IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG HIGH COURT)

Case Number: 27401/15

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

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DATE SIGNATURE

In the matter between:

ROBERT JAMES STRANSHAM-FORD

APPLICANT

And

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES — FIRST RESPONDENT
THE MINISTER OF HEALTH — SECOND RESPONDENT
THE HEALTH PROFESSIONAL COUNCIL OF SOUTH AFRICA — THIRD RESPONDENT
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTION — FOURTH RESPONDENT

JUDGMENT

Fabricius J,

1.

This is an urgent application which in my view requires an immediate decision, and accordingly in the limited time available to me, I have done everything I could to

enable me to make an order and give written reasons shortly thereafter. Having regard to the topic it will be preferable and, no doubt this will occur in due course, that the Constitutional Court pronounce on the relevant principles. At least eight Judges will have sufficient time to consider all relevant aspects and they are also assisted by qualified law clerks who will do all the necessary research. A single Judge in the Urgent Court is therefore somewhat at a disadvantage in this context. Nevertheless one must proceed with courage and fortitude no matter what the topic at hand is. The ideal of course would have been that legislature consider the whole topic and then produce a Bill which could be subject to the scrutiny of the Courts. The South African Law Commission compiled a report on "Euthanasia and the artificial preservation of life" in November 1998, which was submitted to the then Minister of Health. The Third Respondent said that the report did not receive the attention of the Minister and/or the legislature at the time, because there were other urgent matters which required attention such as the AIDS epidemic. It is now 16 years hence and although I cannot proscribe this for the Second Respondent, the topic is in my view important enough, having regard to the relevant principles contained in the Bill of Rights, that serious consideration be given to introducing a Bill on the basis of the South African Law Commission's Report, which suggested a number of options, but supported the development of the common law in this context. It is certainly a topic that deserves broad discussion, but in the context of the Bill of Rights especially.

The Applicant is an unmarried adult male practicing Advocate of the High Court of South Africa. He resides in Cape Town. He was born in 1949. He is the holder of a number of law degrees, has an MBA from the University of Cape Town and a number of other diplomas. He has worked as an Accountant and Tax Practitioner in London and was a Chief Executive of a group of Insurance Brokers at Lloyds in the City of London. He has been an Advocate for about 35 years and was also admitted as an Advocate of the High Court of South Africa in 2001, and was a member of the Johannesburg Bar. He has lived and worked all over the world. He has four children, three of whom are over the age of 25, and has a daughter of 12 years old under the guardianship of her mother, who also made a Confirmatory Affidavit in these proceedings. I say this to indicate that I am dealing with an Applicant who is highly qualified, of vast experience also in the legal profession, and who knows exactly what he requires and why. A Clinical Psychologist also provided a report in this context, dated 10 April 2015. She stated that Applicant was well engaged in the interview and she found no cognitive impairments. There was no evidence of any psychiatric disorder and he particularly impressed as being totally rational. Specifically, Applicant displayed a good understanding and appreciation of the nature, cause and prognosis of his illness and clinical, ethical and legal aspects of assisted suicide.

3.

Applicant has terminal stage 4 cancer and has only a few weeks left to live. This was not an issue. [He died on the day I made my order.]

4.

In these urgent proceedings Applicant seeks the following order:

2. "Declaring that the Applicant may request a medical practitioner, registered as such in terms of the Health Professions Act 56 of 1974 ("a 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 this matter."

5.

Applicant's questions:

5.1

Is it conceivable that the health of a person may deteriorate to a level, where he would be justified in wishing to take his own life ("the sufferer");

5.2

Ought the sufferer be permitted to take his own life;

5.3

Should another person be allowed to assist the sufferer to end his life ("the Samaritan");

5.4

May this person be a medical practitioner;

5.5

Which safeguards need to be in place?

6.

The Applicant's health:

Applicant was provisionally diagnosed with Adema carcinoma (Gleason grade 9/10) on 19 February 2013. During March 2015, Applicant underwent an ultrasound biopsy and it was established that the cancer had metastasized in his lymph glands. Also during March 2015 he was admitted to the Victoria Hospital as an emergency, and in great pain. He has since had to have his lymph removed. It was further discovered that the Applicant's cancer had spread to his lower spine, kidneys and lymph nodes. The Third Respondent obtained a report of Dr. R. A. G. De Muelenaere, a radiation oncologist of 26 years standing, and in private practice since July 1998. This report is not under oath. He also did not examine the patient personally and his opinion was based solely on the contents of the documentation contained in the Court application. In the context of the tests relating to the diagnosis of prostate cancer, he said that the findings were suspicious of colo-rectal cancer including pancreas and liver cancer, not prostate cancer. This debate is not necessary herein, inasmuch as it has not been put in issue that the cancer is terminal and that the Applicant only has a short time to live. However he added the following and I will have brief comments to make about this hereunder: "there are palliative medical treatments available which can improve the

situation for a lengthy period of time. I have sympathy for a patient with widespread metastatic cancer and in my work I have to deal with such situations on a regular basis. I understand a patient asking for "an easy way out" but there are important factors to consider in a case like this. Wider societal aspects need to be addressed, as in the debate preceding abortion legislation. All moral, legal and ethical aspects need to be discussed. With modern medicine including high doses of opioid (morphine-like) drugs less than 10 % of patients will die in pain, regardless of kidney function. (doses can be tri-trated to patient needs and side effects).

