) at footnote 18.

though they have become moot.[20] It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument.[21]

[23] The common feature of the cases, where the Constitutional Court has heard matters notwithstanding the fact that the case no longer presented a live issue, was that the order had a practical impact on the future conduct of one or both of the parties to the litigation. In *IEC v Langeberg Municipality*, while the relevant election had been held, the judgment would affect the manner in which the IEC conducted elections in the future. In *Pillay* the court granted a narrow declaratory order that significantly reduced the impact on the school of the order made in the court below. In *Pheko*, while the interdictory relief that had been sought had become academic, a decision on the merits would affect its claim for restitutionary relief.

[24] This case presents an entirely different picture. Relief was sought specifically tailored to Mr Stransham-Ford's circumstances. The order expressly applied only to any doctor who provided him with assistance to terminate his life. The caveat in para 4 of the order left the common law crimes of murder and culpable homicide unaltered. No public purpose was served by the grant of the order. In any event, I do not accept that it

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[20] See *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC) (*IEC v Langeberg*) para 11; *MEC for Education, KwaZulu Natal & others v Pillay* 2008 (1) SA 474 (CC) (*Pillay)* para 32; *Pheko & others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC) (*Pheko*) para 32. This court has a similar jurisdiction in terms of s 16(2)*(a)* of the Superior Courts Act 10 of 2013.

[21] *IEC v Langeberg Municipality* ibid.

is open to courts of first instance to make orders on causes of action that have been extinguished, merely because they think that their decision will have broader societal implications. There must be many areas of the law of public interest where a judge may think that it would be helpful to have clarification but, unless the occasion arises in litigation that is properly before the court, it is not open to a judge to undertake that task. The courts have no plenary power to raise legal issues and make and shape the common law. They must wait for litigants to bring appropriate cases before them that warrant such development. Judge Richard S Arnold expressed this well when he said:

> '[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties. Counsel almost always know a great deal more about their cases than we do …'[22]

[25] The situation before Fabricius J was not comparable to the position where this court or the Constitutional Court decides to hear a case notwithstanding that it has become moot. When a court of appeal addresses issues that were properly determined by a first instance court, and determines them afresh because they raise issues of public importance, it is always mindful that otherwise under our system of precedent the judgment at first instance will affect the conduct of officials and influence other courts when confronting similar issues. A feature of all the cases referred to in the footnotes to para 22 above is that the appeal court either overruled the judgment in the court below or substantially modified it. The appeal court's jurisdiction was exercised because 'a discrete legal issue of public importance arose that would affect matters

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[22] *United States v Samuels* 808 F. 2d. 1298, 1301 (8th Cir. 1987) cited by the Supreme Court in *Greenlaw v United States* 128 S Ct 2559 (2008). See *Fischer and Another v Ramahlele and Another* [2014] ZASCA 88; 2014 (4) SA 614 (SCA) paras 13 and 14.

in the future and on which the adjudication of this court was required'.[23] The High Court is not vested with similar powers. Its function is to determine cases that present live issues for determination.

[26] The jurisprudence in appellate courts speaks of the case having become moot so that it no longer presents a live issue for determination. I do not think that the extinguishing of a claim by death before judgment is an instance of mootness in the sense in which that expression is used in these cases. If a cause of action ceases to exist before judgment in the court of first instance, there is no longer a claim before the court for its adjudication. Mootness is the term used to describe the situation where events overtake matters after judgment has been delivered, so that further consideration of the case by way of appeal will not produce a judgment having any practical effect. Here we are dealing with a logically anterior question, namely, whether there was any cause of action at all before the high court at the time it made its order. Was there anything on which it was entitled to pronounce? The principles governing mootness have little or no purchase in that situation.

[27] For those reasons alone therefore the order made by Fabricius J must be set aside. But that leaves the dilemma that it is a reasoned and reported judgment by the high court and if this court does not at least to some extent, address the merits it may be taken as having some precedential effect. That is of particular concern in the present case, as it has already been treated as reflecting the South African legal position by a court in New Zealand.[24] This compels us to deal with the merits insofar

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[23] *Qoboshiyane NO and Others v Avusa Publishing Eastern Cape (Pty) Ltd and Others* [2012] ZASCA 166; 2013 (3) SA 315 (SCA) para 5.
[24] *Seales v Attorney-General* [2015] NZHC 1239 para 66.

as necessary in order to dispel that view. In doing so I adopt the same course as did the Constitutional Court in *Director of Public Prosecutions, Transvaal v Minister of Justice and Correctional Services*,[25] a case where the high court had incorrectly entered upon the question of the constitutional validity of certain provisions of the Criminal Procedure Act 51 of 1977 dealing with child witnesses. It did so and made a declaration of constitutional invalidity in respect of those provisions. Notwithstanding that its orders fell to be set aside for that reason alone, the Constitutional Court dealt with the issue of constitutional invalidity and held that the impugned provisions were constitutionally compliant. Inasmuch as I have concluded that, on both its exposition of the law and on the facts, the high court should not have made the order it did, I deal with the merits to the extent necessary to explain why that was so, both legally and factually.

South African law examined

[28] The high court assumed that our law in this delicate area is both clear and simple. It said the following in para 10 of the judgment:

'The current legal position is that assisted suicide or active voluntary euthanasia is unlawful.

See: *S v De Bellocq* 1975 (3) SA 538 (T) at 539 d; and *S v Marengo* 1991 (2) SACR 43 (W) 47 A – B; and *Ex parte Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 A.'

[29] That statement, which was assumed to be correct in the arguments addressed to us on behalf of the various parties and amici, was not only not supported by the authorities relied upon, but was a wholly inadequate

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[25] *Director of Public Prosecutions, Transvaal v Minister of Justice and Correctional Services and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC) paras 63-66.

analysis of the relevant law in this area. Two of the cited cases did not deal with either voluntary euthanasia or assisted suicide and the third, which dealt with encouraging and facilitating suicide, was concerned with a domestic situation far removed from the matters with which we are concerned. A brief exposition of the current state of our law in this area is called for.

Suicide and the refusal or termination of medical treatment

[30] Suicide is commonly understood as being the act of a person in intentionally bringing about their own death. Neither suicide nor attempted suicide is a crime in South Africa.[26] Accordingly the conduct that Mr Stransham-Ford contemplated would not have involved him in any criminal activity So the focus of the enquiry was not on his entitlement to commit suicide, or what is sometimes called the right to die, but on a right to select a method of doing so that was acceptable to him.

[31] A person may refuse treatment that would otherwise prolong life. This is an aspect of personal autonomy that is constitutionally protected and would not ordinarily be regarded as suicide. Medical treatment without the patient's consent is regarded as an assault so that the patient is always entitled to refuse medical treatment.[27] In refusing treatment the

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[26] *R v Peverett* 1940 AD 213 (*Peverett*).

[27] *Stoffberg v Elliott* 1923 CPD 148 at 149-150. For a clear instance from a foreign jurisdiction see *Nancy B v Hôtel-Dieu de Québec* (1992) 86 DLR (4th) 385, where a 25 year old young woman suffering from Guillain-Barré syndrome and only able to breathe with a respirator instructed the hospital where she was being treated to remove the ventilator. For a damages award, where a patient's refusal of treatment (a blood transfusion on the grounds of her religious beliefs) was overridden by a doctor, see *Malette v Shulman* (1990) 72 O.R. (2d) 417; 67 DLR (4th) 321 (CA). In *Schloendorff v Society of the New York Hospital* (1914) 105 NE 92 at 93, Cardozo J said:
'Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault …'

patient is allowing the natural processes of their disease to take their course. It was rightly said in *Re Conroy*[28] that:

'… declining life-sustaining medical treatment may not properly be viewed as an attempt to commit suicide. Refusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of self-inflicted injury.'

This approach applies to invasive surgery, the administration of drugs or therapies and the use of machines such as respirators. It also applies to artificial feeding, so that a person who can only be kept alive by such means may bring about their death by refusing to accept nutrition and hydration.[29] These principles of law are recognised in the right to dignity given by section 10 of the Constitution and the right to bodily integrity given by s 12(2)*(b)* of the Constitution.

[32] The only qualification to what appears in the preceding paragraph is that the patient must have the mental and legal capacity to make that decision. This gives rise to problems where a person suffers a catastrophic injury without any prior expression of their views, or is afflicted with a mental handicap that limits their legal capacity or where, as with a child, they lack legal capacity.[30] It is in circumstances such as

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See generally A Hockton *The Law of Consent to Medical Treatment* (1999) Chapters 2 and 3.

[28] *Re Conroy* 486 A.2d 1209 (N.J.S.C. 1985) at 1224. The distinction is possibly a fine one, but it is hard to see why the refusal of continued treatment is distinguishable from the refusal of treatment in the first place. It is a different matter whether the disconnection of the ventilator is a cause of death. From the perspective of the criminal law it will be so, but the question then will be whether it was unlawful. *Auckland Area Health Board v Attorney-General* [1993] 1 NZLR 235 (HC) (*Auckland Area Health Board*) at 248 line 23 – 249 line 38. This court in *S v Williams* supra fn 4 held that the act of switching off a ventilator did not interrupt the chain of causation between the criminal act of shooting the deceased and her death.

[29] This is what Mr Nicklinson, the initial claimant in *R (on the application of Nicklinson and others) v Ministry of Justice* (*Nicklinson*) [2014] UKSC 38; [2014] 3 All ER 843 (SC), did. See para 6 of the judgment of Lord Neuberger P. Refusing artificial food and hydration comes closer to suicide than the refusal of treatment.

[30] I leave aside for consideration when it arises the case of a patient who expresses their wishes while competent to do so and perhaps in advance of any need therefor by way of a living will or similar document or expression of wishes, but is incapable at the time the need to consider treatment arises to express their decision. There is however much to be said for the position that any such prior

these that courts may be called upon, usually by family members or the medical authorities, to make decisions as to the legitimacy of the withdrawal of medical treatment or artificial nutrition and hydration. That is what occurred in South Africa in *Clarke v Hurst NO*,[31] in the United Kingdom in *Bland*,[32] and in the United States in *Cruzan*[33] and *Quinlan*.[34] In each of these cases the patient was in a persistent vegetative state and the court authorised the cessation of artificial means of keeping them alive, including the removal of artificial nutrition and hydration. In New Zealand, in *Auckland Area Health Board*,[35] the patient, Mr L, suffered from an extreme form of Guillain-Barré syndrome that left him with some brain function, but no connection between his brain and the rest of his body, so that he was wholly dependent on an artificial respirator to breathe and unaware of his surroundings, although not clinically brain dead. The court issued a declaratory order that the removal of artificial ventilatory support would not contravene the relevant provisions of the Crimes Act and would not constitute culpable homicide. The justifications advanced by different courts for making such orders vary from jurisdiction to jurisdiction and range from a concept of substituted consent to the best interests of the patient, but it is unnecessary to examine that in greater detail now.

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instructions clearly expressed should be heeded. It appears to be accepted in the United Kingdom. *Airedale NHS Trust v Bland* 1993 AC 789 (HL) (*Bland*) at 857D-E per Lord Keith; at 864F per Lord Goff of Chieveley and in a number of other jurisdictions, especially in the United States of America. See the discussion in the South African Law Commission Report (Project 86) 'Euthanasia and the Artificial Preservation of Life' Chapter 5, paras 5.4 to 5.96.

