**IN THE HIGH COURT OF SOUTH AFRICA**
**(GAUTENG DIVISION, PRETORIA)**

**CASE NO: 27401/15**

In the matter between:

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| **THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES** | First Applicant |
| **THE MINISTER OF HEALTH** | Second Applicant |
| **THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** | Third Applicant |

and

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| **STRANSHAM-FORD, ROBERT JAMES** | First Respondent |
| **THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA** | Second Respondent |

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**NOTICE OF APPLICATION FOR LEAVE TO APPEAL**

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**KINDLY TAKE NOTICE THAT** the First, Second and Third Applicants (hereinafter collectively referred to as *"the Applicants"*) make application for leave to appeal to the Supreme Court of Appeal of South Africa, alternatively, the Full Court of the High Court of South Africa, North Gauteng Division, on a date to be arranged with the Registrar of the above Honourable Court, against the whole of the judgement and order handed down by His Lordship Mr Justice Fabricius on 4 May 2015 on the undermentioned grounds of fact and law.

**FACTUAL GROUNDS**

1. The Learned Judge respectfully erred, in fact, in finding as he did that the South African Law Reform Commission (the Law Commission) in its report dated November 1998 on Euthanasia and the Artificial Preservation of Life - Project 86 (the report) recommended the introduction of voluntary active euthanasia in South Africa subject to certain safeguards[1]. The Learned Judge ought to have found, instead, that the Law Commission:-

   1.1 Recommended that there be no change to the current law of South Africa prohibiting active voluntary euthanasia and physician assisted suicide; and that

   1.2 Such approach was predicated on the Law Commission's acute awareness of the array of competing interests and the diversity of social, moral and ethical values involved regarding law reform on the issue of active voluntary euthanasia and physician assisted suicide.

2. The Learned Judge erred in not taking into account sufficiently or at all the fact that the Law Commission:

   2.1 Declined to support law reform on the question of active euthanasia;

[1] Judgment, page 27 paragraph 13

2.2 Proposed three alternative models of regulating the practice to the Legislature namely:-

2.2.1 Maintenance of the *status quo*, with active voluntary euthanasia;

2.2.2 The legalization of assisted dying by permitting medical practitioners to give effect to the request of a terminally ill, but mentally competent for the hastening of his or her death, provided that strict procedural guidelines are adhered to;

2.2.3 The determination by a multi-disciplinary panel or committee of requests for active euthanasia;

2.3 Recommended that prosecution for active euthanasia without the express consent of the patient will be maintained in all three scenarios;

2.4 Of the three proposed options provided by it, it preferred not effecting any changes on the current law for the following reasons:

*"… the Commission… holds that a law to permit euthanasia (sic) unacceptable … the arguments in favour of legalising voluntary euthanasia as insufficient reason to*

*weaken society's prohibition of intentional killing as entrenched in section 11 of the Constitution which is considered to be the cornerstone of the law and of social relationships. Whilst acknowledging that there may be individual cases in which euthanasia may be seen by some to be appropriate, these cases cannot reasonably establish the foundation of a general pro-euthanasia policy. It would be impossible to establish sufficient safeguards to ensure that euthanasia were truly voluntary and would not inevitably lead to involuntary or compulsory euthanasia. Dying should not be seen as a personal or individual affair, the death of a person affects the lives of others. The issue of euthanasia is one in which the interest of the individual cannot be separated from the interest of society as a whole."*[2]

3. Had the Learned Judge taken into account sufficiently the fact that:

3.1 the Law Commission recommends no change to current law based on the above considerations;

3.2 extensive public debate was recommended by it on the options suggested;

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[2] The Report Para 4.205 at Page 142

3.3 the Law Commission is a specialist body that is best suited and well-resourced to make recommendations on matters as complex as this;

the Learned Judge would have correctly and properly deferred to the Legislature law reform as regards active voluntary euthanasia and physician assisted suicide.