Hospice doctors and staff specialise in symptom control of terminal patients and this service can be provided at home in the vast majority of patients. Most medical funds will allow home nursing as a benefit and terminal care definitely does not need to be provided in a hospital setting for the majority of cases if that would be the patient's wish.

All and all I consider this request for "assisted suicide" to be against the current medical practice."

Applicant responded by saying that this palliative care does not satisfy his need and right to die in dignity whilst fully aware of the moment of his death.

7.

Applicant's quality of life:

Applicant's quality of life has deteriorated markedly since the middle of March 2015 and he says that he:

7.1

Suffers from severe pain, nausea, vomiting, stomach cramps, constipation, disorientation, weight loss, loss of appetite, high blood pressure, increased weakness and frailty related to the kidney metastasis;

7.2

He is unable to get out of bed and has injections and drips;

7.3

Endures anxiety;

7.4

Cannot sleep without morphine or other painkillers;

7.5

Uses pain medication, which makes him somnolent.

8.

Applicant's treatment:

8.1

The doctors, their diagnosis and prognosis:

Applicant was examined by a specialist urologist and a general practitioner who lectures and specialises in palliative care, both of whom confirm the Applicant's diagnosis and prognosis.

8.2

Medicine, procedures and traditional remedies:

Applicant has undergone numerous treatments, medicines or traditional remedies, including:

8.2.1 Dendritic cell therapy;

8.2.2 Traditional Chinese medicine;

8.2.3 Vedic medicine;

8.2.4 Surgery;

8.2.5 Cannabis;

8.2.6 The insertion of a renal stent for his kidneys from his kidneys to his bladder;

8.2.7 The insertion of a catheter fitter;

8.2.8 Morphine, Buscopan and other pain inhibitors.

He is currently under palliative care.

9.

Imminent future:

9.1

Acceptance of death:

Applicant is acutely aware and has accepted that his death is imminent. This issue is not in dispute.

9.2

Worsening condition:

As time progresses the Applicant's condition will become progressively worse and will later on require an even stronger doses of opioid drugs such as morphine and to possibly be hospitalized.

9.3

Increased frailty:

He is becoming weaker by the day and needs constant assistance in normal daily activities such as getting up from bed, bathing, brushing his teeth and eating.

9.4

Progression of the disease:

As the Applicant's disease progresses and until his last breath, he will become confused and afraid. His last breath might even be with the aid of a machine.

9.5

Applicant's fear:

Applicant says that he is not afraid of dying, he is afraid of dying while suffering.

10.

Current legal position:

Current Law:

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

See: S vs De Bellocq 1975 (3) SA 538 (T) at 539 d; and S vs Marengo 1991 (2) SACR 43 (W) 47 A – B; and Ex parte Minister van Justisie: In re S vs Grotjohn 1970 (2) SA 355 A.

Development of the Law required:

Applicant and his Counsel relied on S. 39 of the Constitution which reads as follows: "39 Interpretation of Bill of Rights

(1) When interpreting the Bill of Rights, a Court, Tribunal or Forum –

a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;

b) Must consider International Law; and

c) May consider foreign law.

(2) When interpreting any legislation, and when developing the common or customary law, every Court, tribunal or forum must (I underline) promote the spirit, purport the objects of the Bill of Rights". Further, s. 8 (3) of the Constitution states that "when applying a provision of the Bill of Rights to a natural of juristic person in terms of subsection (2), a Court –

a) In order to give effect to a right in the Bill, must (I underline) apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right and

b) May develop rules of the common law to limit the right, provided the limitation is in accordance with S. 36 (1)."

In Bel Porto School Governing Body vs Premier Western Cape 2002 (3) SA 265 CC the Court at 324 said that the provision of remedies is open-ended and therefor inherently flexible in this context. The appropriateness of the remedy would be determined by the facts of the particular case.

It is therefore not a matter of discretion or personal "inclination" as it was put in Court, but rather a constitutional imperative. My personal thoughts and feelings are irrelevant and do not enter the picture at all in the decision-making.

11.

Basis of Applicant's relief:

The Constitution:

The Applicant relies on the following provisions of the Constitution and in particular the Bill of Rights:

11.1

Chapter 1:

Founding provisions:

Section 1:

The Republic of South Africa is one, sovereign, democratic State founded on the following values:

a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

11.2

Chapter 2:

Bill of Rights:

Section 7:

"1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

2) the State must respect, protect, promote and fulfil the rights in the Bill of Rights."

11.3

Application: S. 8:

"3) a) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a Court in order to effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right."

11.4

Human dignity:

Section 10:

"Everyone has inherent dignity and the right to have their dignity respected and protected."

11.5

Freedom and security of the person:

Section 12:

1) Everyone has a right to freedom and security of the person which includes the right –

e) "Not to be treated or punished in a cruel, inhuman or degrading way."

2) Everyone has the right to bodily and psychological integrity, which includes the right –

b) To security in and control over their body."

12.