[31] *Clarke v Hurst NO and Others* 1992 (4) SA 630 (D).

[32] *Bland* supra fn 29.

[33] *Cruzan v Director, Missouri Department of Health* 497 U.S 261; (1990) 110 S Ct 2841.

[34] *In the Matter of Karen Quinlan* 355 A 2d 647 70 N.J. 10 (1976)

[35] *Auckland Area Health Board v Attorney-General* supra, fn 27. Although the judge described the patient as suffering from 'locked in' syndrome his situation appears to have been significantly different from that of Mr Nicklinson, who was aware of his surroundings.

[33] In circumstances such as those described in the previous paragraph a doctor in South Africa does not commit a criminal offence by ceasing treatment or other forms of medical intervention that serve neither a therapeutic nor a palliative purpose. The decision in those situations is in the ordinary case a decision to be made by the medical practitioner in conjunction with family and any other persons having a responsibility for the patient. Where there is uncertainty, or a difference of views, it may be desirable for a declaratory order to be sought from a court as to the consequences of a particular course of treatment as occurred in *Clarke v Hurst NO*.

[34] Furthermore a medical practitioner commits no offence by prescribing drugs by way of palliative treatment for pain that the doctor knows will have the effect of hastening the patient's death. This is referred to as the 'double effect', where the drugs serve the purpose for which they were prescribed, but have potentially detrimental side effects. It was accepted as the correct position in our law in *Clarke v Hurst NO*,[36] citing Devlin J's charge to the jury in *R v Adams*:[37]

> 'If the first purpose of medicine, the restoration of health, can no longer be achieved, there is still much for a doctor to do, and *he is entitled to do all that is proper and necessary to relieve pain and suffering, even if measures he takes may incidentally shorten life*.' (My emphasis.)

[35] It is apparent from this necessarily brief summary that, within the current relatively certain framework of the law, there are many steps available to both individuals facing the type of intolerable situation described above and to the medical practitioners responsible for their care

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[36] Supra at 656H-I.
[37] *R v Adams* 1957 Crim LR 365. See also *Nicklinson* supra fn 28, para 255(4) per Lord Sumption.

that will not result in interminable, purposeless treatment or the preservation of life as a purely mechanical process artificially maintained. In addition the evidence now before us, which was not before the high court, shows that there have been considerable advances in recent times in palliative care, both in terms of training medical practitioners in palliative treatment and in the provision of care through the hospice movement, that may serve to alleviate the suffering that would otherwise attend the final stages of terminal illnesses. This emerges from the affidavits of Dr David Cameron and Dr Claire Blanchard, both specialists in this field, tendered by the HPCSA and from those of Dr Gwyther and Baroness Finlay, also experts in palliative care, tendered by the Minister. None of this evidence was challenged. It appears from it that the spectre commonly conjured up of a helpless patient confined to a hospital bed and attached to an array of machinery is, in the vast majority of end of life situations, not what occurs, even with patients suffering from extremely grave diseases. It did not apply to Mr Stransham-Ford.

Mercy killing and active voluntary euthanasia (PAE)

[36] On the other side of the coin a 'mercy killing' undoubtedly constitutes the crime of murder. That emerges clearly from the cases of *Hartmann*[38] and *De Bellocq*,[39] reported alongside one another in the law reports although six years apart in point of time. In *Hartmann*, the accused, a medical practitioner, inserted a lethal dose of pentothal into an intravenous drip in his father's arm. His father was 87 years of age, bedridden, dying of cancer and in a critical state of health and great pain. The son's motive in doing this was entirely in what he conceived to be his

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[38] *S v Hartman* 1975 (3) SA 532 (C).
[39] *S v De Bellocq* 1975 (3) SA 538 (T) at 539D.

father's best interests. He was nonetheless convicted of murder, but sentenced to a year's imprisonment of which all but the period until the rising of the court was suspended for one year.

[37] Mrs de Bellocq's situation was equally tragic. She and her husband were in South Africa temporarily, had been but recently married and she was expecting their first child. The baby was born prematurely and after a short period was found to have toxoplasmosis, which had left it severely disabled, unable to receive nourishment, other than through a naso-gastric tube, and grievously mentally handicapped. Its prognosis was poor. A few weeks after she took the child home, whilst herself suffering from post-natal depression, she decided on the spur of the moment to drown her child while bathing it. As was the case in *Hartmann* the contention that this was culpable homicide was rejected and she was convicted of murder. She was discharged on her own recognizance that she would come up for sentence six months later, at which time it was anticipated that she and her husband would be about to return home.

[38] Neither of these cases, nor *Marengo*,[40] which was also cited by Fabricius J, had anything to do with either assisted suicide (PAS) or active voluntary euthanasia (PAE). They were all cases of euthanasia of the kind usually referred to as 'mercy killing'.[41] They did not involve suicide and in none of them had the person who died asked to have their life ended. They are only relevant in identifying the issue arising from PAE, which is whether the consent of the patient makes any difference to

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[40] *S v Marengo* 1991 (2) SACR 43 (W) at 47A-B, where the accused shot her father who was dying of cancer and declining mentally. As with the other cases she was convicted of murder, but no custodial sentence was imposed. See also *S v Smorenburg* 1992 (2) SACR 389 (C), which involved the attempt by a nursing sister on compassionate grounds to end the lives of two patients by the injection of insulin.
[41] Poignantly depicted in the recent film *'Amour'*.

the legal consequences of the medical practitioner's conduct. The answer, as the law stands, is that it does not. Insofar as the crime of murder is concerned, consent is not a defence available to the person who brings about the death of the deceased. Nor does the fact of consent justify a conviction on the lesser charge of culpable homicide.

[39] That principle is graphically illustrated by circumstances far removed from the present. They were aptly described in a judgment by Holmes JA[42] as involving:

'… a grim and sombre drama of despair and mercenary death, uniquely macabre because the deceased arranged his own murder, in circumstances of dire financial stress, for the purpose of insurance gain to his widow and his avoidance of the prospects of imprisonment for fraud.'

As this characteristically pithy summary reveals, the deceased, Mr Jackson, had arranged with others, including his wife and a friend to have himself killed. Mr Robinson was hired for the purpose of undertaking the killing. After driving with the deceased to a suitably lonely spot, where they consumed a considerable quantity of alcohol, he shot and killed Mr Jackson. Relying on *Peverett*,[43] and certain of the early writers on criminal law, Holmes JA held that consent is no defence to criminal responsibility for intentionally killing another person.

[40] PAE therefore constitutes the crime of murder. A medical practitioner who administers a lethal agent to a patient at the latter's request commits the crime of murder. No doubt if they did so the circumstances would materially affect the sentence imposed for that

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[42] *S v Robinson and Others* 1968 (1) SA 666 (A) at 674F-G. See also *S v Nkwanyana* 2003 (1) SA 303 (W).
[43] *Peverett* supra fn 25.

crime, but nonetheless the conviction would stand.[44] While I have dealt with the problem as if the only person who could be in this situation would be a medical practitioner administering the lethal dose, I can see no reason for distinguishing their situation from that of a family member or friend who did the same.

[41] The critical question posed by this aspect of the relief sought by Mr Stransham-Ford, was therefore whether the law in regard to consent as a defence to a charge of murder should be changed. It involved a challenge to the principle laid down in *Peverett*, and repeated in *Robinson*, but neither the principle, nor these cases, was addressed by the high court. If the common law were to be developed, a topic to which I turn below, this needed to be confronted squarely and the scope and ambit of the requisite exception to, or departure from, existing principle had to be defined. Regard needed to be had to the fact that there are only four countries in the world that permit PAE. All I would say at this stage is that, as there was no attempt by either the parties or the court below to identify this as an issue calling for consideration, it was not given full and proper consideration by the court below. An order making such a profound change to our law of murder, without any consideration of applicable principles, should not have been made and it must now be set aside. Furthermore, on the facts of the matter, the question did not arise. No doctors came forward to say that they were willing to administer a lethal substance to Mr Stransham-Ford or to say that they thought that

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[44] The fact that the act was one of compassion by the medical practitioner undertaken at the specific request of the patient with a view to putting an end to a situation the patient regarded as intolerable, would undoubtedly amount to substantial and compelling circumstances warranting a departure from the minimum sentence for murder prescribed by law. See s 51(2)*(a)*(i) of the Criminal Law Amendment Act 105 of 1997. In *Robinson* supra fn 41 the fact that the deceased had arranged and consented to his own death was held to constitute extenuating circumstances justifying the imposition of a sentence other than death. Where a medical practitioner acted at the patient's request by administering a lethal agent the circumstances justifying a far lesser sentence would be substantial.

appropriate in the circumstances of his situation. The possibility of PAE was accordingly academic. The high court was not in a position to consider whether and subject to what conditions the law in regard to consent as a defence to a charge of murder needed to be altered. Even had Mr Stransham-Ford not died when he did, the court should have refused to enter into this academic question.

Assisted suicide (PAS)

[42] Mr Stransham-Ford sought in the alternative an order that a medical practitioner be authorised to enable him to terminate his own life by providing him with an appropriate lethal agent that he could administer himself in order to terminate his life. Although not mentioned in the affidavits, which speak only of Mr Stransham-Ford wishing to avoid dying in circumstances he regarded as infringing on his right to dignity, the reality is that he said that he wished to be able to commit suicide in a manner and at a time of his own choosing, no doubt because he believed that this would be simpler, less painful and distressing and more certain of being efficacious than any other means open to him. As pointed out in para 30 above his act in committing, or attempting to commit, suicide would attract no criminal consequences for him. Any criminal liability would attach to the medical practitioner who prescribed the means whereby he could commit suicide.

[43] It is here that the case of *Grotjohn*[45] referred to and relied on by Fabricius J is relevant to the issue of PAS. Whether it has the effect he attributed to it requires a detailed consideration of what was in issue in the case and what it decided.

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[45] *Ex parte Die Minister van Justisie: In re S v Grotjohn* 1970 (2) SA 355 (A) (*Grotjohn*).

[44] *Grotjohn* arose from a distressing domestic situation. Mr and Mrs Grotjohn were unhappily married. She was partially paralysed and bipolar, and he was having an affair with another woman. On the day in question they had a heated argument in the course of which she claimed that a rifle he owned was not in working order. He produced the rifle, undertook some makeshift repairs that involved the removal of the trigger guard and, when she suggested it would not work, found a bullet and demonstrated it was in working order by firing the bullet from their flat into the ground outside. Thereafter the argument continued about his affair. Eventually Mrs Grotjohn became furiously angry and said that she would shoot herself. The accused obtained another bullet from elsewhere in their flat, loaded the gun in her presence and handed it to her saying 'Shoot yourself then if you will because you are a burden'.[46] Mrs Grotjohn placed the butt of the rifle on the floor, the muzzle under her chin and fired it by pulling the trigger with her foot, thereby killing herself.

