WHY JUDGE FABRICIUS WAS WRONG ON THE STRANSHAM-FORD EUTHANASIA 2015 CASE

Prepared by: Philip Rosenthal
Euthanasia Exposed
www.EuthanasiaExposed.co.za
Version Date: 2 November 2016

INTRODUCTION 3
Limitations 3
ERRORS IN THE JUDGEMENT 3
Judge fails to correctly understand correctly or rebut the prevailing medical ethical position 3
Judge selectively applies his own position on the role of religion and philosophy 3
Judgement repeats list of medical errors despite rebuttal 4
Judgement incorrectly cites the South African Law Reform Commission 4
Substantive arguments incorrectly cited 4
Recommendations incorrectly cited 4
Claim SALRC report did not go to parliament 4
Misinterprets constitution on dignity 4
Failure to correctly consider the 'Right to life' 5
Failure to give primacy to the right to life 5
Incorrectly defines the Right to life 5
Muddling the Sanctity of Life 5
Muddles first generation rights and second generation rights 5
Citation of applicant view in cited case law rather than judgement 5
Fails to differentiate between legal positions on issue elsewhere in world 6
Muddling of the difference between humans and animals 6
Dismissal of risk of ripple effect and impacts on vulnerable 6
Comparison with Environmental Social Impact Assessment Requirements 6
Applicant and judge refuses to identify the medical practitioner authorised to kill 7
Incorrect citation of medical ethical requirements 7
Attacking ethical boundaries without defining new ones 7
Elitist decision making 7
Claims he is developing the common law 7
CONSTITUTIONAL IRREGULARITIES 8
The court order applies to only one person 8
Does not consider less restrictive means to achieve the same purpose 8
The court order violates an entrenched clause in the Bill of Rights 8
A person cannot contract themselves out of a fundamental entrenched constitutional right 8
Violation of the separation of powers: Judiciary versus the legislature/Constitutional Assembly 9
Expects the legislature to rubber stamp and work out the details of an elitist decision 9
Likely violate the mandate and freedom of conscience of the elected representatives 9
Actual purpose of constitutional review 9
What the purpose of constitutional review is not 9
Inappropriate use of foreign case law 9
ERRORS IN THE APPLICANT'S FOUNDING AFFIDAVIT (TREATED AS CORRECT) 10
Introduction 10
Medical errors in affidavits not considered by judge 10
Failure to prove imminent death 10
Failure to prove cannot treat pain (as alternative to euthanasia) 10
Applicants false fear of being in a 'disassociative state' 10
Applicant not informed of his medical rights and treatment alternatives 10
Judge adopt above errors in his judgment 11
Inaccuracies relating to the South African Law Reform Commission (SALRC) Report 11
Context: The authority of the SALRC 11
Quotations from first draft and not final report 11
Claim SALRC did not go to parliament 11
False claim the SALRC report recommended legalisation of euthanasia 11
Errors assumed by judge in judgment 12
THE HISTORY OF THE APPLICANTS IN DEFYING AND ABUSING THE LAW AND ETHICS 12
Cannabis 12
Violation of own criteria for assisted suicide 12
Stretching of criteria in media debate 12
Failure to define any new boundary criteria 12
OTHER ISSUES RELATING TO APPLICANT 12

Motivation of applicant: Not actually a real application for suicide *12*
Subjective concept of dignity of the applicant *13*
JUDGE PLAYING ROLE OF ADVOCATE 13
Judge introducing argument *13*
Judge introducing evidence *13*
PROCEDURAL DECISIONS FAVOUR EUTHANASIA ADVOCACY GROUP 13
Trial delayed at request of applicant *13*
Extreme urgency ruled *14*
Doctors for Life not allowed to be respondents *14*
Refusal to suspend the order pending appeal *14*
The case was really about the principle and not the individual applicant 14
Judge refused to declare the ruling moot *14*
Summary *14*
JUDICIAL ERRORS AND CONTROVERSIAL ISSUES 14
Jurisdictional location of court *14*
Role of the lower court versus the higher Court *15*
Judge fails to consider the guilt or innocence of the applicant *15*
MANUFACTURED AND RECKLESS URGENCY 15
Applicants delayed filing case until last minute *15*
Inadequate time for respondents and amicus to prepare *15*
Only three working days for opposition to prepare 15
Urgency followed by trial delay to benefit one side only and then urgency resumed 15
No time to collect and file expert affidavits 16
Duration of trial *16*
Real admitted reason for urgency *16*
Urgency ruling *16*
Failure of the applicants to notify opposition of the application *16*