Freedom, security and control to die with dignity:

Before I continue with Applicant's argument I deem it desirable to say something about the role of dignity in our constitutional dispensation (in general and in the present context). The seminal work on this topic is HUMAN DIGNITY: L- for Equality in South Africa, L. Ackermann, Juta. The principle of human dignity as a central value of the "objective, normative value system" established by the Constitution has in my view a pre-imminent value. In S vs Makwanyane 1995 (3) SA 391 (CC). At par. 329 it was said that "recognition and protection of human dignity is the touch stone of the new political order and is fundamental to the new Constitution." In the context of s. 10 read with s. 1 and 7 (2), Ackermann says that human dignity, besides being a value and a right, is also a categorical imperative. I have approached

this application on that basis. In the context of the duty of the State regarding this imperative, it is best to refer to the views of the Constitutional Court in Glenister vs President of the Republic of South Africa 2011 (3) SA 347 CC at par. 189 – 191.

Just prior to the hearing of this case I admitted DOCTORS FOR LIFE INT. and CAUSE FOR JUSTICE as amici curiae, and received their affidavits. I cannot deal with all their arguments propounded in the affidavits: some were clearly inappropriate and others paid scant attention to the imperative contained in s. 8 (3) of the Bill of Rights. I did consider them all though. One such argument on behalf of the latter was that Applicant had merely or solely expressed his subjective view of dignity and his medical condition, whereas the values of the Constitution had to be looked at, and determined objectively. There are two answers to this submission: of course a Court must, as a practical necessity look at the subjective views of – and the condition of – a person who complains that his constitutional rights have been affected. In the present context one would then ask, whether from a constitutional policy point of view, the complaint is justified. I have no doubt that any reasonable reader and physician, would regard Applicant's view of his condition in the context of human dignity as wholly justifiable. In fact, Dr. S. Fourie, on behalf of the first mentioned organisation said: "All those patients who die every year from advanced prostate cancer have similar symptoms and clinical situations as the Applicant." Ackermann supra at 97 says that the Constitutional Court in Carmichele vs The Minister of Safety and Security and the Minister of Justice and Constitutional Development 2001 (4) SA 938 CC at par. 54 clearly categorized the rights that individuals had under the Bill of Rights as 'subjective rights'. Contextually speaking therefore there is no merit in this contention.

This topic is also dealt with in some detail in the Bill of Rights Handbook, Currie and Johan de Waal, 6th Edition, Juta and Co at 250 chapter 10. It becomes clear that it has been said on a number of occasions that the concept of "human dignity" has a wide meaning which covers a number of different values. Dignity is a human worth and an "inherent" human worth. See Ackermann supra at p. 97 for the valuable discussion on this topic.

See also Le Roux vs Day 2011 (3) SA 274 (CC) at par. 138. Moreover there is a very close link between human dignity and privacy and as well as a close relationship with freedom, and Applicant correctly relied on the inter-relationship between these concepts. Ackermann supra at p. 99 and 102 is of that view in the light of the relevant authorities and legal writings and of course he is right.

I can also refer to Bernstein and Others vs Bester and Others N.N.O. 1996 (2) SA 751 CC at par. 67 – 68.

Although it is difficult to capture in precise terms, the concept requires us to acknowledge the value and worth of all individuals as members of society. It is the source of a person's innate rights to freedom and to physical integrity, from which a number of other rights flow, such as the right to bodily integrity. It is my view also that persons must be regarded as recipients of rights and not objects of statutory mechanisms without any say in the matter. I said this 15 years ago but it is worth repeating.

See: Advance Mining Hydraulics (Pty) Ltd and Others vs Botes N.O. and Others 2000 (1) SA 815 TPD at 823 e to g. Currie and De Waal say at p. 253 by way of summary, that: "human dignity is not only a justiciable and enforceable right that must be respected and protected, it is also a value that informs the interpretation of possibly all other fundamental rights and it is further of central significance in the limitations

enquiry." As far as active euthanasia is concerned, the authors say at p. 267 that in terms of the current law, a person may not be actively killed, but life-sustaining treatment may be withdrawn even if this would cause the patient to die from natural causes. I will return to this topic hereunder but I pose the question whether this is not a good example of dolus eventualis? A person acts with intention, in the form of dolus eventualis, if the commission of the unlawful act or the causing of the unlawful result may ensue, and he reconciles himself with this possibility.

See: S vs De Bruyn en 'n Ander 1968 (4) SA 498 (A) at 510 G – H, S vs Makgotho 2013 (2) SACR 13 (SCA) and S vs Maarohanye 2015 (1) SACR 337.

Applicant's Counsel submitted that from a philosophical point of view there was no difference between assisted suicide by providing the sufferer with a lethal agent or by switching off a life supporting device (see: Clarke vs Hurst N. O. and Others 1992 (4) SA 630 D), or the injecting of a strong dose of morphine with the intent to relieve pain and knowing that the respiratory system will probably close and death will result. In his replying affidavit Applicant himself said that there is no logical ethical distinction between the withdrawing of treatment to allow "the natural process of death" and physician-assisted death. He also called this distinction "intellectually dishonest". There is much to be said for this view but I best leave it for the philosophers, and confine myself to the constitutional debate.