[45] Mr Grotjohn was acquitted of his wife's murder on the ground that her death had been occasioned by her own independent act in committing suicide and that this broke the chain of causation between any action on his part and her death. In reaching that conclusion the trial court relied on an earlier, somewhat different case, involving a failed suicide pact.[47] There, the wife of a married man engaged in an affair confronted him over the affair. After he broke the news to his girlfriend, they discussed the impossibility of their situation and decided to commit suicide

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[46] The original words were spoken in Afrikaans and were 'Skiet jouself dan as jy wil want jy is 'n las.'. (At 359A.)
[47] *S v Gordon* 1962 (4) SA 727 (N).

together. To that end he acquired sleeping pills in addition to some he already had in his possession and that evening they went to a secluded spot near a beach, divided the pills into two equal portions and consumed them together. Some hours later he awoke and found that his girlfriend was dead beside him in the car. He then tried to commit suicide by drowning but was rescued by fishermen. On his trial for the murder of his girlfriend he was acquitted on the basis that her independent act in committing suicide was the cause of her death.

[46] Mr Grotjohn's acquittal caused the Minister of Justice to refer to this court the following questions: [48]

'(a) Whether encouraging, providing the means for or helping a man or woman to commit suicide was a crime? and

(b) If so, what crime?'

[47] The judgment dealt at length with the question whether suicide or attempted suicide was a crime and concluded that they were not. It then said that this did not mean that the first question posed to the court had to be answered in the negative. A person who encouraged, provided the means for or assisted a suicide to commit suicide was concerned with the life of that person and their criminal liability had to be determined in accordance with the ordinary principles of our criminal law. In both *Grotjohn* and *Gordon* the actions of the accused had formed part of the factual complex leading up to the death of the deceased. The trial courts had proceeded on the footing that the independent actions of the deceased had interrupted the causal chain between the accused's actions and the

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[48] In *Grotjohn* at 359D. He had been urged to do so in a note by J H Hugo 'To Kill a Mocking Bird – Murder or Suicide?' (1969) 86 SALJ at 148.

deceased's death in each case. While the correctness of those findings in each case was not questioned, as it did not fall within the compass of the questions and the records of the trials were not before the court, Steyn CJ said that:

'I would not subscribe to a general proposition that the final "voluntary and independent" act of the suicide must always result in the acquittal of the accused, without reservation in regard to the independence of that act.' (My translation.)[49]

[48] Steyn CJ went on to explain that the fact that the immediate cause of the suicide's death is the act of suicide, does not necessarily interrupt the chain of causation between the conduct of the accused person and that person's death, so as to free the accused from criminal liability. In other words, not every subsequent event that leads to a particular consequence is to be viewed as a *novus actus interveniens* (an intervening cause). To have that effect the intervening cause must be a completely independent action ('n volkome onafhanklike handeling') in the sense of being separate from and unconnected to the earlier conduct.

[49] In a lengthy passage that requires careful consideration Steyn CJ went on to say that: [50]

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[49] *Grotjohn* at 363H. The original passage reads:
'Ek sou egter nie 'n algemene stelling dat die laaste "vrywillige en selfstandige" handeling van die selfmoordenaar altyd op vryspraak van die beskuldigde moet uitloop, sonder voorbehoud ten aansien van die selfstandigheid van die handeling wil onderskryf nie.'
[50] *Grotjohn* at 364B-H. The original passage reads:
'Waar die ander se handeling … 'n berekende deel is van die oorsaaklikheidsreeks wat die dader aan die gang gesit het, 'n gebeurlikheid wat hy voorsien as 'n moontlikheid en *wil aanwend om sy doel te bereik, of as iets waarop hy staat kan maak om die beoogde gevolg teweeg te bring,* sou opset ook nie ontbreek nie, en sou dit strydig met erkende regsbeginsels en met alle regsgevoel wees om hom agter die ander se handeling as later toetredende oorsaak te laat skuil. Dat dit nie 'n misdadige handeling is nie, kan hieraan geen verskil maak nie. So ook, meen ek, lê dit by selfmoord voor die hand dat die oorledene se laaste handeling, hoewel dit 'n eie, selfstandige handeling mag wees en die onmiddellike oorsaak van die dood, nie noodwendig 'n volkome onafhanklike handeling in bogenoemde sin hoef te wees nie, en dat die nie-misdadigheid daarvan weinig ter sake is by die vraag na die oorsaaklikheid van die optrede of gedrag van die persoon wat die selfmoordenaar aanmoedig, help of in staat stel om selfmoord te pleeg. Dit is geredelik denkbaar dat bedoelde optrede of gedrag 'n onmiddellik

'Where the [deceased's] act formed a calculated part of the chain of events that the [accused] set in train, an event that he foresaw as a possibility *and desired to bring about in order to achieve his goal, or was something on which he could rely to bring about the desired result*, intention would also not be lacking, and it would be contrary to accepted legal principles and every sense of justice to permit [the accused] to shelter behind the [deceased's] act as a subsequent intervening act. That it [suicide] is not a crime does not make a difference. So too, I consider that it is obvious that the suicide's final act, although it may be his own independent act and the immediate cause of his death, is not necessarily a completely independent act in the abovementioned sense, and that its non-criminality is rarely relevant to the causative impact of the actions or conduct of the person who encouraged, helped or enabled the deceased to commit suicide. It is reasonably conceivable that the intended action or conduct [by the accused] may be an immediate contributory cause of the final deed. Someone, for example, who provides another with the means whereby he wishes to commit an act, contributes to the act and its outcome, and the employment of the means and its consequences would justifiably be seen as the direct result of the provision of the means. *The conclusion can hardly be avoided that he who provides the desired or necessary means for an intended suicide, has a causative role therein if suicide is committed; and if he does that willingly and knowingly, with the requisite intention of putting an end to the life of the person who wishes to commit suicide, he is guilty of murder even though the final act is performed by the non-criminal hand of the deceased, because he [the accused] has then unlawfully and intentionally complicit in ending the life of another.* If the act is not completed then he is likewise guilty of attempted murder.' (My translation and emphasis. The insertions are made for the sake of clarity.)

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aanleidende oorsaak vir die laaste daad kan wees. Iemand, bv. wat 'n ander die middel in die hand gee waarmee hy 'n daad wil pleeg, dra by tot die daad en sy gevolg, en die aanwending van die middels met die gevolg daarvan sou tereg as die direkte uitvloeisel van die oorhandiging beskou kan word. *Die gevolgtrekking kan kwalik vermy word dat hy wat die gesogte of nodige middel vir 'n voorgenome selfmoord verskaf, 'n oorsaaklike deel daaraan het as dit uitgevoer word; en as hy dit willens en wetens doen met die vereiste opset dat 'n end gemaak word aan die lewe van die persoon wat selfmoord wil pleeg, dan is hy skuldig aan moord, al geskied die laaste daad deur die nie-misdadige hand van die selfmoordenaar, want dan is hy wederregtelik en opsetlik aandadig daaraan dat ń ander se lewe beëindig is.* Word die daad nie voltooi nie, kan hy insgelyks skuldig wees aan poging tot moord.' (My translation and emphasis.)

[50] Steyn CJ found support for this in *Peverett*. This was another case of a failed suicide pact, but in that instance neither party died. They sat in a car and the accused led a pipe into the interior and tried to seal it so that exhaust gases would fill the car and kill them both. For reasons that are unexplained, while they both lost consciousness and the woman nearly died, they were rescued and survived. He was convicted of her attempted murder and sentenced to pay a fine of £30. The conviction was upheld on appeal. In that case, unlike *Gordon* where each participant consumed their own pills, there was no intervening action by his lover. She simply acquiesced in his actions and made no attempt to get out of the car. So it was his actions that constituted the *actus reus*, there was no intervening cause or event, and a clear intention to bring about her death. Some commentators regard that as providing a distinction, while others regard the distinction as spurious.[51] However, both are different cases from that of a person who provides the means to commit suicide, but neither encourages nor performs any direct role in the act of suicide, and may seek to discourage it.

[51] Finally, Steyn CJ concluded:

'In connection with encouragement and help corresponding considerations apply. Both the encourager and the helper could, *in the light of the circumstances of the particular case*, be found guilty of murder or attempted murder.

In the situations under consideration the possibility of culpable homicide cannot be excluded. Naturally that would have to be determined in accordance with applicable legal principles.'[52] (My translation and emphasis.)

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[51] J R L Milton *South African Criminal Law and Procedure* Vol 2, 3ed (1996) at 355. For the contrary view see the passage from *In Re Joseph G,* 667 P. 2d 1176 (SC California 1983) at 1183 cited by J M T Labuschagne 'Strafregtelike Aanspreeklikheid van die Oorlewende van 'n Selfdodingspakt' (1995) 112 *SALJ* 16 at 20.

[52] The original passage at 365F-G reads:

[52] There is little difficulty in applying these principles to a case such as *Grotjohn*. If a man hands his wife a loaded gun and invites her to shoot herself, adding that she is a burden to him, it would be legitimate to draw the inference that he intended that she should kill herself and that this was his intention in providing her with the means to do so. That is what the court held in very similar circumstances in *Hibbert*.[53] But it is, to say the least, debatable how to apply these principles to a failed suicide pact or the case of a medical practitioner who reluctantly and at the insistence of a dying patient provides the means for them to commit suicide, while counselling them against doing so.

[53] This court was extremely careful in *Grotjohn* to say no more than that it was not an automatic conclusion from the fact that the final act in the chain of events was that of the suicide, that a person who encouraged, provided the means or assisted the suicide in that act, would commit no crime. It recognised the possibility that they might be guilty of murder if their actions were performed with criminal intent and there was no break in the chain of causation between their actions and the ultimate death of the suicide, or culpable homicide if their actions were merely negligent. Every case was to be decided in accordance with basic principles and on its own peculiar facts. That much is apparent from the final answers given to the questions posed to this court, which were: [54]

'Met betrekking tot aanmoediging en hulp, geld ooreenstemmende oorwegings. Ook die aanmoediger of helper sou, *na gelang van die omstandighede van die besondere geval*, aan moord of poging tot moord skuldig kan wees.
By die gevalle onder oorweging kan ook die moontlikheid van strafbare manslag nie uitgesluit word nie. Ook dit sal natuurlik volgens die toepaslike regsbeginsels beoordeel moet word.' (Emphasis mine.)

[53] *S v Hibbert* 1979 (4) SA 717 (D). The sentence was four years imprisonment suspended for five years.

[54] *Grotjohn* p 365G-H. The original passage reads as follows:

'As will appear from the aforegoing the answer to the questions posed is to be found in the applicable principles of our criminal law. The first question cannot be answered with a simple "yes" or "no". Whether a person who encourages, assists or enables another to commit suicide commits an offence will depend on the facts of the particular case. With an eye on the cases that gave rise to these questions it is necessary to place in the foreground that the mere fact that the final act was the suicide's own, independent, non-criminal act, will not without more result in that person not being guilty of a crime. The answer to the second question depends entirely on the factual circumstances. After consideration thereof the crime may be murder, attempted murder or culpable homicide.'