Introduction

- There are further irregularities not listed here, which await receipt provable evidence.
- The purpose of this list of irregularities is:
  - To motivate why the Fabricius judgement was ill considered and should not be used as precedent internationally or by the media.
  - To serve as a draft schedule to inform the appeal.
- Some of the irregularities on their own could be defended in another case in exceptional circumstances. Nevertheless, the sheer number of irregularities in this case indicates recklessness, lack of application of the mind, and a poor decision on the part of the judge.

Limitations

- I, Philip Rosenthal the author am not a lawyer. I have nevertheless been involved in lobbying and influencing the political and legislative process since around 1989, including lobbying the Constitutional Assembly in 1992-1996. I therefore have some knowledge of the legal issues at stake.
- The draft version of this report was compiled in one day given the urgency of the request to assist the very similar Seales case in New Zealand.
- It is based on a single reading of the applicants affidavit and the judgment. A second reading may likely reveal more errors.
- The following summary list of irregularities with the Stransham-Ford trial and judgement is not comprehensive, does not include argument on the merits of the case. It does not include references, which are available on request.

Errors in the Judgement

Judge fails to correctly understand correctly or rebut the prevailing medical ethical position

- The judge clearly does not agree with the logic of the prevailing 'Sanctity of Life'/ Hippocratic oath status quo legal-medical-ethical position regarding ethical boundaries in end of life decisions and advocates one based instead on maximising 'quality of life' (page 41).
- Nevertheless, in attempting to rebut the opposing position, he fails anywhere in his judgment to clearly and correctly state and rebut it. Instead in attempting to do so, he fudges and muddles different issues together into a confusion, misrepresents it and then attacks this as logically inconsistent. It appears logically inconsistent, only because he misrepresents the opposing alternative view. The apparently learned judge fails to understand the core argument or prevailing medical ethical position, but only his own position.
- He fails to understand what the whole of the medial profession potentially affected by this judgement does understand and what in fact the overwhelming majority of citizens of South Africa believe.
- The judge has thus acted without properly applying his mind.

Judge selectively applies his own position on the role of religion and philosophy

- During the trial, the judge argued that religion and philosophy were interesting, but not relevant to the legal decision. Nevertheless, in his judgement he:

  i. Acknowledges that philosophy overlaps with jurisprudence.
  ii. Attempts to hijack a the 'Sanctity of life' argument, by imposing the religious concept of 'sanctity' on 'The sanctity of the quality of life' – something not supported by any religion.

iii. Calls the euthanasia killer 'a Samaritan' again alluding incorrectly to a biblical metaphor (page 7, para 5.3).

- The judge uses this argument selectively as a razor to dismiss arguments that don't favour his position, but then will happily ignore the criterion when he believes they favour his position.
- The judge contrary to his own claims, does make use of religious pre-suppositions in his decision, but does so:
  - Skilfully dressed up as legal argument.
  - Muddling and confusing the religious concepts that the cites. These misunderstandings could have been remedied had the trial not been rushed.

Judgement repeats list of medical errors despite rebuttal

- The judgement repeats multiple medical errors in the applicants affidavits despite being previously rebutted by two medical affidavits by the respondent and amicus (see previous discussion on this above). See pages 12-13 of judgement.
- Judgement does cite one of the medical rebuttal points, but then seems to ignore its significance to the case and assumes the opposite claim by the applicant is true. This point of dispute was thus never resolved in court.
- Errors cited in the judgment include the claim the applicant may otherwise breathe his last breath on a machine and in a hospital, both of which he has every right to refuse.

- The judgment (page 20) stresses the reasons that:
  → The applicant is fully aware of the treatment alternatives available to him. Nevertheless, this is incorrect, since the applicant describes these alternatives incorrectly.
  → The applicant has no alternative to be released from unbearable suffering.