4. The Learned Judge erred in finding, as he did, that "*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*[3]*".*

5. In finding as he did, the Learned Judge did not take into account sufficiently or at all the following undisputed facts:-

5.1 palliative medical treatment is available and it improves the terminally ill patients' condition for a prolonged period of time;

5.2 there are wider societal aspects that need to be addressed as was the case in relation to the debate that preceded the Choice on Termination of Pregnancy Act, 1996 (Act No. 92 of 1996);

5.3 with modern medicine, including high doses of opioid drugs, less than 10% of patients similarly placed as the first respondent die of pain regardless of kidney function;

[3] Judgment, page 20, para 12

5.4 Hospice doctors and staff specialising in symptom control of terminal patients can be provided at home in the vast majority of patients;

5.5 the result of the above is that a terminally ill patient's quality of life is capable of being vastly improved and such a patient could spend the last days of his life under quality medical care and being surrounded by his loved ones in a familiar environment of his home, if he so chooses.

6. The Learned Judge respectfully erred in finding, as he did, that the Constitution seems to be supportive of the introduction of voluntary active euthanasia in South Africa along the lines of the recommendation of the Law Commission[4] because:

6.1 The Law Commission recommends no reform to current law as regards voluntary active euthanasia; and

6.2 Current law proscribes voluntary active euthanasia.

7. The Learned Judge erred, furthermore, in that regard because:-

[4] Judgment, page 27, para 13

7.1 the actual form of regulation and monitoring contemplated is by no means clear from the judgment or the evidence before the Learned Judge;

7.2 no evidence of the financial implications of such "*regulation"* and *"monitoring*" was adduced before the Learned Judge;

7.3 the Learned Judge's judgment and order imposes financial obligations on the State without having properly investigated facts relevant to the imposition of such an obligation;

7.4 the impact of such *"regulation*" and *"monitoring"* to the prevailing doctor-patient ratio in the Republic of South Africa, and thus to the realisation of the section 27 rights of all South Africans, was not fully canvassed nor investigated before the Learned Judge; and because:

7.5 Matters of equitable distribution of financial and human capital resources properly reside within the policy-makers' sphere of competence as opposed to that of the judiciary.

**LEGAL GROUNDS**

**Appealability**

8. Although the first respondent is now deceased, the whole of the judgment and order of the Learned Judge is appealable because:

8.1 The judgment and order granted by the Learned Judge raises issues of immense public interest impacting on fundamental rights enshrined in the Bill of Rights.

8.2 The judgment has far-reaching consequences to the content of the unqualified right to life. It does so by:

8.2.1 broadening the scope of the right to include the right to a minimum of quality of life without properly defining the scope thereof; and by

8.2.2 limiting the fundamental right to life without a law of general application[5] in circumstances where there are less restrictive means in place to achieve the right to dignity being the right which the first respondent sought to vindicate *in casu.*

[5] The Learned Judge held that his are not of general application

8.3 The Learned Judge acknowledged the above and expressed the view that the matter should be heard by the highest court in the land[6].

8.4 Although the Learned Judge held that the relief granted "*was case dependent and certainly not a precedent for a general uncontrolled 'fee for all'*"[7], the judgment is binding on coordinate courts on the application of the doctrine of precedent and *stare decisis* which is an intrinsic feature of the rule of law[8]. Accordingly, the Learned Judge erred by seeking to limit the precedential value of the judgment.

9. The Learned Judge erred in not taking into account sufficiently or at all the fact that the rationale behind the general dis-ease with euthanasia is that it may be abused by compelling vulnerable ill patients to consent to euthanasia. Had the Learned Judge done so, he would not have granted the relief sought by the first respondent.[9]

**Separation of Powers Doctrine**

10. The Learned Judge erred in granting the first respondent the right to assisted suicide by a medical practitioner through the administration of a lethal agent

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6 Judgment, page 2, para 1

7 Judgment, page 54, paragraph 25

8 Makhanya v University of Zululand 2010(1) SA 62 (SCA) at 66C and True Motives 84 (Pty) Ltd v Mahdi and Another 2009(4) SA 153 (SCA) at para 100.