The authors also refer to the mentioned Law Commission Paper on Euthanasia and the Artificial Preservation of Life, and the proposed legislation that the Commission submitted to the Minister of Health. One of the options was that a medical practitioner would be allowed to carry out a patient's request to die. Certain safeguards were recommended namely that the patients had to be terminally ill, subject to extreme suffering but mentally competent. A second independent medical practitioner would

have to confirm the diagnosis and the findings also had to be recorded in writing. The request must therefore be based on an informed and well considered decision and the patient had to make this request repeatedly. In this context the authors say that from a constitutional perspective, the Law Commission proposal does seem to strike a proper balance between the State's duty to protect life and the person's right (derived from the rights to physical and psychological integrity and to dignity) to end his or her life. It is also worthwhile quoting what O'Reagan J had to say in the Makwanyane decision supra about the notion that the right to life must be a life that is worth living: "the right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, nut the right to human life: the right to share in the experience of humanity. This concept of human life is at centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society. The right to life, thus understood, incorporates the right to dignity. So the rights to dignity and to life are intertwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: without dignity, human life is substantially diminished. Without life, there cannot be dignity." I respectfully agree with those views. I may also add that I agree with the warning that any pious uncoupling of moral concern from the reality of human and animal suffering has caused tremendous harm to mankind throughout the centuries.

See The Moral Landscape, S. Harris, Bantam Press 2010, at p. 63.

It was also submitted that the current legal position was of course established in a pre-constitutional era. In a post-constitutional era, the law requires development to give effect to the Applicant's constitutional rights. I agree, and my decision and reasons are based on that premise.

13.

I have also consulted the chapter on euthanasia in its various forms in Foundational Principles of Medical Law, Pieter Carstens and Debbie Pearmain, Lexis Nexis 2007 at p. 200. The authors discuss various approaches to the topic, and deal with various authorities from a number of foreign jurisdictions, as well, and also case law of our South African Courts, especially on the topic of the cessation of medical treatment. Having also discussed the recommendations of the South African Law Commission and the present state of the South African law that I have already referred to they say the following at p. 210: "the present writers finally submit, that the underlying values, spirit and purport of the applicable sections in the Constitution, seem to be supportive of the introduction of voluntary active euthanasia in South Africa. Such a dispensation, along the lines of the recommendation of the South African Law Commission, should be strictly regulated and monitored to ensure the autonomy of competent terminally ill patients while guarding against any possible abuse of the system. Ultimately, they say, euthanasia is a matter of patient autonomy and individual choice. They also quote from a European writer who was already in the 14th century enlightened enough to have said the following: "Life is dependent on the will of others, death on ours." I agree, and the Constitution supports this view.

14.

<u>Dying as part of living:</u>

Applicant's Counsel submitted, if one needs judicial authority for that simple but significant fact, that in 1990 it was said by the American Supreme Court in Cruzan vs Director, Missouri Department of Health, et al 497 US 261 (1990) 343 that, "dying is part of life, it is completion rather than its opposite. We can, however, influence the manner in which we come to terms with our mortality". This was referred to by Sachs J in Soobramoney vs Minister of Health, Kwa-Zulu Natal 1998 (1) SA 765 (CC). Applicant's Counsel therefore submitted that it follows that it is a fundamental human right to be able to die with dignity which our Courts are obliged in terms of Sections 1 (a), 7 (2) and 8 (3) (a) of the Constitution, to advance, respect, protect, promote and fulfil.

I agree with that contention.

I am of course aware that there are divergent views, and very many of them have been dealt with in the report of the South African Law Commission that I have mentioned. Those were considered and I have read a number of them, though not all. I am in agreement with the Commission's view that in a context such as the present, the new Constitution with its Bill of Rights should inform me of what to decide and which appropriate order to issue. The norms of the Constitution should inform the public, and its values, not sectional, moral or religious convictions. I agree also that sacredness of the quality of life should be accentuated rather than the sacredness of life per se, contrary to what Counsel for the Respondents and the amici submitted. It is noticeable, unfortunate and disturbing that from a philosophical point of view and jurisprudential point of view (often they overlap, sometimes they do not), societies in various parts of the world acquiesce in thousands of deaths caused by weapons of mass destruction. They seem to even tolerate a horrendous murder rate in a number of countries, including ours. They seem to tolerate the yearly slaughter on our roads

because despite the statistics, thousands of people drive like lunatics on our roads every single day. People die of AIDS, from malaria by the hundreds of thousands, from hunger, from malnutrition and impure water and insufficient medical facilities. The State says that it cannot afford to fulfil all socio-economic demands, but it assumes the power to tell an educated individual of sound mind who is gravely ill and about to die, that he must suffer the indignity of the severe pain, and is not allowed to die in a dignified, quiet manner with the assistance of a medical practitioner. The Commission's report deals with these examples and asks of course the appropriate questions. The Commission said that a dying person is still a living person, and one must not forget that and he is entitled to the rights of a living person. Their draft proposals, in their view, balance the rights of patients, providers and the State. Another aspect is that of personal autonomy. The irony is, they say, that we are told from childhood to take responsibility for our lives but when faced with death we are told we may not be responsible for our own passing. There are many other ironic considerations in this context. One can choose one's education, one's career, one can decide to get married, one can live according to a lifestyle of one's choice, one can consent to medical treatment or one can refuse it, one can have children and one can abort children, one can practice birth control, and one can die on the battlefield for one's country. But one cannot decide how to die. In this context the Commission says, and I agree with it, that belief or moral doubts of third parties is not the main point in this context at all. The choice of a patient such as the present, is consistent with an open and democratic society and its values and norms as expressed in the Bill of Rights. There is of course no duty to live, and a person can waive his right to life. With reference to the Soobramoney decision supra they say that the withholding of dialyses of the kidneys led directly to the Applicant's death in that case. The irony

again is that the State sanctions death when it is bad for a person, but denies it when it is good. (At least according to Applicant's Counsel). In S vs Makwanyane supra the following was said by the Chief Justice: "Public opinion may have some relevance to the enquiry but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive there would be no need for constitutional adjudication." (at 431 B – D) This was said in the context of the constitutionality of the death penalty. I have however nevertheless considered many of the divergent views that the Law Commission already considered, and the lengthy affidavit of DOCTORS FOR LIFE. The point remains: I must comply with the constitutional imperative and make an order according to it.