[54] Steyn CJ was not dealing with the kind of case that is before us. He said that the correctness of the findings in *Gordon* and *Grotjohn* were not questions that he would enter upon. It is true that certain academic commentators have viewed the judgment as incompatible with the results of those cases and suggested that they must be taken to have been overruled. But that is not a reason for assuming how the judgment is to be applied in relation to circumstances that not only were not before the court, but so far as can be discerned from the judgment were not within its contemplation. The first question posed to the court was not answered with a simple yes or no. That demonstrates that the court did not decide that a criminal offence is committed whenever a person encourages, helps or enables someone to commit suicide or to attempt to do so. Whether they will depends on the facts of the case and issues of intention (mens rea), unlawfulness and causation. It follows that it cannot be said that in

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'Soos sal blyk uit die voorgaande, is die antwoorde op die gestelde vrae in die toepaslike beginsels van ons strafreg te vind. Die eerste vraag kan nie met 'n eenvoudige "ja" of "nee" beantwoord word nie. Of 'n persoon wat 'n ander aanmoedig, help of in staat stel om selfmoord te pleeg, 'n misdaad begaan, sal afhang van die feite van die besondere geval. Met die oog op die gewysdes wat aanleiding tot die vrae gegee het, is dit egter nodig om op die voorgrond te stel dat die blote feit dat die laaste handeling die selfmoordenaar se eie, vrywillige, nie-misdadige handeling is, nie sonder meer meebring dat bedoelde persoon aan geen misdaad skuldig kan wees nie. Die antwoord op die tweede vraag hang eweseer van die feitlike omstandighede af. Na gelang daarvan kan die misdaad moord, poging tot moord of strafbare manslag wees.'

the current state of our law PAS is in all circumstances unlawful. The judge's statement to that effect went too far.

[55] A court confronted with a case of PAS would have to consider how the principles articulated in *Grotjohn* should be applied and adapted to the present day. The facts of the particular case of PAS would have to be considered. The background would be markedly different, given changes in medical circumstances in the nearly fifty years that have passed since that judgment was delivered. The court would also have to pay particular heed to the requirements of s 39(2) of the Constitution, which requires that in the development of the common law the court must strive to give effect to the nature purport and objects of the Bill of Rights. Assistance could profitably be sought from the approach to causation in this type of situation in other jurisdictions.[55] Whether and to what extent it would determine that PAS was unlawful is unforeseeable. Only at that stage would the question arise whether the criminal law involved an infringement of a right in the Bill of Rights.

[56] Assuming that a matter reached the stage where the court thought that a development of the common law was required in relation to PAS, it would then have to decide whether that should take the form of a different view of causation, or of intention (mens rea), or of unlawfulness. The possibility of a special defence for medical practitioners or carers would arise and have to be explored. All of this is absent from the judgment in the court below and generally speaking from the arguments presented in this court. There is also a complete absence of evidence on these issues.

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[55] *R v Kennedy* [2007] UKHL 38; [2008] 1 AC 269; [2007] 4 All ER 1083 (HL).

Summary

[57] The discussion in paras 36 to 56 above demonstrates that the authorities did not support the simple proposition on which the court below based its judgment and on which the arguments before it and in this court were based.[56] Instead the matter was dealt with and has been argued before us on a hypothesis as to the existing state of the law that is unjustifiable. It is on that basis that it was argued that the inability of persons such as Mr Stransham-Ford to have access to PAS infringed their constitutional rights. On the law that question was not reached in this case. On the facts the erroneous approach to the law rendered it impossible to consider whether any limitation of a constitutional right was reasonable and justifiable in terms of s 36 of the Constitution. The approach adopted was unsuited to the consideration of the complex legal issues that arise in the context of these debates about the manner and means of dying.

Foreign law

The evolution of permissive jurisdictions

[58] Whether PAE and PAS are, or should be, lawful has confronted courts and legislatures in a number of jurisdictions. An overview of their responses, more fully set out in the appendix to this judgment, further highlights the difficulties that this complex situation poses. One thing can be said immediately and that is that the responses have differed widely

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[56] Nor does it have the unequivocal support of academic writers. C R Snyman *Criminal Law* 5ed (2008) at 125 fn 122 says that 'somebody who assists another in committing suicide, or who brings it about, may render herself guilty of murder.' J Burchell *Principles of Criminal Law 5*ed (2016) at 213 says in regard to *Grotjohn* that: 'The Appellate Division did not decide that the conduct of the facilitator in the suicide *always* be unlawful. It is still open for a court in South Africa to hold that, in certain limited circumstances, the legal convictions of the community do not require that the conduct of the person facilitating another's suicide be labeled "unlawful".'

from country to country and even within countries. While the expression 'permissive jurisdictions' is used to encompass all of those countries where either PAE or PAS are permitted, that does not mean that they share a common approach. In some jurisdictions one is dealing with country-specific legislation, while in others one is concerned with decisions by the courts. Those in turn are sometimes developments of the common law or interpretations of local criminal codes, and sometimes decisions under Bills of Rights or similar constitutional instruments. The variety of answers they give to the problems under consideration is instructive in considering how our courts, when faced with a proper case, might address those problems within the context of our own society and its needs. They also stand as a cautionary warning against any too ready assumption that the approach in a foreign court can readily be transplanted to South African soil. This is a warning that has already been sounded by the Constitutional Court.[57]

[59] The position in the various permissive jurisdictions appears from the summary in the Appendix to this judgment. Apart from the Benelux countries and Canada, PAE is unlawful in every state for which I have been able to find information.[58] Philosophically the approach in the exceptions appears to be that all conduct, whether active or passive, that either fails to prolong life, such as refusing or removing treatment, or deliberately accelerates death, such as PAE and PAS, is to be regarded as equivalent. They are treated as falling within the private realm of the relationship between the medical practitioner and the patient, subject only

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[57] *Bernstein and Others v Bester NO and Others* 1996 (2) SA 751 (CC) paras 132 and 133.

[58] There is no information available to me about the position in African countries other than South Africa. It is reasonably safe to assume that in the absence of information to the contrary they are unlikely to be 'permissive' jurisdictions in this area of the law.

to certain specific requirements, compliance with regulatory controls and reporting requirements in order to avoid abuse. The three in Europe reflect a gradual extension of the right to request PAE, with Belgium's extension to children of any age and the proposed extension in the Netherlands to end of life decisions not based on incurable disease or suffering, the most recent. There are variances between them in regard to the ambit of the availability of PAE and PAS, with the Canadian position the most stringent, and variations in the requirements that must be satisfied in order to request these. The process up until the end is almost always supervised by the medical practitioner, save that in Canada there may be PAS without medical supervision of the last act of consuming the lethal drug.

[60] In the American states of Oregon, Washington, Vermont, California and soon to be Colorado, the right to PAS has been the product of a democratic process in terms of which the citizens of these states have approved such legislation. It is tightly restricted to situations where a person is suffering from a terminal illness and, as with Switzerland, it requires the patient to be able to administer the lethal drugs.[59]

[61] The states where court decisions played a role in PAS being legitimised are the Netherlands, in the early days prior to legislation, Colombia, the state of Montana and Canada. Jurisprudentially the approach, seen from the perspective of a South African lawyer, was different in each case. In the Netherlands it involved a development of the defence of necessity. In Montana it required a development of the defence

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[59] It would not therefore accommodate people such as Mr Nicklinson, who was suffering from 'locked in' syndrome.

of consent on the basis that the absence of criminal intent on the part of the physician meant that their actions were not contrary to public policy. In Colombia it appears to involve a finding that the actions of the physician are not unlawful. In Canada the decision in *Carter* was based on the Charter and led directly to the legislation.

PAS and constitutionally protected rights

[62] There is no international unanimity as to the effect of guaranteed human rights on either PAE or PAS and the task is rendered more difficult by the lack of commonality in the rights being guaranteed. No constitutional instrument embodies a right to commit suicide or to determine the time and manner of one's death or to have assistance in hastening the arrival of death. Any such right must then be distilled from other constitutionally protected rights. Various rights have been invoked to that end.

[63] A starting point is the right to life, which is guaranteed in a number of bills of rights, including our own. In *Pretty*[60] the House of Lords held that the right to life was the antithesis of a right to determine the manner and timing of one's death.[61] The European Court of Human Rights, in the appeal from that decision, accepted this.[62] In the view of these two courts therefore there is no right to die, or right to either PAS or PAE arising from a constitutionally protected right to life. But in New Zealand, relying on a finding in the lower court in *Carter*[63] that the effect of the

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[60] *Pretty v Director of Public Prosecutions and Secretary of State for the Home Department* [2001] UKHL 61; [2002] 1 All ER 1 (HL) (*Pretty-HL*).
[61] Paras 3-9 per Lord Bingham of Cornhill.
[62] *Pretty v United Kingdom* [2002] 35 EHRR 1 (*Pretty-EC*) paras 37-42.
[63] Recorded in *Carter v Canada (Attorney General)* 2015 SCC 5; [2015] 1 SCR 331 (*Carter*) para 57. The first instance judgment is reported as *Carter v Canada (Attorney General)* 2012 BCSC 886 (CanLII).

prohibition on physician assisted dying was to force some individuals to terminate their lives earlier than they would otherwise have done, the court held that the prohibition on aiding and abetting suicide in New Zealand engaged the right to life.[64] By contrast, the Irish Supreme Court[65] held that the State's obligation to vindicate the life of its citizens extended to the right to die a natural death or letting nature take its course, but it did not extend to the right to have life terminated or accelerated and was confined to the natural process of dying.[66] In *Morris v Brandenburg* the district court, but not the state supreme court, held that the criminalising of PAD infringed the patient's right to 'life, liberty and the enjoyment of life'.[67]

[64] Turning to other guaranteed rights the European Court of Human Rights has held that the right to decide by what means and at what point life will end is an aspect of the right to a private life.[68] The House of Lords by contrast had held that this right was not engaged.[69] All of their Lordships held that the right was relevant to the way in which a person lived their life, which included the manner in which a dying person was treated, but it did not relate to the manner in which they wished to die or confer a right to end that life by assisted suicide. In Canada, in *Rodriguez*,[70] the prohibition on aiding and abetting suicide was held to infringe the right to security of the person, which was regarded as encompassing personal autonomy, control over the person's physical and

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[64] *Seales* supra fn 23 para 166. There was an allegation in Ms Seales' affidavit that she might fall into this category but the occasion did not arise because she died the day after the judgment was delivered.
[65] *Fleming v Ireland* [2013] IESC 19 (*Fleming*) paras104-105.
[66] *Fleming* supra paras 104-105.
[67] *Morris v Brandenburg* Supreme Court of New Mexico, No S-1-SC-35478 dated 30 June 2016 (*Morris v Brandenburg*).
[68] *Pretty-EC* supra fn 61, paras 61-67; *Haas v Switzerland* [2011] 53 EHRR 33 para 51. The statement is repeated in *Koch v Germany* (2014) 58 EHRR 6 and *Gross v Switzerland* (2014) 58 EHRR 7.
[69] *Pretty-EC* paras 23-26 (Lord Bingham), para 61 (Lord Steyn), para 100 (Lord Hope).
[70] *Rodriguez v Attorney-General of Canada* [1993] SCR 519 at 587-8.

psychological well-being and basic human dignity. The court went further in *Carter*[71] where it was said that the decision to seek PAS 'is rooted in their control over their bodily integrity; it represents their deeply personal response to serious pain and suffering. By denying them the opportunity to make that choice, the prohibition impinges on their liberty and security of the person'. In effect that seems to construe the right to liberty and security of the person to extend to a right to determine the manner and timing of death.