9 Judgment, page 27

and in granting to the said medical practitioner immunity from prosecution by the third applicant and/or disciplinary proceedings by the second respondent.

11. The Learned Judge erred, in law, in that having correctly and properly found that:-

11.1 "*the ideal course would have been that the legislature considers the whole topic…*"[10];

11.2 "…*the topic is … important enough regard been had to the relevant principles contained in the Bill of Rights that serious consideration be given to introducing a Bill on the basis of the SALRC report.";* [11]

11.3 active voluntary euthanasia is *"a topic that deserved broad discussion, that in the context of the Bill of Rights, especially";* [12]

the Learned Judge proceeded, nevertheless, contrary to the constitutionally entrenched separation of powers doctrine to grant relief in the form of assisted suicide and/or voluntary active euthanasia.

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10 Judgment, Page 2.

11 Judgment, Page 3.

12 Judgment, Page 3.

12. The Learned Judge ought to have refused relief in the form of active voluntary euthanasia and/or assisted suicide because:-

12.1 the functional independence of each branch of Government prevents these branches of Government from usurping power from one another;[13]

12.2 in exercising their power to develop the common law, Judges should be mindful of the fact that *"the major engine for law reform*" is the legislature and not the judiciary; [14]

12.3 overzealous judicial reform is not to be countenanced; [15]

12.4 the Court's powers to appropriate the legislative function of law reform when developing the common law ought to be exercised only "*in exceptional circumstances where justice so demands*"; [16]

12.5 When a Court is invited to intrude into the terrain of the legislature especially where the legislative process is still uncompleted, it must do so only in the clearest of cases. This is particularly so where the

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13 *Ex-parte Chairperson of the Constitutional Assembly: in Re : Certification of the Constitution of the RSA* 1996 (4) SA 744 (CC) at [109].

14 *Carmichele vs Minister of Safety & Security* 2001 (4) SA 938 (CC) at para [36].

15 *Carmichele*, supra, at para [56].

16 *Masiya v Director of Public Prosecutions, Pretoria and Another* 2007(5) SA 30 (CC).

decision entails multiple considerations of national policy choices and specialist knowledge in respect of which Courts are ill-suited to judge;[17]

12.6 the formulation of policy is the terrain of the executive function;

*12.7* Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution[18].

**The Right to Die With Dignity**

13. The Learned Judge erred in finding as he did, that the respondents infringed the applicant's fundamental human right to be able to die with dignity which fundamental right our Courts are obliged, in terms of sections 1(a), 7(2) and

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17 *ITAC vs SCAW SA (Pty) Ltd* 2012 (4) SA 618 (CC) Act para [101].

18 *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 416 (CC) at para 37.

8(3)(a) of the Constitution, to advance, respect, protect, promote and fulfil because *"dying is part of life, its completion rather than its opposite"*[19].

14. In finding as he did, the Learned Judge relied on the *dictum* paragraph [57] of *Soobramoney v Minister of Health, Kwa-Zulu Natal* 1998 (1) SA 765 (CC) (*Soobramoney*).

15. The Learned Judge ought to have found that:-

15.1 based on the *dictum* at paragraph [58] of *the Soobramoney case*, courts are not the proper place to resolve the agonising personal and medical problems that underlie medical choices that have to be made where scarce resources are being invoked;

15.2 the provisions of the Bill of Rights should be not interpreted in a way that results in Courts feeling unduly pressurised into ordering hospitals, indeed medical practitioners, to furnish the most expensive and improbable procedures thereby diverting scarce medical resources and prejudicing the claims of others;

15.3 what the applicant seeks is a positive act as opposed to a negative act by the State which would similarly impose resource allocation obligations on the State without proper and thorough investigation;

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[19] Judgment, page 27, para 14

15.4 *the Soobramoney Court* refused to grant such relief on the basis that same was not a matter for the Court to decide but for the executive;