15.

Applicant's undignified death:

Having regard to the details put before me in the affidavits drawn by Applicant and the submissions made by his Counsel I agree that there is no dignity in:

15.1 Having severe pain all over one's body;

15.2 being dulled with opioid medication;

15.3 being unaware of your surroundings and loved ones;

15.4 being confused and dissociative;

15.5 being unable to care for one's own hygiene;

15.6 dying in a hospital or hospice away from the familiarity of one's own home;

15.7 dying, at any moment, in a dissociative state unaware of one's loved ones being there to say good bye.

It was also submitted, with reference to the mentioned decision of the American Supreme Court, and in the context of forgoing life sustaining treatment, that "the timing of death – once solely a matter of fate – is now increasingly becoming a matter of human choice" (per Brennan J at 783 F/G). Counsel submitted that by allowing a person to choose how he or she wishes to respond to a terminal prognosis was also to respect, protect, promote, advance and fulfil a person's subjective sense of dignity and personal integrity, and thus their constitutional right to dignity. Applicant said in his Founding Affidavit that he seeks to end his life with dignity surrounded by loved ones whilst he is able to breathe on his own, speak to his loved ones, see them, hear them, feel them and be aware of their presence and in circumstances where he knows that he ended his life with sovereignty through active voluntary euthanasia or assisted suicide by a medical professional who will be able to ensure that he is provided with and assisted in the administration of the appropriate lethal agent and dose to ensure a dignified end to his life.

16.

Humanity of euthanasia to cease unbearable suffering:

Again, for the sake of convenience, I take this heading from the Applicant's Heads of Argument. It was submitted, with reference to the humane treatment of animals, that it has long been recognised as humane to euthanize a severely injured or diseased animal. This is provided for in S. 2 (1) (e) of the Animals Protection Act 71 of 1962 read with S. 5 (1) and 8 (1) (d) thereof. It is clear from these provisions that the owner of an animal is obliged to destroy such animal which is seriously injured or diseased or in such a physical condition that to prolong its life would be cruel and would cause such animal unnecessary suffering. Applicant therefor says that it is universally

accepted that to permit an injured or sick animal to suffer is not only merciless and cruel but is also a crime. He asked why could the same dignity not be accorded to him?

17.

The sole true concern re legalisation of euthanasia:

Applicant's Counsel submitted that it has been recognised that, but for the risk posed to the weak and vulnerable, active voluntary euthanasia should be legalised. That was also the view of the South African Law Commission, and it is clear from the options that it proposed and the discussions surrounding the various options that this is indeed a major consideration. It is not an issue in the present application. I agree that there should be minimum safeguards in any given context, but at the end of the day each case must be decided on its own merits, and I am sure that any envisaged legislation will provide for sufficient safeguards to be applied depending on the circumstances of each individual sufferer. Any future Court will also determine the necessary safeguards on its own facts. There is therefore no uncontrolled "ripple effect" as it was put to me. Applicant also says that it is in any event not in the best interests of a patient remain alive where he would suffer unbearably and his or her wishes should be given effect. This was also said by Thirion J in Clarke vs Hurst N.O. 1992 (4) SA 630 (d) at 660 E – G. That case concerned the withholding of further treatment to a patient who had been comatose for a number of years. An application for the cessation of life sustaining mechanisms was granted by the Court. With reference to British Chemicals and Biologicals SA (Pty) Ltd vs SA Pharmacy Board 1955 (1) SA 184 A, the respected Judge, at 636, said that a Court may in an appropriate case and despite opposition from the Attorney-General (in this instance the National Director of Public Prosecution) exercise its discretion in favour of declaring whether the

adoption by an applicant of a certain cause of conduct would constitute a crime. When treatment was withdrawn, the question arose, in the context of causation, that the uncoupling of a ventilator, which undoubtedly would cause death, would not be the legal cause of death where a patient had suffered severe brain damage and was actually brain dead. By way of analogy, although this is often odious, I can ask here without deciding, whether Applicant's death will not be caused by the cancer rather than the medication which will hasten it with the sufferer's consent? The learned Judge (at 660) also stressed, in the context of taking the best interests of a patient into account, that a Court would approach those interests with a strong predilection in favour of the preservation of life, which did however not extend as far as requiring that life should be maintained at all costs, irrespective of quality. The patient in that case, had previously made a so-called Living Will in which he, in no uncertain terms, stated that he be allowed to die and not be kept alive by artificial means and heroic measures if there was no reasonable expectation of his recovery from extreme mental or physical disability. The learned Judge said that just as a living person had an interest in the disposal of his body, so a patient's wishes as expressed when he was in good health should be given effect to. I know of course that the context was different in that case but, in my view the same reasoning applies to the present. I say this because of the human rights relied on that I must give effect to where the common law does not provide for the given situation, and in effect, totally negates the rights that every human being is entitled to.