Judgement incorrectly cites the South African Law Reform Commission

Substantive arguments incorrectly cited

- The judgement cites arguments in favour of euthanasia in the South African Law Reform Commission Report, 1999. Nevertheless, the report actually summarises arguments in submissions for and against euthanasia and the judge simply copies the set of arguments in favour of euthanasia, without referencing the heading in the report i.e. Arguments in favour of euthanasia. He fails to similarly reference the arguments against euthanasia and incorrectly claims this list of arguments in favour of euthanasia is the view of SALRC, which they explicitly stated they did not.

Recommendations incorrectly cited

- The judgment claimed the SALRC recommended legalisation of euthanasia. It did not. It specifically stated in multiple places that it did not make such a recommendation but put this forward as one alternative (see previous discussion).
- The judgment also cites a legal textbook, which also incorrectly cites the SALCR on this issue.

Claim SALRC report did not go to parliament

- The attempt here is to portray parliaments rejection of these proposals as neglect on their part, and in effect to try to fill the gap of neglect rather than what it is, an attempt to usurp the constitutional role of the legislature.

Misinterprets constitution on dignity

The SA Bill of Rights says on Dignity "*10. Everyone has inherent dignity and the right to have their dignity respected and protected*."

- Firstly this refers to inherent dignity. The judgment does not seem to understand this concept, which is linked to the Sanctity of Human Life, but rather advocates subjective relative dignity. The judgment fails to understand the difference or the affidavits submitted to this effect.
- Secondly this protects people from other people who may abuse such dignity. It does not protect people from the indignities that may arise from natural processes and the circumstances of life – as the judgment tries to do in this instance.
- Thirdly, rights must be balanced with other rights. The judgment places the right to dignity as paramount and gives 'trump rights' to his incorrect interpretation of the right to dignity above the right to life.

Failure to correctly consider the 'Right to life'

Failure to give primacy to the right to life

The judgement fails to consider the Right to life in its summary of the relevant parts of the Bill of Rights (page 16-18) but simply cites dignity.

Incorrectly defines the Right to life

Later in the judgement he redefines the 'Right to life' as a right to experience of quality of life. No correct definition of the Right to Life is given. An incorrect 'straw man' definition of the opposing view is given and then falsely rebutted without considering the correct definition.

Muddling the Sanctity of Life

- The judgement refers to the 'Sanctity of the quality of life', which is an attempt to ignore the issue of the Sanctity of life by muddling it with Quality of life.
- 'Quality of life' is not in the Bill of Rights at all. If it was to be found indirectly in the Bill of Rights by a 'creative' judge, it would have to be interpreted and 'read in' indirectly via the rights to education, housing and healthcare – with the qualification that the state must progressively realise these. The scope of such a right is very limited to the topics mentioned in the Bill of Rights and not an absolute right comparable with the Right to life, let alone replacing it. Quality of Life cannot thus be read to trump the Right to Life.

Muddles first generation rights and second generation rights

- The judgement fails to consider the difference between first generation rights (inherent rights) which are absolute and second generation rights (socio-economic rights) which are relative to the state's capacity to assist people (page 29).
- When the Bill of Rights was drafted, I opposed the inclusion of second generation rights in the Bill of Rights exactly because of the risk of this manner in which second generation rights undermine inherent rights. These were included as a result of the specific historical context.
- The second generation rights (e.g. Right to housing, education, and healthcare are qualified in the Bill of Rights with the words 'progressive realisation' which acknowledges the state does not have the resources to give these to everyone and thus they are not absolute).
- The judgement thus muddles weight that should be attached to the two types of rights and then reinterprets the first generation rights (e.g. Right to life and dignity) as if they were second generation rights (e.g. Right to quality of life and extra-ordinary medical treatment).

Citation of applicant view in cited case law rather than judgement

While the judgement does refer to case law, it is selective in such citation and frequently quotes the contention of the applicant rather than the judgement (example page 28). Many people make

claims in applications to the court, which do not and should not become precedent. He should be citing the conclusions of the judgment and not just the selected claims of the applicants favouring his position.