15.5 That logic applies with equal force *in casu*.

16. The first respondent's concept of death with dignity is described in paragraph 35 of his founding affidavit. In essence the first respondent seeks to die whilst *compos mentis* in the presence of his loved ones. In this regard the Learned Judge erred in not finding that palliative care provides adequate guarantee for the realization of the right to dignity of terminally ill patients such as the first respondent in that:

16.1 with modern medicine, including high doses of opioid drugs, less than 10% of patients similarly placed as the first respondent die of pain regardless of kidney function;

16.2 Hospice doctors and staff specialising in symptom control of terminal patients can be provided at home in the vast majority of patients;

16.3 the result of the above is that a terminally ill patient's quality of life is capable of being vastly improved and such a patient could spend the last days of his life under quality medical care and being surrounded

by his loved ones in a familiar environment of his home, if he so desires.

16.4 The first respondent could die in the setting desired without the assistance of a medical practitioner.

17. The Learned Judge erred in not finding that the alleged infringement of the right to dignity amounts to a limitation capable of justification:

17.1 In the public interest;

17.2 Based on the countervailing claims of other constitutional rights such as the right to life; and

17.3 That there a less restrictive means available to the first respondent for the realisation and vindication of the right to dignity in the circumstances of this matter.

**Right to Life**

18. In respect of the right to life and dignity,[20] the Learned Judge found that as stated by O 'Regan J in *S v Makwanyane* [21] the right to life and dignity were

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20 Pages 24 and 25.

21 1995 (3) SA 391.

inextricably linked. Interference with the these rights in that matter related to the fact that abolishing the death penalty would not be sufficient, the State would have to go further and ensure that the dignity of prisoners is preserved.

19. All the judges in *Makwanyane* concurred that the right to life is sacrosanct and antecedent to all rights in the Constitution.

20. The court found that a lack of minimum quality of life justifies the termination of life and that the sacredness of the quality of life is above the sacredness of the right to life itself.[22] The learned Judge respectfully erred in that regard because:

20.1 The right to life is sacrosanct and antecedent to all rights in the Constitution;

20.2 The minimum quality of life sought to be vindicated was not clearly defined;

20.3 Accordingly, the finding is overbroad in that the proposition may lead to the proverbial opening of the floodgates;

20.4 Not only is there no clear definition of what constitutes the minimum quality of life sought to be vindicated, but there is also no explanation as to the perimeters of its application;

20.5 The test for determining the minimum quality of life standard is by no means clear which begs the question whether same is objective or subjective and whether it only applies in the context of persons who are terminally ill or would anyone who had no undefined minimum quality of life;

*20.6* The finding amounts to an impermissible granting of the right to *"opt out".*

21. The Learned Judge erred in holding that generally a person makes a number of choices in his lifetime and should be able to do so about death.[23] In so finding, the Learned Judge did not take into account the fact that:

21.1 Personal autonomy is subject to various limitations which the individual has no control over;

21.2 The choice of career depends on the individual having the aptitude to pass the course undertaken and the financial ability to fulfill the dreams one has.

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[23] Page 30.

22. The Learned Judge erred in finding that since animals are relieved of their suffering when ill, the same should be done for humans[24] because:

22.1 The life of animals is not comparable to that of human beings. Human beings are able to reason. In any event, the mischief which the common law guards against does not arise with animals. Humans are the higher species; they can give consent and have opinions;

22.2 Animal rights are not protected in the Constitution, this is unlike human rights.

23. The Learned Judge erred in that he failed to give due consideration to the fact that legalising voluntary active euthanasia and/or assisted suicide would amount to an impermissible limitation of the right to life because:

23.1 Such a limitation of the right to life would not pass the constitutional muster as a law of general application in that it only refers to a particular individual;[25]

23.2 The extent to which voluntary active euthanasia limited the fundamental right to life was not considered with a view to determining whether such limitation was reasonable and justifiable as prescribed in section 36 of the Constitution;

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[24] Page 33.

[25] First Respondent's AA: page 11, para 15.1.