18.

Developments in respect of euthanasia:

Applicant's Counsel point out that there are at least 11 foreign countries or States in which assisted suicide or active voluntary euthanasia is not unlawful namely Albania, Belgium, Canada, Columbia, Luxembourg, The Netherlands, Switzerland, and Oregon, Vermont, Washington, New Mexico and Montana. I deem it convenient and important at this stage to refer to a decision of the Supreme Court of Canada given on 6 February 2015 in Carter vs Canada (Attorney-General) 2015 SCC5. The introductory paragraph to this judgment reads as follows: "[1] It is a crime in Canada to assist another person in ending her own life. As a result, people who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent and dangerous means, or she can suffer until she dies from natural causes. The choice is cruel."

The question in that appeal was whether the criminal prohibition that put a person to this choice violated her Charter rights to life, liberty and security of the person and to equal treatment by or under the law. That was the question that asked the Court to balance competing values of great importance. On the one hand stood the autonomy and dignity of a competent adult who sought death as a response to a grievous and irremediable medical condition. On the other stands the sanctity of life and the need to protect the vulnerable.

The trial Judge found that the prohibition violated the s. 7 rights of competent adults who are suffering intolerably as a result of grievous and irremediable medical condition. She concluded that this infringement was not justified under s. 1 of the Charter. The Supreme Court agreed. The trial Judge had found that the evidence before her concluded that the violation of the right to life, liberty and security of a

person granted by s. 7 of the Charter was severe. It also supported the finding that a properly administered regulatory system is capable of protecting the vulnerable from abuse or error. The Supreme Court overruled the Provincial Court of Appeal, and agreed with the trial Judge, and found that the prohibition on physician-assisted dying was void insofar as it deprived a competent adult of such assistance where:

1) The person affected clearly consented to the termination of life; and
2) The person had a grievous and irremediable medical condition (including an illness, disease or disability) that caused enduring suffering that was intolerable to the individual in the circumstances of his or her condition.

The Canadian Charter of Rights is very similar to the South African Bill of Rights. I find the reasoning of the Canadian Supreme Court not only enlightening but very persuasive. The Court dealt with the situation in many of the countries that I have already mentioned, and the various arguments both pro and against the assisting of dying. It found that the total prohibition was overbroad. This of course is also what s. 36, the limitation clause in the Bill of Rights, refers to where it says that Court, when considering the limitations of rights contained in the Bill of Rights, must take into account, amongst others, less restrictive means to achieve the stated purpose. (s. 36 (1) (e)) If proper safeguards were in place in any given instance, there would be no need for a total prohibition of assistance. It is clear from the judgment of the Supreme Court, and the trial Judge, that great emphasis was placed on the concept of dignity and autonomy in this particular context. I wish to quote from par. 66 of this judgment: "…an individual's response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy. The law allows people in this situation to request palliative sedation, refuse artificial nutrition and hydration, or request the removal of life sustaining medical equipment, but denies them to request their

physicians' assistance in dying. This interferes with their ability to make decisions concerning their bodily integrity and medical care and thus trenches on liberty. And, by leaving people like Ms Taylor to endure intolerable suffering, it impinges on their security of the person."

It is my opinion that this dictum applies to the present case as well for the reasons already stated. I agree therefore with Applicant's Counsel that it should not be for the State to say as the Third Respondent did, that it was not a matter of dignity at all, and that the Applicant had other options at his disposal in the context of well-managed palliative care. The author of the Opposing Affidavit of the Third Respondent obviously did not keep in mind that a decision of a person on how to cease to live was in many instances a decision very important to their own sense of dignity and personal integrity, and that was consistent with their lifelong values and that reflected their life's experience. This topic was dealt with by the Canadian Supreme Court in par. 68 of its judgment. I also agree with the finding of the Supreme Court, although in the present instance there is no legislation relevant, that laws that impinge on life, liberty or security of the person must not be arbitrary, overbroad, or have consequences that are grossly disproportionate to their object. The trial Judge had found, and the Supreme Court had agreed with her, that the object of the prohibition was to protect vulnerable persons from being induced to commit suicide at a time of weakness. The Prosecutor in that case had asked the Supreme Court to posit that the object of the prohibition was to preserve life whatever the circumstances. The same argument was raised by the Respondents herein. The Court found that this formulation went beyond the ambit of the provision itself. The direct target of the measure was the narrow goal of preventing vulnerable persons from being induced to commit suicide at a time of weakness, and that this could be ensured by necessary safeguards in any given case.

The total ban on assisted suicide would clearly not help to achieve the object of the Canadian Statute, so it was found. It is of course obvious, and it is so in the present instance, that many cases would not be connected to the objective of protecting vulnerable persons at all. The Court also found that total prohibition of assisted suicide had a severe impact: it imposed unnecessary suffering on effected individuals, deprived them of the ability to determine what to do with their bodies and how those bodies would be treated, and could cause those affected to take their own life sooner than they would were they able to obtain a physician's assistance in dying.

19.

