

STEWART AND ANOTHER v BOTHA AND ANOTHER 2008 (6) SA 310 (SCA)

SUMMARY

- In an action in the High Court against the medical practitioners who attended upon his wife during her pregnancy with their minor son, the appellant claimed damages in delict on behalf of his son consequent upon the fact that he was born with severe congenial defects, namely, damages for maintenance, special schooling and past and future medical expenses.
- He alleged that the respondents' negligence subsisted in their failure to have detected the congenital abnormalities in the foetus and to have informed his wife of the defects, who would have terminated the pregnancy, with the result that his son would not have been born and would not have suffered from the severe physical handicaps from which he suffered.
- The respondents excepted to the appellant's claim as not disclosing a cause of action, as being *contra bonos mores* and against public policy, ie they disputed the wrongfulness element of the appellant's claim.
- The High Court upheld the exception and dismissed the appellant's claim.
- In an appeal to the Supreme Court of Appeal the court recognised the parents' claim for damages flowing from the child's condition, but drew a distinction between the parents' claim and that of the child for the same damages.
- *Held*, that conduct which caused loss to another was actionable only if, in addition to being negligent, it was wrongful, ie if public-policy considerations demanded that, in the particular circumstances, the plaintiff had to be compensated for his or her loss.
- *Held*, further, that where the conduct causing the loss was an omission rather than a positive act, it was considered to be wrongful only where there existed a legal duty on the defendant not to act negligently in the circumstances. In turn, whether or not there existed a legal duty not to act negligently was a matter for judicial determination involving criteria of public or legal policy consistent with constitutional norms.
- *Held*, further, that the decided cases arising from a similar context involved claims by parents to recover the additional financial burden in consequence of the negligence. The question therefore did not arise in any of those cases whether the child would have been

better off had he or she not been born. In the present case, however, if the child's claim were to succeed, the court would have to find that he would have been better off had he not been born.

- *Held*, further, that the question whether the particular child should have been born at all was a question that went so deeply to the heart of what it was to be human that it should not even be asked of the law. For that reason, the court should not recognise an action of that kind.
- *Held*, further, that the court below therefore correctly refused the claim on exception.
- Appeal dismissed.
- The decision in *Stewart and Another v Botha and Another* 2007 (6) SA 247 (C) (2007 (9) BCLR 1012) upheld.