Fails to differentiate between legal positions on issue elsewhere in world

The judge cites on page 37, eleven legal jurisdictions which allow for euthanasia and assisted suicide as precedent. Nevertheless, he fails to differentiate between the actual laws in these jurisdictions: i.e. between allowing denial of sustenance, lethal prescription to assist suicide and active euthanasia. In fact only three of these jurisdictions have current active euthanasia, which is what he permits in his court ruling. These three Benelux countries are tiny and make up less than half a percent of the world's population. The judge is apparently unaware of the radical nature of his ruling in relation to international precedent.

Muddling of the difference between humans and animals

The judgment fails page 33-34 to consider the difference both in law and reality between animals and humans. The applicant supported by the judge cites how animals are euthanased to relieve suffering.

This fails to consider that animals are not given palliative care precisely because they are animals and have lesser dignity and no right to life as people do. In wishing to treat people like animals the judgment is lowering and not raising the dignity of people.

Taking that logic to its absurd conclusion, should we also allow people if they so request to voluntarily contract themselves into slavery to be sold, branded, neutered and housed like animals? No. Because people and animals are different. The judgement fails to acknowledge this basic distinction.

Dismissal of risk of ripple effect and impacts on vulnerable

The judgment without any evidence or consideration of social impacts in other countries dismisses such concerns (page 34). There are a number of problems here:

- Firstly a failure to consider that the abuses in the countries with legal euthanasia (in Benelux)
- Secondly a failure to consider scope creep of the criteria for euthanasia (in Benelux)
- Thirdly, a failure to consider scope creep in the criteria for euthanasia already being demanded by the euthanasia lobby in South Africa.
- Fourthly, a failure to consider such scope creep over the longer term.
- Fifthly a failure to consider that South Africa has a struggling regulatory system much weaker than that in Benelux.
- Sixthly a failure to consider the greater number of terminally ill (HIV) patients in South Africa.

Comparison with Environmental Social Impact Assessment Requirements

- We have here an ironic situation, where engineering projects of comparatively trivial social impact are required to undertake a detailed 'Social Impact Assessment' under National Environmental Management Act regulations.
- The courts are frequently approached for relief if they believe such impact assessment is inadequate or if there has been inadequate consultation.
- Nevertheless here a much bigger social impact risk is dismissed without any evaluation.

Applicant and judge refuses to identify the medical practitioner authorised to kill

- The court order fails to identify the medical practitioner authorised to kill the applicant When challenged the judge argued this was a privacy issue (Judgement page 44). Nevertheless, this is problematic for a number of reasons:
- It is legally irregular since the specific court order is really in favour of the doctor and not the suicide applicant. The doctor is the one who would be breaking existing law. There is no law against suicide in South Africa but only assisting suicide.
- This 'privacy' right granted by the judge then implicitly violates the right of the patients of that doctor to know that their doctor is a killer.
  - Most patients would not want to be treated by a doctor who is killing other patients
  - Most people would they trust their grandmother to be treated by a killer doctor.

Incorrect citation of medical ethical requirements

The judgment page 48 cites a legal masters thesis discussing ethical considerations used by the doctor in caring for the dying patient. The only issue cited is quality of life and dignity. There are multiple other ethical requirements considered by doctors in caring for patients and this requirement is not central. This is a case of lawyers not understanding the ethics of another profession. Considering the correct spectrum of medical ethical criteria would have yielded a different result.

Attacking ethical boundaries without defining new ones

- The judgment attacks various existing recognised ethical boundaries. In doing so it muddles the issues, for example in failing to draw a distinction between ordinary care and extra-ordinary care.
- While trying to destroy existing ethical boundaries it fails to define any new ones that are legally defensible. In doing so, it creates an 'open season' for legal applications of a similar nature to be brought to courts, without any firm criteria to consider them. It then allows a situation where these may be incrementally pushed one case at a time, since once this clear boundary is crossed, there is no other boundary.

Elitist decision making

- The judge dismisses the views of the majority of South Africans as well as those of religious bodies as irrelevant, but gives weight to academic views (judgement page 49-50) which conveniently fit his views. Nevertheless, the entire attitude of his judgement in thinking he has some sort of right to overturn the Bill of Rights, the democratic majority, the parliament with a fiat judgment is elitist in the extreme.
- He is trying to see what he can get away with. South Africans need to put a stop to this kind of judicial power abuse.