[65] The lower court decision in Montana in *Baxter*, as well as the dissenting judgment on the constitutional argument on appeal, was based on a constitutional guarantee of the right to dignity, which was construed as a right to a dignified death. By contrast Lord Bingham in *Pretty*[72] rejected the argument that the right to life guaranteed in article 2 of the European Convention of Human Rights has as a corollary the right to die. He pointed out that death is the very antithesis of life and that if the right is construed as conferring a right to self-determination in relation not only to life, but also as to the timing and manner of death, there is no reason to distinguish between PAE and PAS. He stressed the distinction between taking one's own life and taking the life of another and that between the refusal or cessation of life-saving or life-prolonging treatment and the taking of action with no medical, therapeutic or palliative purpose directed solely at terminating life. Lord Hope[73] pointed out that article 8(1) relates to how a person lives and, as 'the way in which she chooses to pass the closing moments of life is part of the act of living' must also be respected. But importantly, he added that 'it is an entirely different

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[71] *Carter* supra fn 62 para 68.
[72] *PrettyHL* supra fn 59 paras 4-9.
[73] *Pretty-HL* para 100.

thing to imply into theses words a positive obligation to give effect to her wish to end her own life by means of an assisted suicide'.

[66] Lastly, in this consideration of constitutional rights that may be affected by a prohibition on PAE and PAS in the Supreme Court of British Columbia in *Carter* Lynn Smith J held that the equality rights of one of the applicants, Ms Taylor, were infringed by the absence of PAE because she was unable, due to her illness, to commit suicide, which she would otherwise have been free to do albeit without the assistance of a medical practitioner. Lynn Smith J held that this breached her right to equality because she was unable to commit suicide when other people similarly situated, but not as disabled, could do so. It is debatable whether this ground of distinction can find a place within the framework of the provisions of s 9(3) of the Constitution.

[67] Two other constitutional points bear mention. The first is that even where courts have held that constitutional rights were engaged or infringed, in only three cases, *Carter* and the lower courts in *Baxter* and *Morris v Brandenburg*, have they held that this infringement was not justified. The reason for this in *Carter* was that the criminal prohibition on aiding and abetting suicide was held to be overbroad.[74] It was held not to be justified, because the Supreme Court accepted a factual finding by the trial court that, in the situation prevailing in Canada, it was practicable to put in place measures that would have permitted PAD while safeguarding vulnerable people against coercion or any form of inducement to ask for PAD.[75] Against that the European Court of Human

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[74] *Carter* supra fn 62, paras 85-88.
[75] *Carter* supra fn 69, paras 102-121.

Rights has consistently held that this is a matter within the margin of appreciation of member countries, and the Supreme Court in *Nicklinson*[76] held that Parliament had considered the prohibition on assisted suicide on a number of occasions and maintained the prohibition and that the matter was more appropriately one for regulation by Parliament.

Development of the common law in South Africa

[68] The high court was expressly asked to resolve the issue of PAE and PAS by developing the common law of murder and culpable homicide. Its order purported to do this, while confining the development to Mr Stransham-Ford. That created an internal incoherence in the court's order. The common law is the law applicable to all in South Africa. There is no principle of the common law, nor any founded in the Constitution, that permits the law to be developed for an individual, but not for the rest of society. That is to give someone – in this case Mr Stransham-Ford and any doctor who assisted him – an exemption from applicable criminal law and from professional obligations. No court may do that.

[69] Even were we to accept the notional possibility that the high court retained some power in the present case, to grant an order notwithstanding Mr Stransham-Ford's death, the question would remain whether it was appropriate for it to do so. The focus of the case would then have shifted from Mr Stransham-Ford's individual situation to the general requirements of our law in relation to murder and culpable homicide. That required a clear and accurate understanding of the existing state of our law, the scope of the development being sought and the terms upon which any development could have been sanctioned. All

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[76] *Nicklinson* supra fn 28.

of these were absent here. It would have been necessary to address a number of difficult questions about the meaning of certain guarantees in the Bill of Rights. I mention a few of these. Does the guarantee of the right to life includes a right to die, or does it stand in opposition to it and support the criminalisation of PAE? Does the right to dignity extend beyond dignity in the process leading up to our inevitable death, so as to encompass a right to die when and in the manner we choose? When we are in reality concerned with the implications of the criminal law for the medical profession, do the rights of patients warrant a change in existing criminal law as it affects doctors? Does the right to health care extend to the provision and possible administration of lethal agents or does it by necessary implication exclude this? What are the implications of palliative care for the question whether a person's dignity is infringed by their inability to terminate their own life or have it terminated?

[70] At the outset the high court misstated the present situation in South African law. It then failed to consider precisely what development was being sought. It treated PAE and PAS as clear and simple concepts capable of easy application, when they are nothing of the sort. It did not recognise the distinction between the two. It paid little regard to international jurisprudence or to the answers to the constitutional questions posed in the previous paragraph. It claimed that the relief it was granting was 'case dependent and certainly not a precedent for a general "free for all"', without any indication of how its effects could be so limited.

[71] The next question that was not considered by the high court was the issue of justification in terms of s 36 of the Constitution. All the foreign jurisprudence to which I have referred makes it clear that the state

has a legitimate interest in imposing constraints on the application of PAE, PAS and other forms of aiding and abetting suicide. The facts of *Grotjohn, Hibbert and Robinson* illuminate why that is also necessary in South Africa. Some constraint is plainly reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The question is what? And that requires a court to consider the nature of any right that is infringed by the present state of the law; the importance and purpose of the limitation; its nature and extent; the relation between the limitation and its purpose and less restrictive means to achieve that purpose.

[72] In considering that last issue, it should be borne in mind that it was only on the question of overbreadth that the Supreme Court of Canada held in *Carter* that the criminalisation of aiding and abetting suicide unjustifiably infringed a protected right. Whether a South African court faced with the same issue would arrive at the same conclusion would need to be determined in the light of the very different circumstances in this country; the availability of medical care and especially palliative care; the wide diversity of our society in its cultures and belief systems; our sense of the need to protect the poor, the weak and the vulnerable and the value attached to providing such protection. The high court's too ready adoption of the reasoning in *Carter* ignored the very different context in which that case was decided.

[73] Lastly, a consideration and determination of these issues without any live dispute existing would raise the issue of remedy. Would the appropriate remedy be declaratory? Should there be a development of the common law crimes of murder and culpable homicide and if so to what extent and how should that be defined? Assuming the basis for any

judgment was a finding that a constitutionally protected right had been infringed, would the more appropriate remedy be that adopted by the Canadian Supreme Court of a declaration of incompatibility joined with a suspension of the order to enable parliament to remedy the deficiency? That would be an extremely important possibility bearing in mind that on issues of this nature, raising complex questions of the public interest, the nature of any regulations that should attach to permitted PAE or PAS and the supervisory regime that should accompany any relaxation of the law, the legislature is the proper engine for legal development.[77] Had Mr Stransham-Ford still been alive the court could have joined that with a limited constitutional exemption as was done in the court of first instance in *Carter* and in the minority judgments in *Rodriguez*.

[74] None of these issues were fully canvassed in the high court. Nor could they be, given the circumstances in which the litigation was conducted. They all point away from the court engaging in a significant and substantial development of the law when there was no longer a justiciable issue before it. I may add that, even had Mr Stransham-Ford survived, the fact that the issues had not been adequately canvassed should have given the judge pause for thought. While litigation is sometimes urgent it should not become a race against time to defeat the grim reaper of death. When a court is dealing with litigation brought to test the existing law against constitutional norms and values, it is vitally important that the court has the advantage of a full exposition of the facts and the law so that an appropriately considered judgment may result.[78] A

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[77] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies intervening)* 2001 (4) SA 938 (CC) para 36.
[78] *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) para 8; *Minister of Safety and Security and Another v Carmichele* 2004 (3) SA 305 (SCA); *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30*;* 2012 (1) SA 256 (CC) paras 51 and

balance must always be struck between the desire for haste of the litigant and the requirement resting on all judges that they do justice in accordance with the law of South Africa and the Constitution. In this case I am satisfied that the result of the judge's desire to deal urgently with the matter was that insufficient opportunity was available for a fair public hearing and determination of the issues in the case.

[75] There is another aspect that must be commented on in this regard. While the litigation in this case purported to be solely a matter in relation to Mr Stransham-Ford, and the attorneys representing him strongly asserted this in response to applications in the high court and again in this court for other parties to be admitted as amici curiae, the replying affidavit of Mr Stransham-Ford discloses that Dignity SA had already commenced preparation of an application for similar relief in November 2014 with a different applicant. However, that person had committed suicide in January 2015 and Mr Stransham-Ford stepped in as the applicant in March 2015. Nonetheless the litigation was only commenced on 17 April and conducted in such haste that the judge made his order 13 days later.

[76] Dignity SA described the litigation on its website as being litigation brought jointly by it and Mr Stransham-Ford. In the course of hearing this appeal counsel representing the Estate of Mr Stransham-Ford had his attention drawn to the fact that on its website Dignity SA was seeking to raise funds for 'their legal disbursements in their upcoming Supreme Court of Appeal case'. Counsel did not refute this or the

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52; *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22*;* 2013 (5) SA 325 (CC) para 104.

necessary implication that while the litigation was ostensibly being conducted on behalf of the Estate the reality appears to be that this organisation was the real and substantial litigant. 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. But such litigation is rarely urgent and certainly not of such urgency as to warrant a court being hustled into a decision on issues as complex and important as these on an inadequate record and without the benefit of full argument and time to reflect on the issues.[79] Dilatoriness by judges in rendering decisions is to be condemned, but judges must also resist efforts to compel them to make decisions on fundamentally important issues without an adequate record, full argument and proper time for reflection and consideration.

[77] Among all the cases that have been considered by this court in the course of preparing this judgment, the only one that was brought with anything like a similar sense of urgency was the New Zealand case of *Seales*. But that case was launched on 20 March 2015, when Ms Seales was expected to survive for between three and eighteen months. Even though her condition deteriorated rapidly it was heard two months later from 25 to 27 May 2015 and the judgment was delivered on 4 June 2015. Ms Seales died the following day, having been informed on 2 June 2015 of the judge's conclusion. Notwithstanding its urgency, five parties were fully represented at the hearing, which lasted three days, and the court had the benefit of evidence from 36 witnesses, embodied in 51 affidavits, as well as a comprehensive exposition of the law from a number of

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[79] In *Nicklinson* the Supreme Court took six months to prepare the judgment. The Supreme Court of Canada took five months to prepare the judgment in *Carter*.

jurisdictions. The presentation of this case in the high court cannot compare with that.[80]

[78] It might be contended that the deficiencies in the preparation and presentation of the legal arguments in this case could be overcome by the fact that in this court the argument has been somewhat more comprehensive, albeit proceeding on an erroneous view of the present state of South African law. At least we have had our attention drawn to the leading judgments in various jurisdictions, if not to the massive body of literature surrounding the topic, both here and overseas. But then there is the ultimate stumbling block of the state of the factual record. It is to this that I now turn.

The factual record was inadequate

[79] I have already outlined the contents of Mr Stransham-Ford's affidavit insofar as it related to his physical condition. There was no opportunity before the hearing in the high court for any medical practitioner to examine him on behalf of the respondents and the supporting medical evidence was sparse in the extreme. It consisted of the original letter in 2013 that he had commenced treatment for prostate cancer; a few reports by radiologists and pathologists, unaccompanied by any explanation of their significance; and three affidavits by Dr Cameron Bruce, who had assumed responsibility for his care, Dr Eppel, a specialist urologist and Ms Melnick and clinical psychologist.