23.3 On the contrary, the Learned Judge wrongly circumscribed the enquiry as being whether the prohibition of voluntary active euthanasia constituted a limitation of the right to dignity.

24. Had the Learned Judge conducted a section 36 analysis with reference to section 11, he would have correctly and properly found *inter alia* that there are less restrictive means of achieving the purpose of vindicating the right to dignity short of murder and that palliative care constitutes less invasive and less restrictive means than the finality of voluntary active euthanasia.

**Conflation of Active and Passive Euthanasia**

25. The Learned Judge erred by rejecting the arguments raised by the Applicants. In reaching the conclusion, the Court:

25.1 Observed that the right to dignity and the right to life are inextricably linked.

25.2 Dismissed the submissions by Doctors for Life and Cause for Justice as inappropriate in that they ignored section 8(3) of the Bill of Rights.[26]

26. The Learned Judge made an analogy between the withdrawal of medication in *Soobramoney* and euthanasia and the hastening of death was *dolus eventualis*.[27] The court found that in *Soobramoney*, the State had sanctioned the withdrawal of medication. The Learned Judge erred in that regard in that:

26.1 The distinction between the two is too often the state of mind of the patient, as the withdrawal of medication is often effected when the patient is brain dead as opposed to euthanasia where it is the active termination of a life of a person who is fully conscious in a manner akin to murder;

26.2 The facts of the case in *Soobramoney* are clearly distinguishable. The Constitutional Court never sanctioned the intention cessation of life by a health care professional (assisted suicide) but, applying the principle of rationality, recognised the need for the State to prioritise certain cases in the manner in which it utilized its scarce resources to meet the needs of society. The Constitutional Court recognised the constitutional obligations of the State, but found that the failure to

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[26] Page 20 of judgment.

[27] Page 23 para 12

provide emergency medical care in certain circumstances did not amount to a breach of the State's constitutional duty; [28]

26.3 The Learned Judge erred in finding support for the possibility of legalising active euthanasia in the future based on the recommendations of the Law Commission.[29]

27. The Learned Judge took solace in the fact that the[30] Law Commission recommended strict regulations and monitoring of euthanasia in order to protect the vulnerable and avoid abuse. Whilst regulation and safeguards are very important, they are only as effective as the mechanisms in place to monitor compliance. It would have been prudent for an inquiry into -

27.1 the capacity of the State to regulate such safeguards;[31]

27.2 the financial implications for setting up and administering the system; and

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28 *Soobramoney*; see judgment of Chaskalson, P at paras 29, 31 and 36.

29 End of Life Decisions Bill 1999

30 Page 27.

31 *Prince v President, President of the Law Society of the Cape of Good Hope and Others* 2002(2) SA 794 (CC) at ("the Prince case") the court found that granting exemptions for the use of cannabis for religious purposes, could be abused due to the police lacking the capacity to enforce the regulations.

27.3 The administrative infrastructure including human resources as well as logistical implications required to give effect to the regulations.

**The Duty to Develop the Common Law**

28. The Learned Judge erred in his interpretation and application of the duty to develop the common law. In *Carmichele,*[32] the court laid down the following principles for the courts to exercise restraint when applying the constitutional power to develop the common law –

28.1 the courts should be mindful not to over-step the sacred boundaries of separation of powers; making laws is the preserve of the legislature, not the judiciary; [33]

28.2 the Court is not obliged to go off on a tangent in each case to determine whether the common law needs to be developed;[34]

28.3 The common law must be developed within the matrix of an *"objective normative system"*. This requirement does not, however, entail *"overzealous judicial reform*".[35]

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32 2001(4) SA 938 (CC).

33 Ibid at para 30.

34 Ibid at para 39.

29. In developing the common law, Courts are obliged to act in deference to the legal principles such as *stare decisis* and the doctrine of precedent.

**SIGNED AT PRETORIA ON THIS THE DAY OF MAY 2015.**

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**TO: THE REGISTRAR OF THE HIGH COURT**
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[35] Ibid at para 55.

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