The South African Law Commission – Project 86:

I have already referred to this report, part of its reasoning and the recommendations made. I may just add that the Commission pointed out that the Department of Health had in principle agreed with the Commission's proposed legislation legalising euthanasia. (See the report p. 146 footnote 486) Third respondent in its Answering Affidavit did not refer me to this and I do not know whether the other Respondents are aware of this. By way of summary, and in the context of the Commission's report, Applicant's Counsel submitted that the Commission's approach and the community's opinion was of limited value only and the ultimate question for determination was not what the public opined, but rather, what the Constitution provided. I agree with this contention. I do not deem it necessary in this judgment to deal with the proposed safeguards proposed by the Commission but I have considered them and I agree that they are valuable and appropriate in most cases, but certainly not all. I must say it again: in the absence of legislation, which is the Government's prerogative, any other Court will scrupulously scrutinize the facts before it, and will determine on a case-by-

case basis, whether any safeguards against abuse are sufficient. I do not agree with the Respondents contention that my facts-based development of the common law will leave a void which inevitably lead to abuse.

20.

Applicant's safety measures employed:

Applicant states that the doctors confirm that he was suffering from terminal cancer. He confirms that he has more than adequately been informed of his terminal illness, the prognosis of his condition and the treatments and care that are available to him. Extensive information was provided to him by all the doctors who have treated him, he has made his own extensive research into his condition and his request for assisted dying and has considered all that thoroughly. He was still in command of his faculties and he confirmed that he persisted in his decision to end his life with dignity and thus his request as per the Notice of motion. In his view, assisted dying was the only way that he would be released from his eventual unbearable suffering and for him to prevent the imminent intolerable and undignified suffering that was to occur in the future. I regard this as sufficient in the present case. Contrary to what Counsel for CAUSE FOR JUSTICE required, I do not think it was necessary for the Applicant to say who the doctor would be, when he would die, and what lethal agent he would acquire. That is private and a facet of his own dignity.

21.

Respondents' arguments:

I have considered the Opposing affidavits and the Heads of Argument handed to me. I have read them carefully and where I do not deal with them in this judgment in this Urgent Court, it must not be understood to mean that I have not considered each proposal and submission. Before I deal with the main points of opposition, if I can call it that, I need to make some preliminary observations about the affidavits of the Respondents. The affidavit on behalf of the First Respondent was made by an Acting Chief Director: Legal Services. He referred to the Commission Report. Apart from saying that this Report was handed to the Minister of Health in 1999, and was not attended to because other issues of national importance which required prioritisation such as HIV and the AIDS epidemic, he did not say why the Report was not given legislative attention since then. He said that the conduct of a medical doctor who provided the assistance sought, would amount to a criminal offence. He denied that Applicant's right to dignity was involved in the present context. He also said that the application ought to be dismissed because if it were granted, it would be tantamount to promoting inequalities and discrimination of the poor by way of limiting access to the Courts to the rich only, which would be in violation of the constitutional guarantee of the poor to access the Courts. I do not understand this argument in the present context. It is not relevant, but may be relevant in other future cases if no objective safeguards are put in place either by a Court in any particular instance or by way of legislation. For present purposes, this argument is irrelevant. I would have preferred the view of the Minister of Justice in the present application and what he intended doing about the proposals contained in the Commission's Report or, at the very least what the Government's present policy was in this particular context. I understand however that because of the urgency of this matter his considered view was probably not able to be obtained timeously. The Fourth Respondent, the National Director of

Public Prosecution was represented herein by a Senior State Advocate who said that she was authorised by the Fourth Respondent to depose to this affidavit. Nothing further of note was said accept that assisted suicide was a crime. Third Respondent disputed that the Applicant's condition constituted a violation of his human right to dignity, or that he was at present being treated in an inhumane or degrading way. The sad reality was, so it was put, that the Applicant suffers from a condition which may impact on his dignity, as it may on numerous persons who die of causes both natural and otherwise. It is clear that Applicant's dignity was not infringed, because his view was merely subjective. In the First Respondent's Answering Affidavit it was denied that the manner of death as outlined by the Applicant was not dignified. It was also said that this was the Applicant's own subjective view. I was almost shocked when I read this although I am not easily shocked anymore having regard to my 40 years' experience in litigation. The undignified suffering that the Applicant was experiencing was also natural, and thus his constitutional right to dignity was not being infringed. I could not help wondering whether the deponent to this affidavit had ever visited a cancer patient who was in a terminal stage. In my view the comment is not justified on any factual basis. Applicant's view in this context is that it is undoubtedly justifiable and considered medically ethical to withdraw life sustaining or life extending medical treatment to a patient, in order to recognise and give effect to a terminally ill patient's dignity. In this context I was referred to L. B. Grové's thesis for the degree of Magister Legum titled "Framework for the implementation of euthanasia in South Africa" prepared under the supervision of Prof. P. A. Carstens at the Faculty of Law University of Pretoria in 2007 at pages 30 – 31. Applicant said in this context that there could be no logical or justifiable distinction between:

21.1 The withdrawal of life sustaining or prolonging medical treatment; and

21.2 Active voluntary euthanasia or assisted suicide.

He said that the main intention for the medical practitioner remains to ensure the patient's quality of life and dignity. The secondary result, namely death or the hastening of death is exactly the same in both instances. I agree that that is so. On behalf of Applicant it was therefore submitted that where a doctor withdraws life sustaining or life prolonging treatment, he or she knows that the result would be a hastening of the patient's death, which a doctor could have avoided, yet reconciled himself or herself with the result and still acted accordingly. Is this not a good example of dolus eventualis? Where life sustaining or life prolonging treatment has been administered and is subsequently withdrawn, the act of withdrawal is nonetheless a commission – it remains an active and positive step taken by the medical staff directly causing the death of the patient (on a factual basis). It is accepted that such medical treatment may be refused from the outset by a terminally ill patient, in which the failure to render treatment would constitute an omission only on the part of the medical practitioner. It was therefore submitted that there can be no distinction between active euthanasia and passive euthanasia in the circumstances where such argument is based on so-called ethical considerations. Once it is recognised, so it was put, as was indeed conceded at least by implication, that a medical practitioner has a duty to recognise and ensure that a terminally ill patient's dignity is protected by an omissio or passive euthanasia, then, the same duty remains on a medical practitioner through a commissio or active euthanasia. From a philosophical point of view and a jurisprudential point of view, I do believe that this argument is sound. One must also remember that suicide and attempted suicide are not criminal offences. The State allows abortion and so does the medical profession. Birth control measures are implemented universally. Cessation of treatment which

hastens or causes death happens on a daily basis no doubt. Academics by and large appear in favour of voluntary active euthanasia or assisted suicide as is clear from chapter 7 of the Grové thesis. In the context of conscientious objections, the Applicant said that his rights are sacrosanct to him, which should not be sacrificed on the altar of religious self-righteousness. He also submitted that "conscientious objections" to homo-sexuality, same-sex marriages, mixed-race marriages and abortion did not detract from enshrined constitutional rights and it should not do so now.

22.

In the context of the specific relief sought Applicant submitted that until such time as the legislature provided statutory safeguards, this Court could grant the relief claimed with the safeguards employed in this particular application. It was certainly not uncommon for the Courts to firstly rule on matters such as present prior to legislation being enacted. This occurred in Canada and in other jurisdictions such as Netherlands and Belgium, the practice was conducted prior to legislative sanction and regulation. A Court was also empowered to rule that the legislature should make the necessary regulations as was the case in Carter before the Canadian Supreme Court. I may just add the following in the context of prayer 4: s. 39 (2) of the Constitution requires the careful consideration to determine whether the common law needs to be developed in any particular case. A Court must keep in mind that the primary responsibility for law reform rests with the legislature. A Court should develop the common law incrementally only.

See: Masiya vs DPP Pretoria and Another 2007 (5) SA 30 CC at par. 31 – 33. It was said that the judiciary should confine itself to those incremental changes which are necessary to keep the common law in step with the dynamic and evolving fabric of

our society. A Court however must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights. Where there is such a deviation, Courts are obliged (my emphasis) to develop the common law by removing the deviation. This is abundantly clear from the dicta that appear in the mentioned paragraphs, and I propose doing so. It must be remembered that S. 39 of the Constitution does not give the Court discretionary powers. It imposes an obligation on the Court.

The topic of the obligation to develop the common law was also discussed in Carmichele vs Minister of Safety and Security 2001 (4) SA 938 CC. (At 953 par. 33 and further). In the context of s. 39 (2) of the Constitution a Court is obliged to undertake a two stage enquiry which cannot be hermetically separated from one another. The first stage would be to consider whether the existing common law, having regard to the s. 39 (2) objectives, requires development in accordance with these objectives. This enquiry requires a reconsideration of the common law in the light of s. 39 (2). If this enquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the s. 39 (2) objectives.

23.

I have done so and am of the view that the absolute prohibition on assisted suicide in common law does not accord with the rights that the Applicant relies on. First Respondent's Counsel's main argument was that the right to life was paramount and that life was sacrosanct. I agree with this general submission and s. 11 of the Constitution provides for this. This provision safeguards a person's right vis-à-vis the State and society. It cannot mean that an individual is obliged to live, no matter what the quality of his life is.

24.

A further argument was that a Court is in law incompetent to declare that the Fourth Respondent is prohibited from prosecuting the particular medical practitioner because of the provisions of s. 179 of the Constitution which grants it the sole power to decide in any particular case. That is so of course, but it does logically not follow that when a Court develops the common law, and holds on the facts of a particular case that a particular act by a person is not unlawful, the prosecuting authority has been unlawfully deprived of its discretionary power as a result. The authority given to the Court to develop the common law in a specific case, may have by necessary implication this consequence, such as in the present instance.

25.

The prayers sought by Applicant were addressed by me in Court and Counsel for Applicant and Third Respondent also provided me with a suggested amendment, were I to grant an order. I reflected upon this, and amended it to ensure that the relief was case dependant and certainly not a precedent for a general uncontrolled ‘free for all’ as it was suggested.

26.

Accordingly, on 30 April 2015, I made 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 authorize 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.

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JUDGE H.J FABRICIUS
JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case no.: 27401/15

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Counsel for CAUSE FOR JUSTICE: Adv M. J. Engelbrecht

Instructed by: Smit & Viljoen Attorneys

Heard on:	29/04/2015
Order granted on:	30/04/2015
Reasons given on:	04/05/15 at 14:00