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[80] In *Fleming* supra fn 64, the proceedings were commenced on 23 October 2012 and a hearing held over six days before the Divisional Court which delivered judgment on 10 January 2013. The judgment in the appeal was delivered on 29 April 2013. The medical evidence was agreed. In Canada the trial court in *Carter* heard evidence and argument over 23 days before delivering judgment.

[80] Dr Cameron's affidavit described Mr Stransham-Ford's condition and said somewhat obscurely that although none of the symptoms of cancer and treatment towards the end of his life could be confirmed they were probable. He said rather more helpfully that his symptoms would escalate and he would require a greater dose of medication to control such symptoms. It was possible that he would ultimately die from renal failure or some other complication. He estimated, accurately as it transpired, that he had only two to four weeks to live.

[81] Dr Eppel said nothing more than that Mr Stransham-Ford was suffering from terminal cancer and was likely to die in the not too distant future. It followed that there was no expert medical opinion before the court confirming Mr Stransham-Ford's own description of the likely progress of his illness such as the need for hospitalisation or that he might breathe his last breath with a machine. Nor was there any confirmation of his view that he would die dulled by opiates, unaware of his surroundings and loved ones, confused and dissociative or that his death would be attended by unbearable suffering. Save that he was in a coma for the last few days, none of this in fact transpired.

[82] Mr Stransham-Ford was at pains to assert that he was of full mental capacity and competent to make the decision to choose PAE or PAS. Ms Melnick's report was intended to support this contention. Unfortunately it had no probative value. First it was not attested in an affidavit. Second it was a brief report arising from a single interview and consideration of Mr Stransham-Ford's mental state on 10 April 2016. The report commences by saying – inaccurately – that he had commenced proceedings to seek sanction to engage in assisted suicide. It concluded that he showed no sign of any psychiatric disorder and had a good understanding of his

illness, the 'clinical, ethical and legal aspects of assisted suicide' and the possible adverse effects of the procedure. Accordingly it concluded that he was competent to participate in the application. There were no details of how Mr Stransham-Ford came to consult with Ms Melnick, where the consultation took place, how long it lasted or whether Ms Melnick sought to probe the true depths of his desire to participate in PAE or PAS. As she and he were living in the same street in Cape Town there may have been some prior connection. We do not know.

[83] The high court nonetheless accepted all this evidence as to Mr Stransham-Ford's condition and prognosis. It also accepted that he sincerely wished to participate in PAE and PAS. However, when as a result of an application by the HPCSA to this court – an application opposed by the attorneys representing the estate – an order was made for the disclosure of Dr Cameron Bruce's medical records to Dr David Cameron and for the two to meet a very different picture emerged. The clinical record has been summarised in para 6 above. But new facts emerged. Until at least 12 March 2015, that is six weeks before his death, Mr Stransham-Ford was able to continue his practice as an advocate with a significant case load. He was only suffering mild pelvic pain controlled by a common analgesic. On that day, when his oncologist (not Dr Eppel) referred him to Dr Bruce, who is a palliative care practitioner, he said that Mr Stransham-Ford 'has made it very clear that he understands these implications [of his disease] and does not wish to have anything done about his obstructive uropathy'.

[84] Dr Bruce's notes as explained to Dr Cameron disclosed that as at 25 March 2015, Mr Stransham-Ford was mentally alert and mobile, but requiring some assistance with activities such as showering and going to

the toilet. He spent a good deal of the initial consultation explaining the application he intended to bring to the high court. On 26 March Dr Bruce installed a syringe driver to provide medication and a saline infusion. Whilst this was unusual, he did it at Mr Stransham-Ford's request because he wished to maintain mental clarity for as long as possible. On 8 April Mr Stransham-Ford saw Dr Bruce and reported that he had good and bad days. On that day he had got up and had a shower as well as using the toilet. On 10 April he was able to hold a normal conversation and on 16 April he signed his founding affidavit.

[85] On 18 April Mr Stransham-Ford was delirious and by 20 April he was sleeping much of the time. The events of that day are important. He was trying to say something to Dr Bruce that the latter could not entirely understand. His former wife told Dr Bruce that he was asking whether he needed to go through with assisted death or whether he could change his mind. Dr Bruce's note reads:

'Chatted with Rob today – he is asking about whether he can change his mind about assisted death. He was reassured that he always has the option to change his mind. He is also having nightmares relating to death. He is more anxious than before – worried about death and whether he will be obliged to see his quest through.'

[86] On 21 April Mr Stransham-Ford was again delirious but able to get up to visit the toilet. Between that date and 28 April his condition deteriorated and by that date he was in a coma. (There is no record of his condition on 26 April when his replying affidavit was signed. The signature and initials on the affidavit fluctuate wildly and suggest that he was not at all well.)

[87] The judge was not told of the change in Mr Stransham-Ford's condition. He was unaware of the fact that he had indicated on 20 April that he had some doubts about the course he had adopted. He was unaware that he had slipped into a coma before the hearing and that this might render the whole application unnecessary. Had that information been available to him the proper course would have been to delay the hearing until he had further information, not to press on.

[88] According to Dr Bruce's notes, Mr Stransham-Ford's death was not the undignified and frightening experience he had anticipated. It is described in these terms in the supplementary report of Dr Cameron:

'Dr Bruce commented that, together with the assistance of community nurses from St Luke's Hospice, he had been able to provide palliative care to RSF in the setting of his ex-wife's home. This had enabled those who had been separated in the past to be brought together in a very meaningful way. His symptoms were managed effectively enough for him to be able to die in a homely atmosphere surrounded by family and friends who cared for him. The impact of palliative care surpassed his expectations and defied his own predictions of a frightening, impersonal and undignified death.'

[89] This evidence revealed that the picture of Mr Stransham-Ford's final illness as depicted in the affidavits bore little resemblance to reality. More particularly it casts grave doubts on his desire to embark upon PAE or PAS. That throws into high relief the absence of any indication in his affidavits that he had been in contact with any medical practitioner who was willing to assist him in taking either of those steps. A feature of the cases in this area is that there is evidence that a medical practitioner is available and willing to assist the patient but is only willing to do so if they will not face criminal proceedings and possible sanctions if they do so. That is absent from this case. So there is neither a patient nor a doctor before the court seeking relief. Indeed precisely who is before the court at

this stage is something of a mystery. The estate has no legal interest in the matter and as the affidavits in all the motions to secure access to evidence and to be admitted as amici were deposed to by Ms Buitendag, the attorney who has been handling the matter at all times, we cannot penetrate behind the ostensible litigant to identify the real party pursuing the case.

[90] The deficiencies in the evidence in this case are highlighted by the numerous attempts in this court to place fresh evidence before us. I have already dealt with the evidence of Dr Cameron, which is most valuable and which the estate sought to prevent him obtaining from Dr Bruce. But in addition to that, the Minister presented an application to provide us with further evidence running to some 500 pages and providing expert evidence on legislative consideration of PAE and PAS in the United Kingdom, as well as extensive expert evidence on palliative care. This evidence dealt with the experience in certain jurisdictions of the ability to maintain proper oversight of, and compliance with, the statutory requirements for PAE and PAS. It was directed at showing that the legislative provisions were difficult to enforce and that there were at the least doubts whether the requirements for PAE and PAS were being strictly complied with.

[91] The HPCSA also sought to tender evidence in the form of over 600 pages of affidavits and annexed material. Apart from addressing some of the same issues as the evidence of the Minister it tendered specific evidence concerning the impact in South Africa of PAE and PSA. This highlighted the disparities among different communities in regard to the availability of palliative care. It also drew attention to the fact that poverty and economic pressures could cause families to put pressure on

elderly or sick relatives to employ PAE or PAS in order to relieve the financial burden on the family of their continued existence. The differences in cultural approaches to family, life and death were highlighted and the view expressed that accepting PAE or PAS could conflict with important cultural norms that should inform our understanding of constitutional rights such as the right to life and the right to dignity.

[92] In response to some of this evidence CALS asked for leave to admit a number of affidavits and accompanying annexures dealing with the situation in regard to PAD in Oregon and the Netherlands. These ran to a little over 130 pages. Shorter applications to lead additional evidence on appeal were also submitted by Doctors for Life and Cause for Justice. In addition the heads of argument presented us with a great deal of additional material that might strictly speaking be regarded as additional evidence.

[93] This court adopted the expedient of admitting all of the material on a provisional basis so as to expedite the conduct of the appeal. A careful perusal of it reveals that it does not satisfy any of the ordinary requirements for admitting fresh evidence on appeal. In particular it is not incontrovertible. This was also the experience of Collins J in *Seales*. He commented (para 15) that:

'For every proponent of Ms Seales' case, there is an equally forceful opponent.'

[94] It is utterly unsatisfactory for any court to be requested to determine issues of fundamental importance on this basis. As the Constitutional Court has pointed out in the context of mootness what will sway the court in deciding whether to hear the case is 'the importance of

the issue, its complexity and the fullness or otherwise of the argument'.[81] I would add that a material factor should be whether the record is appropriately complete to enable the court to arrive at a properly reasoned conclusion. This court made a similar point in a case where the parties sought to argue fundamental constitutional issues on a stated case that failed adequately to state the facts relevant to the point in issue.[82]

[95] I have little doubt that much of the material in the further evidence tendered to us on appeal would be relevant to the constitutional issue of the lawfulness of PAE and PAS in South Africa, but we are simply not in a position to assess its weight and to sift the wheat of relevant facts from the chaff of opinion, argument, hearsay and sensationalism that form part of it, as well as part of the material that is already in the record. Its primary relevance is to show that it was and would be wholly inappropriate to make a determination of the constitutional issues on this record. Matters this important require the careful presentation of evidence that we have noted occurred in *Carter* and *Seales*. That is the proper approach to constitutional litigation in this country as laid down by the Constitutional Court in *Prince*.[83]

[96] I am further fortified in the views I have expressed about the inadequacy of the record and the evidence by the fact that similar complaints were expressed by the Supreme Court in the United Kingdom in *Nicklinson.* Thus Lord Mance[84] recorded that they had not had the wide-ranging examination of expert and statistical material concerning

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[81] IEC v Langeberg supra fn 19 at 926.
[82] *Minister of Police v Mboweni and Another* [2014] ZASCA 107; 2014 (6) SA 256 (SCA); [2014] 4 All SA 452 (SCA).
[83] *Prince v President, Cape Law Society, and Others* 2001 (2) SA 388 (CC) paras 12-16 and 22.
[84] *Nicklinson* supra fn 28 paras 175-177. See also per Lord Sumption paras 224 -229.

suicide and the psychological factors and risks bearing on its occurrence that the United States Supreme Court had before it in *Washington v Glucksberg*. He recorded that much of the material before them in *Nicklinson* was second-hand adduced in other litigation or by other enquiries. He recorded that before the Court of Appeal the approach had been that it was necessary to consider 'a vast array of detailed evidence, including sociological, philosophical and medical material' while before the Supreme Court it was suggested that a close study of the evidence on the relative risks and advantages of relaxing the prohibition on assisted suicide was no longer necessary because it had already been carried out by a number of expert bodies.