Claims he is developing the common law

The judge claims he is developing the common law (page 52-53). Nevertheless, this is an extreme departure from the common law, attempting to change 1500 years of Roman law and 2400 years of Hippocratic Oath medical ethics and the considered decision of the state and legislature in one lower court judicial fiat.

Constitutional irregularities

The court order applies to only one person

- The court order was written in such a way as to apply to only one person.
- The court order imposes a limitation of the constitutional Right to life.
- The South African Bill of Rights only allows limitations based on a law of general application. Clause 36(1) of the Bill of rights.

"36. (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose
.
(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights."

- While the fact that this court order only applies to one person is less damaging in preventing a 'free for all' precedent of euthanasia, it nevertheless is unconstitutional.

Does not consider less restrictive means to achieve the same purpose

- The ruling allows for active euthanasia by a medical practitioner and not only assisted suicide (i.e. prescription of lethal medication).
- This would go against the constitutional requirement of selecting a legal remedy that would be the least restrictive (Clause 36(2) of the Bill of rights) i.e. least conflict with the interests of other parties.
- The applicant did not motivate why he needed active euthanasia by a medical practitioner.

- The judgement did not consider the alternatives for palliative care that are available at home and under existing law to relieve suffering.
- The judgment did not consider the opportunity the applicant has to commit suicide without the assistance of anyone else, thus not impinging the rights and interests of the Health Professions Council of South Africa and the medical profession.

The court order violates an entrenched clause in the Bill of Rights

- The South African Bill of Rights requires a 75% Constitutional Assembly majority to change an entrenched clause in the Bill of Rights. Nevertheless, the judge attempts to do so using judicial activism imposing an interpretation of the Bill of Rights never contemplated by the Constitutional Assembly.

A person cannot contract themselves out of a fundamental entrenched constitutional right

- The court order allows the applicant to request a medical practitioner to contract himself out of his most fundamental human right, the right to life.
- He would presumably need to sign an agreement with a medical practitioner to kill him. Nevertheless, such an agreement would be contractually invalid because it violates his right to life.

Violation of the separation of powers: Judiciary versus the legislature/Constitutional Assembly

Expects the legislature to rubber stamp and work out the details of an elitist decision

- Judge wishes the case to go to Constitutional Court, which he hopes will make an in principle decision and instruct parliament to make a law on euthanasia.
- Nevertheless, this is extreme judicial activism and not the legitimate role of the Constitutional Court.
- The judge expects the legislature to legislate 'safeguards' (page 50 of judgement) for his reckless, unwise and unconstitutional judgment. He expects the legislature to accept the judicial decision as a fait accompli and simply work out the details. This is not the role of the legislature. The legislature is not there to be a servant of an elite and unelected group of judges and put a rubber stamp on their judicial fiat decisions.

Likely violate the mandate and freedom of conscience of the elected representatives

- The ruling party in South Africa has not allowed a conscience vote on either abortion or same-sex marriage. Parliamentarian Jennifer Fergusson, who abstained from voting for abortion was immediately removed by disciplinary action by the party. Insiders leaked the ruling party caucus meeting had a majority opposed to same-sex marriage. Nevertheless, parliamentarians were forced to vote in favour of it, or lose their seats. A Parliamentary health committee member who questioned their abortion policy in a committee discussion, was immediately suspended from the committee for several weeks and on his restoration never questioned it again. This makes a farce of the parliamentary and constitutional process.
- The judge expects parliamentarians against their constitutional mandate, electoral mandate and own consciences to enact a law in favour of euthanasia.

Actual purpose of constitutional review

The judiciary has to interpret the Bill of Rights for certain legitimate purposes, for example:

- To correct new legislation is clearly in conflict with the Bill of Rights;
- To adjudicate on interpretation of legislation not clearly spelt out in such legislation, in which it uses the Bill of Rights as a guide.
- To review executive decisions which are challenged as conflicting with fundamental rights.

