

CLARKE v HURST NO AND OTHERS 1992 (4) SA 630 (D)

SUMMARY

- The applicant's husband ('the patient') had suffered a cardiac arrest in 1988 and had since then been in a persistent and irreversible vegetative state and was fed artificially by means of a naso-gastric tube.
- The applicant applied to be appointed as *curatrix personae* in respect of the patient, with powers in that capacity to authorise the discontinuance of any treatment to which the patient was subjected, specifically the discontinuance of any naso-gastric or other non-natural feeding regime, and to act in this manner notwithstanding that the implementation of such decision might hasten the patient's death.
- The patient, a medical doctor, was a life member of the SA Voluntary Euthanasia Society and had signed a document headed 'A Living Will', directed to his family and physician, in which he requested that in the event of there being no reasonable expectation of his recovery from extreme physical or mental disability, he be allowed to die and not kept alive by artificial means.
- The third respondent, the Attorney-General, opposed the application, stating that what the applicant was in fact asking for was an order declaring that she would not be acting unlawfully if she were to authorise the discontinuance of artificial life-sustaining measures such as naso-gastric feeding and that the State was not prepared to undertake in advance not to prosecute should steps be taken to terminate the patient's life and that the Court should refrain from making a declaratory order which would anticipate facts which have yet to come about.
- The Court held that it was entitled, despite the opposition of the Attorney-General, to exercise its discretion in an appropriate case in favour of declaring whether the adoption by an applicant of a certain course of conduct would constitute a crime and that the instant case was a proper one for the exercise of the Court's discretion.
- The applicant, who was facing an agonising decision, was entitled to have the legal position dispassionately and objectively determined by the Court.

- The *dictum* in *British Chemicals and Biologicals (SA) (Pty) Ltd v South African Pharmacy Board* 1955 (1) SA 184 (A) applied.
- The Court, applying the principles set out above, held that the decision whether the discontinuance of the artificial feeding of the patient and his resultant death would be wrongful depended on whether, judged by the *boni mores* of society, it would be reasonable to discontinue such artificial feeding, and that the decision of that issue depended on the quality of the life which remained to the patient.
- The Court held that the patient's brain had permanently lost the capacity to induce a physical and mental existence at a level which qualified as human life and that in these circumstances, judged by society's legal convictions, the feeding of the patient did not serve the purpose of supporting human life as it is commonly known.
- The Court accordingly held that the applicant, if appointed as curatrix, would act reasonably and would be justified in H authorising the discontinuing of the artificial feeding of the patient and would therefore not be acting wrongfully if she were to do so, notwithstanding that the implementation of her decision might hasten the death of the patient.
- The Court finally held that in our law the *curator personae* was under a duty to act in the best interests of the patient and not necessarily in accordance with his wishes but that in the instant case it could not be said that the applicant would not be acting in the best interests of the patient if she were to discontinue the artificial feeding regime: although the Court approached the interests of the patient with a strong predilection in favour of the preservation of life, it however did not extend as far as requiring that life should be maintained at all costs irrespective of its quality.
- Furthermore, this view accorded with the patient's wishes as expressed when he was still in good health and should be given effect to.
- The application was allowed and the order granted J accordingly.
- THIRION J
Semble: As a matter of policy, taking into account factors such as reasonableness, fairness and justice, the discontinuance of the artificial feeding regime would not in law be the cause of the patient's death if he were to die as a result of such discontinuance.