[97] Lord Mance's description of this approach as 'an invitation to short-cut potentially sensitive and difficult issues of fact and expertise by relying on secondary material' is equally apposite in this case. Lord Sumption's understated comment that 'there are obvious difficulties about reaching a concluded view on untested, incomplete and second-hand material of this kind' strikes me as sensible. Speaking for myself, before deciding this type of issue I would like to have some assurance that as far as humanly possible the material before me is reasonably comprehensive and accurate.[85] That was not, and is not, the case here.

[98] Finally under this head I mention one further concern. South Africa is a very different country facing very different challenges from countries such as Canada, Switzerland, the Netherlands, Belgium and Luxembourg, and states such as Oregon, Washington, California, Vermont and Colorado in the United States. Those countries and states have

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[85] In this regard, see the careful approach of Thirion J in *Clarke v Hurst* NO fn 30.

sophisticated health care systems and extensive palliative care networks. Comparatively speaking they are wealthy. South Africa is not. Our health care system faces significant challenges dealing with everyday cases. Voluntary organisations and private medical practitioners largely provide palliative care. It is not widely available to the majority of people. Regulatory enforcement in many fields is under pressure or completely lacking. Our population is diverse and there are substantial disparities of wealth and resources. Before a court could be satisfied that the acknowledged risks attendant upon permitting PAE or PAS could be guarded against by way of regulation, as is the case in other countries, it would need to be satisfied that a proper regulatory framework was, or could be put, in place and that the framework would not be a pious hope designed in a bureaucrat or idealist's office, but one the functional operations of which had been tested and not found wanting.

[99] The different challenges facing this country emerge from the affidavit of Ms Mayeza, tendered by the HPCSA. She is a palliative care social worker employed at Chris Hani Baragwanath Academic Hospital, Soweto and has specialised in the treatment of people with HIV/AIDS and TB. This constitutes about 40 to 45 per cent of her caseload, with a similar proportion suffering from cancer and cancer-related conditions. Ms Mayeza drew attention to the fact that, among the communities that she serves, the life of aged and infirm members is valued and they are usually cared for within the family and the broader community. The attitude towards life is communitarian and it is treated as a gift to be preserved. Suicide is alien to this culture. She suggested that in these communities permitting PAE and PAS posed a real threat given their socio-economic circumstances.

[100] A court addressing these issues needs to be aware of differing cultural values and attitudes within our diverse population. It needs to consider the impact of its decision beyond our affluent suburbs into our crowded townships, our informal settlements and in the vast rural areas that make up South Africa. It is in that context that it must determine whether its decision will further undercut the foundational value of the right to life or be supportive of it. The notion of a dignified death must be informed by a rounded view of society, not confined to a restricted section of it. This was not done in this case and could not have been done because of the inadequacies of the evidence and the haste with which it was decided.

Conclusion

[101] I said in para 5 above that the appeal had to succeed for three inter-related reasons. Each taken separately would in my view suffice to reach that conclusion. When they are taken cumulatively they demonstrate unequivocally in my view that the high court was wrong to make the order that it did. It was wrong to hold that the common law crimes of murder and culpable homicide needed to be or should be developed to accommodate PAE and PAS. South African law in that regard is as set out in paras 28 to 56 above. When an appropriate case comes before our courts the common law will no doubt evolve in the light of the considerations outlined there and the developments in other countries. It is of course possible that Parliament will, as has occurred in other countries, intervene and pass legislation on the topic. That would be welcome if only because it would give effect to the proper role of Parliament in a society where the doctrine of the separation of powers has application. Lobby groups could then make their voices heard and a proper debate and process of reflection could occur. In general, whilst

recognising the role that the Constitution confers upon the courts, 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 people of the country as a whole.

[102] In saying that, I agree with the views of Lord Sumption in para 233 of *Nicklinson,* where he said the following in regard to the proper role of Parliament in issues of this type:

'In the course of argument, it was suggested that the case for the Respondents in the Nicklinson appeal required the Appellants to suffer a painful and degrading death for the sake of others. This is a forensic point, but up to a point it is a legitimate one. It is fair to confront any judge, or indeed legislator, with the moral consequences of his decision. The problem about this submission, however, is that there are many moral consequences of this decision, not all of them pointing in the same direction. For my part, I would accept a less tendentious formulation. In my view, if we were to hold that the pain and degradation likely to be suffered by Mr Lamb and actually suffered by Mr Nicklinson made section 2 of the Suicide Act incompatible with the Convention, then we would have to accept the real possibility that might give insufficient protection to the generality of vulnerable people approaching the end of their lives. I conclude that those propositions should be rejected, and the question left to the legislature. In my opinion, the legislature could rationally conclude that a blanket ban on assisted suicide was "necessary" in Convention terms, i.e. that it responded to a pressing social need. I express no final view of my own. I merely say that the social and moral dimensions of the issue, its inherent difficulty, and the fact that there is much to be said on both sides make Parliament the proper organ to deciding it. If it were possible to say that Parliament had abdicated the task of addressing the question at all, so that none of the constitutional organs of the state had determined where the United Kingdom stood on the question, other considerations might at least arguably arise. As matter stand, I think it clear that Parliament has determined that for the time being the law should remain as it is.'

[103] We were not asked to make any order as to costs save in regard to the costs incurred by the HPCSA in having to make application to this court in order to secure access to the medical records in respect of Mr Stransham-Ford and to enable Dr Cameron to discuss those records and Mr Stransham-Ford's condition and treatment with Dr Bruce. I agree with counsel for the HPCSA that the attitude of the estate in refusing to provide access to those records and for consultation purposes access to Dr Bruce (who was himself willing to discuss the matter with Dr Cameron) was obstructive in the extreme. It precipitated an entirely unnecessary opposed application to this court. The request that the estate pay those costs is justified. If, as one suspects, there is another organisation behind the litigation no doubt it will have to deal with the estate over the consequences of its actions.

[104] I accordingly make the following order:

1 The appeal is upheld and the order of the court below is set aside.

2 The respondent is ordered to pay the costs incurred by the fourth appellant in applying for the order granted by this court on 30 May 2015 and in thereafter procuring and lodging the evidence of Dr David Cameron in his affidavit sworn on 17 October 2016.

M J D WALLIS
JUDGE OF APPEAL

Appearances

First to Third Appellants:	L Nkosi-Thomas SC (with her S Poswa-Lerotholi and N Mgcina)
Instructed by:	The State Attorney, Pretoria and Bloemfontein
Fourth Appellant:	C H van Bergen (with him A J D'Oliviera)
Instructed by:	Moduka Attorneys, Pretoria and Matsepes Inc, Bloemfontein
Respondent:	H B Marais SC (with him H P van Nieuwenhuizen and C A Du Plessis)
Instructed by:	Nkosi Rogers Attorneys, Pretoria Honey Attorneys, Bloemfontein.
First Amicus Curiae:	R S Willis (with him T Mafukidze and A Schluep)
Instructed by:	Robin Twaddle Attorneys, Midrand and Webbers Attorneys, Bloemfontein.
Second Amicus Curiae:	In person
Third Amicus Curiae:	M J Engelbrecht (with her A Montzinger)
Instructed by:	Smit and Viljoen Attorneys, Stellenbosch McIntyre and Van der Post, Bloemfontein.
Fourth Amicus Curiae:	Hamilton Maenetje SC (with him Gina Snyman)
Instructed by:	Centre for Applied Legal Studies, Johannesburg Blair Attorneys, Bloemfontein.
Fifth Amicus Curiae:	Darryl Cooke
Instructed by:	Norman Wink & Stephens, Cape Town

Lovius Block, Bloemfontein.

APPENDIX

[105] Articles 114 and 115 of the Swiss Criminal Code of 1937 provide that:[86]

‘**114 Homicide at the request of the victim**

Any person who for commendable motives, and in particular out of compassion for the victim, causes the death of a person at that person's own genuine and insistent request is liable to a custodial sentence not exceeding three years or to a monetary penalty.

115 Homicide / Inciting and assisting suicide

Any person who for selfish motives incites or assists another to commit or attempt to commit suicide is, if that other person thereafter commits or attempts to commit suicide, liable to a custodial sentence not exceeding five years or to a monetary penalty.’

Article 114 renders PAE a criminal offence. Article 115 criminalises incitement and assistance to commit suicide where that is done for selfish motives. That effectively legitimises PAS if performed for an unselfish motive. Assistance to commit suicide is permissible, for example, by prescribing and providing the drugs to be taken by the potential suicide, but active euthanasia is a crime. Switzerland is the only jurisdiction that permits foreigners to take advantage of its laws on assisting suicide.[87] Article 115 was enacted in 1942 but only assumed substantial significance in 1998 with the establishment of the organisation

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[86] The translation is taken from the Swiss Federal Council website where it is explained that, as English is not an official language of the Swiss Confederation, the translation is provided for information purposes only. See https://www.admin.ch/opc/en/classified-compilation/19370083/index.html.

[87] This summary is derived from Samia A Hurst and Alex Mauron ‘*Assisted suicide and euthanasia in Switzerland: allowing a role for non-physicians’* 2003 BMJ 326 (7383) at 271-273. I have not found a specific prohibition on foreigners invoking PAE or PAS in the legislation in the Netherlands, Belgium or Luxembourg, but an exclusion may arise under the provisions governing the national health systems of those countries. In the American state legislation there is always a requirement that the person be a resident of the state in question.

DIGNITAS,[88] which offers a service in assisting people to commit suicide.

[106] The first jurisdiction to provide a statutory framework for PAS was the state of Oregon in the United States of America by way of what is referred to as the Death with Dignity Act.[89] The citizens of Oregon passed this as ballot measure 16 of 1994, although the Act only came into effect in 1997. It provides a complete framework for PAS, or as it is referred to in Oregon, where the statute specifically provides that death through the means provided in the statute is not suicide, PAD (physician assisted dying). In summary the requirements of the statute are that the person be over the age of 18 years; a resident of Oregon; capable of making and communicating healthcare decisions and diagnosed with a terminal illness that will lead to death in six months. There are a number of requirements that must be satisfied before a prescription for lethal medication will be issued for use by the patient. In addition the statute creates a new crime and makes provision in relation to the existing crimes relating to mercy killing and euthanasia. Under Liabilities s 127.890 s 4.02(2):

'A person who coerces or exerts undue influence on a patient to request medication for the purpose of ending the patient's life, or to destroy a rescission of such a request, shall be guilty of a Class A felony.'

and under Construction of Act s 127.880 s 3.14:

'Nothing in ORS 127.800 to 127.897 shall be construed to authorize a physician or any other person to end a patient's life by lethal injection, mercy killing or active euthanasia.'

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[88] Another organization called EXIT, established in 1982, is the largest provider of assisted suicide services in Switzerland, but it apparently does not act on behalf of non-Swiss residents. The publicity attached to the activities of DIGNITAS, which are sometimes described as constituting 'suicide tourism' is what has placed Switzerland in the forefront of public debates over PAS.

[89] Chapter 127 of the Oregon Revised Statutes.

In the result PAE is unlawful in Oregon and attracts criminal penalties as does conduct aimed at pressurising someone to obtain medication for the purpose of ending their life. But PSA is lawful subject to compliance with the provisions of the statute, which include confirmation of diagnosis and prognosis and mental capacity; at least two requests and a 'cooling-off period' of 15 days between them; and information about alternatives to PAD.