What the purpose of constitutional review is not

- The purpose judicial review is not for the Judiciary to become an activist body to progressively implement a certain ideological path, by reinterpreting the meaning of certain terms, which it deems 'Constitutional' never contemplated by the Constitutional Assembly.
- There is a school of thought in the legal profession which supports such an activist approach, both in foreign courts and in South Africa. These judges represent a danger to constitutional democracy and should be removed from the judiciary.
- Judge Fabricius has demonstrated he is one of them.

Inappropriate use of foreign case law

- The judge cites the Canadian Supreme Court February 2015 decision on euthanasia. Nevertheless, he fails to consider the differences between South African society and that of Canada. These include:
  - An overwhelming majority of South Africans believe in the Sanctity of Human Life, which includes opposing euthanasia.
  - Canada is a stable society with police in control, while South Africa is an unstable society with thinly stretched law enforcement without capacity to police doctors licensed to kill. It is evident they are not regulating illegal abortions, which was promised at the time of

legalisation of abortion on demand. In his judgment, the judge cites the Canadian decision to mitigate impacts on vulnerable through regulation (page 38).

- South Africa unlike any other country in the world has millions of people terminally ill with HIV/AIDS and thus the potential for a much wider implementation of the law than any other country on earth.

Errors in the applicant's founding affidavit (treated as correct)

Introduction

- The applicants founding affidavit includes multiple factual errors and failure to prove argument.
- The time frames for the trial did not allow opportunity for correcting or debating these errors.

Medical errors in affidavits not considered by judge

Failure to prove imminent death

- The medical reports submitted did not provide evidence that the applicant was in danger of dying within the claimed time frame of two to four weeks.
- The claimed expected death was due to cancer resulting in renal failure. Nevertheless, both the Health Professions Council doctor and the Christian Medical Fellowship doctor reviewing this affidavit argued the renal function of the applicant was quite good and unlikely to degenerate in the time frame.
- As it turned out, the applicant did die during the trial. Nevertheless, the court should only act on proven evidence and no evidence was provided of such imminent death.
- With any prognosis, there will be a statistical range of results, with a few dying before, some at the expected time and many much later. The actual death, does not prove the correctness of the prognosis, as it may simply be on the early range of the statistical scatter.

Failure to prove cannot treat pain (as alternative to euthanasia)

- The applicant argued that his pain medication was contra-indicated in the case of renal failure (which he believed would be his likely cause of death).
- Nevertheless, this particular medication is contra-indicated in renal patients because of resulting toxicity, not because it is ineffective in treating pain. In the case of palliative care patients, toxicity is irrelevant since the patient will die anyway soon.
- Even in the instance that he did not wish to take this medication, there are other effective medications for treating renal failure.
- Evidence for this was presented to the court, but not properly considered.

Applicants false fear of being in a 'disassociative state'

The applicant in his affidavit expressed fear that the pain medication would put him in a 'disassociative state' and that he instead wanted to die aware of his surroundings. This indicates the effect of the medication had not yet been explained to him by the time he wrote the affidavit, but by the time the trial actually happened he had started taking the medication and so would have been aware of this. In fact, the pain medication puts a person in such a state only temporarily for a few days after which the body adjusts to the medication and sharp awareness is restored. The fear of the applicant is thus unfounded and the drastic solution of suicide/euthanasia not needed to achieve it.

Applicant not informed of his medical rights and treatment alternatives

- The applicant stated he wished to die at home with his family and feared dying in hospital attached to a machine.

- Nevertheless, under existing law, he had every right to die at home with his family and to refuse extra-ordinary medical treatment. The palliative care medication he needed could also be easily administered at home.
- This reason motivating the application is thus invalid. The applicant was misinformed of his medical choices.

Judge adopt above errors in his judgment

Despite the above inaccuracies being corrected by medical affidavits by two of the parties to the case, the judge in his judgment accepts the applicants claims as valid. He thus indicates a failure to apply his mind to the case.

Inaccuracies relating to the South African Law Reform Commission (SALRC) Report

The applicants affidavit makes numerous references to the South African Law Reform Commission Report on euthanasia.