[107] Some other states in the USA have followed Oregon's lead. First was Washington, which in 2008 passed a law virtually identical to that in its neighbour Oregon. Vermont did the same in 2013,[90] California in 2015,[91] and in the recent election in the USA voters in Colorado approved Proposition 106, which will introduce similar legislation in that state. In each of Washington, Vermont and California the legislation followed upon a citizens' initiative and was supported in a ballot. The statutes are broadly similar and in all five states provide for regulatory controls and reporting requirements by the medical practitioners involved. There is no obligation on medical practitioners to participate in PAS and actions not in compliance with the statutory prescripts may, as was the position prior to these statutes, attract criminal liability.

[108] The state of Montana is usually cited as one where PAS is permissible, but to the extent that this is correct it arises not by statute but by virtue of the construction given by the state supreme court in *Baxter*[92] to the provisions of its criminal code dealing with consent as a defence to

[90] Patient Choice and Control at End of Life, Title 18: Health Chapter 113 of the Vermont Statutes available at http://legislature.vermont.gov/statutes/chapter/18/113.

[91] End of Life Option Act AB 15 available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520162AB15. See also Linda Ganzini 'Legalised Physician - Assisted Death in Oregon' QUT Law Review, Vol 16 (1), 76

[92] *Baxter v State of Montana* 2009 Mt 449 (*Baxter*).

liability for criminal conduct. The criminal code provided that 'consent of the victim to conduct charged as an offence or to the result thereof is a defense'. That was subject to four exceptions of which the only one that was relevant, where the consent had been given by someone competent to consent, was whether it was against public policy to permit the conduct or the resulting harm, even though consented to. The majority of the court held that while it was against public policy to consent to arbitrary violence, it was not against public policy to permit a physician in their private interaction with their patient to accede to the request of a terminally ill patient to provide a prescription for medicine that the patient could take subsequently. The decision effectively cleared the path for PAS in Montana, but without the statutory framework existing in other states. The limits of the public policy exemption are not yet clearly delineated but must evolve on a case by case basis. Issues such as the nature of the consent required, the need for a confirmatory opinion from another physician, the stage and nature of the terminal illness will be dealt with in future.

[109] Although *Baxter* succeeded in the lower court on the basis that criminalising the conduct of the physician breached the constitutional right to dignity in Montana's Constitution, and one of the appellate judges agreed with the lower court, in general it remains the case that claims for PAS or aid in dying as a constitutional right have not been accepted in the United States. The Supreme Court in *Washington v Glucksberg*[93] held that statutes criminalising assisted suicide are constitutional.[94]

[93] *Washington v Glucksberg* 521 US 702 (1997).
[94] This has been reaffirmed by the Supreme Court of New Mexico in *Morris v Brandenburg* supra, fn 66.

[110] In the Netherlands Article 294 of the Dutch Criminal Code made it a criminal offence for a person to intentionally encourage another to commit suicide or help them or provide the means to do so and suicide followed.[95] Article 293 made it an offence to take the life of another person at that person's express and serious request. On its face both PAE and PAS were unlawful. Nonetheless by 1992 it was possible for a researcher to write[96] that:

'Voluntary euthanasia has, since the early 1970s, become an established part of medical practice in the Netherlands.'

The way in which courts in the Netherlands circumvented these apparently strict criminal provisions in relation to medical practitioners was to recognise a defence of necessity in terms of which a medical practitioner would escape liability if they acted according to responsible medical opinion measured by the standards of medical ethics. Necessity could be shown if the request came from the patient and was entirely free and voluntary; the request was well considered and durable; the patient was experiencing intolerable suffering, not necessarily physical, with no prospect of improvement; euthanasia was a last resort; euthanasia was performed by a physician and the physician had consulted with another physician who was an expert in the relevant field.[97] The effect of the requirement that the euthanasia be performed by a physician was to legalise PAE.

[111] In 2002 the Netherlands formalised the position by way of legislation. The Termination of Life on Request and Assisted Suicide (Review Procedure) Act authorises both PAE and PAS provided the

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[95] The text of the section is in Labuschagne, supra, fn 50 at 19.
[96] John Keown 'The Law and Practice of Euthanasia in the Netherlands' (1992) 108 *LQR* 51.
[97] Keown, supra, 52-56.

requirements of the Act are observed. The physician must be convinced that the patient's request is voluntary and well-considered; that the patient's suffering is lasting and unbearable; must have informed the patient about the situation and their prospects; the patient must be convinced that this is the only solution; and at least one other independent physician must have been consulted and given an opinion that these requirements are satisfied.[98] A person aged 16 or over may invoke the Act and may do so by way of a prior written statement made before they reached the situation where they seek PAE. The parents or guardian must be involved where the child is between 16 and 18. A child between 12 and 16 may also seek PAE or PAS with the consent of their parents or guardian. The physician must be present when PAS is chosen. Compliance with the requirements of the Act falls within an exemption to Article 293 of the Criminal Code. According to a letter of the government position on 'completed life' addressed by the Minister of Health, Welfare and Sport and the Minister of Justice and Security to the House of Representatives on 12 October 2016 the government intends to introduce legislation to extend the scope of this legislation to people who are not undergoing intolerable suffering, but regard their lives as complete.[99]

[112] Belgium passed the Belgian Act on Euthanasia of 28 May 2002, which provides for PAE, but not PAS.[100] Article 2 provides that euthanasia is the intentional termination of life by someone other than the

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[98] Article 2.1 of the Termination of Life on Request and Assisted Suicide (Review Procedures) Act 01 April 2002.

[99] See https://www.government.nl/topics/euthanasia/news/2016/10/21/government-scope-for-assisted-suicide-for-people-who-regard-their-life-as-completed. According to the Health Minister the proposal is to address the needs of older people who do not have the opportunity continue life in a meaningful way, who are struggling with the loss of independence and reduced mobility, and who have a sense of loneliness, partly because of the loss of loved ones, and who are burdened by general fatigue, deterioration and loss of personal dignity.

[100] It seems however that the distinction is regarded as only of semantic relevance.

person concerned at the latter's request. Under the original statute the patient had to be a major or an emancipated minor and be legally competent and conscious when making the request; the request had to be voluntary, well-considered and repeated and not the result of external pressure; and the patient has to be in a medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated resulting from a serious and incurable illness or accident. Where the patient is no longer able to express their will the physician can proceed, if authorised to do so under an advance directive in writing prepared by the patient at a time they were able to do so. In February 2014 the law was amended to permit children of any age to request euthanasia, with the agreement of their parents, if they are terminally ill, close to death and suffering beyond any medical help. In all instances the medical practitioner must be present when the fatal dose is taken or administered.

[113] The only other country in Europe that permits both PAE and PAS is Luxembourg under the Law of 16 March 2009 on euthanasia and assisted suicide. A patient may request either of these if suffering from a grave and incurable condition and has asked repeatedly for the procedure. The only country outside Europe that permits both PAE and PAS is Canada under the amendments to the Criminal Code to permit medical assistance in dying that came into force on 17 June 2016.[101] These amendments were passed in response to the judgment of the Supreme Court of Canada in *Carter*[102] holding that the provisions of s 241 of the Criminal Code rendering it a criminal offence to aid and abet a person to

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[101] Bill C-14 (Royal Assent) 17 June 2016.
[102] *Carter* supra fn 62.

commit suicide, and those of s 14 of the Code saying that no person may consent to death being inflicted on them, unjustifiably infringed section 7 of the Charter[103] insofar as they prohibited physician assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that cause enduring suffering that is intolerable to the individual in the circumstances of his or her condition. The court issued a declaration to that effect but suspended its operation for twelve months to enable the legislature to act, which it has now done.

[114] The legislation in substance leaves intact the offence of counselling a person to commit suicide or aiding or abetting a person to commit suicide and also leaves s 14 unaltered in any material respect. It introduces an exception if the person concerned is a medical practitioner or nurse practitioner providing medical assistance in dying. This is defined in a manner that encompasses both PAE and PAS. People are eligible for that assistance if the are eligible for health care in Canada; are at least 18 years of age and capable of making decisions in regard to their health; have a grievous and irremediable medical condition and have made a voluntary request for such assistance and given informed consent thereto. A person suffers from a grievous and irremediable medical condition if they have a serious and incurable illness, disease or disability; they are in an advanced state of decline in capability; this causes them to endure physical or psychological suffering that is intolerable to them and that cannot be relieved under conditions acceptable to them; and their natural death has become reasonably

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[103] Section 7 states that 'Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.'

foreseeable.[104] The legislation embodies various safeguards and reporting requirements.

[115] Looking elsewhere in the world, in Finland PAS is not illegal because suicide is not illegal, but any form of PAE is illegal. Germany passed a law on 6 November 2015 permitting PSA on an 'individual basis out of altruistic motives' but forbidding commercial euthanasia or suicide business.[105] Presumably therefore the operation of a clinic such as the DIGNITAS clinic in Switzerland would be illegal in Germany. Apart from that, so far as my researches reveal, both PAE and PSA are illegal in Denmark, France, Ireland, Italy, Norway, Russia, Spain, Sweden and the United Kingdom. Outside Europe both are illegal in Australia, China, India, Israel, Mexico, New Zealand, the Philippines, Turkey and Uruguay, and probably Japan.[106] The European Court of Human Rights, while accepting that the manner in which a person dies engages their right to privacy under Article 8 of the European Convention on Human Rights,[107] has consistently held that it is within the margin of appreciation of member states to regulate PAE and PAS. Challenges to legislation criminalising assisted suicide on the grounds of an infringement of Article 8 rights have been rejected in Ireland[108] and the United Kingdom.[109] A similar challenge failed in New Zealand.[110]

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[104] In order to make sense of this requirement this must mean foreseeable in the immediate future albeit that there is no prognosis as to the specific length of time they have remaining.
[105] The precise terms of the law are not available to me.
[106] Information on http://euthanasia.procon.org/view.resource.php?resourceID=000136 accessed on 24 November 2016.
[107] *Pretty-EC* supra fn 61.
[108] *Fleming*).
[109] *Nicklinson* supra fn 28.
[110] *Seale* supra fn 23.

[116] Lastly in this survey of what are described as permissive jurisdictions there is the judgment of the Constitutional Court of Colombia,[111] which upheld the constitutional validity of section 326 of the Criminal Law that provided that someone 'who killed someone else for mercy to end their acute suffering caused by bodily injury or serious and/or incurable disease' committed a criminal offence. However, the court fashioned an exception to this rule in relation to physicians who engaged in mercy killing at the informed request of someone with full and reliable information about their illness and prognosis and sufficient intellectual capacity to make decisions. Such persons must be exonerated from responsibility because they have not acted unlawfully. This appeared to flow from a general concept of unlawfulness rather than from the application of a right protected by way of an instrument akin to our Bill of Rights.[112] The Court went on to point out that there are a number of requirements that should be fulfilled to give effect to this decision and regulate it and that these could only be established by the legislature. It therefore exhorted the legislature to regulate the issue of death with dignity in the shortest possible period of time. However, nearly twenty years have passed and this exhortation has not been heeded.

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[111] Constitutional Court Sentence # C-239/97.

[112] The only translation of this judgment available to me is imperfect, It is difficult therefore to be certain as to the legal principles that the court applied, as opposed to its conclusion, so my comments in that regard are necessarily tentative.