Context: The authority of the SALRC

The South African Law Reform Commission is a para-statal body that researches maybe twenty to fifty speculative suggestions for legal changes each year, allocating two or three researchers the task of writing a report on each topic. Their final reports are reviewed by a senior official before being released to the public and to parliament for further consideration. It is purely a research body and has no authority or democratic accountability. The opinions are simply those of the allocated researchers. Sometimes parliament finds there work useful and they find their way with modifications into law. In many cases such as this one they are not accepted. A law is never voted on by Parliament exactly as proposed by SALRC.

Quotations from first draft and not final report

- The applicant quotes extensively from a suggested Bill legalising euthanasia from the South African Law Reform Commission Report, and cites his compliance with these requirements as grounds for his application to the court.
- Nevertheless, they incorrectly from the first draft of the report, as if it was the final presented to parliament and fail to distinguish between the draft and final. Such indicates sloppy legal homework.

Claim SALRC did not go to parliament

- The applicant claims the SALRC report did not go to parliament. Did go to parliament and parliament rejected it. i.e. Parliament was not interested in legalising euthanasia. It was discussed on at least nine separate occasions: First in the Justice Committee, then the Health Committee, then the National Council of Provinces, then the National Assembly in various ad-hoc motions. It did not find sufficient support to be tabled as a formal bill and was reported as abandoned on 3 August 2004. Nevertheless, the issue continued to be raised in parliament and thus far has not been formally supported by any political party or defended by a single parliamentarian in their personal capacity. It has been rejected by the Ministries of Health and Justice.

False claim the SALRC report recommended legalisation of euthanasia

- The applicants affidavit claimed the SALRC report recommended the legalisation of euthanasia. This is false. The report was mainly on the subject of clarifying or modifying in legislation the existing legal situation of patient and doctor rights for end of life decisions. The final report, its summary and its media summary stressed that it was neutral on the subject of legalising euthanasia. Three alternatives were proposed: First to keep the law as is (no euthanasia). Second to let a doctor decide. Third decision by panel or committee. The overwhelming majority of interested organisations: medical, religious and political favoured the first option.

Errors assumed by judge in judgment

- The same inaccurate claims of the SALRC report recommending euthanasia and not being sent to parliament were repeatedly fed to the media by Dignity SA, assumed true by the Judge and cited in the judgement.

The history of the applicants in defying and abusing the law and ethics

Cannabis

- The applicant admits in his affidavit to being treated with cannabis (not legal in South Africa).
- The applicant's photograph appears on the web site of the lobby group Dignity SA in front of a banner promoting Cannabis.
- A newspaper report cites another Dignity SA activist who committed suicide receiving Cannabis from the applicant. This activist also lobbied in parliament to legalise Cannabis.
- This was and is still being motivated as a 'Right to life' cause – a very creative misinterpretation of the right to life.

Violation of own criteria for assisted suicide

- The lobby group Dignity SA, led by Sean Davidson, is by common cause the real applicant.
  - This is evident from their web site, social media posts and from the applicants affidavit.
- Sean Davidson confessed in a media interview to an assisted with the suicide of a man, who was not terminally ill, which is the criterion promoted by the lobby group. He then says they are revising their own criteria.
- This is Sean Davidson's second assisted suicide and a flagrant violation of the law and his own previous ethical guideline.

Stretching of criteria in media debate

- There is an open public debate amongst Dignity SA own supporters on social media on how far criteria for assisted suicide should be allowed (i.e. Facebook and Blogs). Dignity SA has not made any effort to marginalise or censor more radical views within their own ranks and in fact continues to profile these people and their views.
- One euthanasia activist, frequently profiled on their social media, has argued the minority assisted suicide should be extended to children (as in Belgium).
- They have posted an article in favour of extending to the clinically depressed, with supportive comments by many of their supporters.
- Some posts argue for individual right to decide (rather than medical criteria).
- One commenting post argues for a state decided age limit for everyone and a duty to die for those who exceed it.

Failure to define any new boundary criteria

- The judge argued against the existing legal and medical precedent boundary for killing. Nevertheless, he failed to draw any new alternative clear boundary. Neither has the applicant lobby group.

Other issues relating to applicant

Motivation of applicant: Not actually a real application for suicide

- The applicant already had pain medication his possession, which he could easily overdose on to commit suicide. He could have taken this at any time but did not. The only remaining motivation for the court application which he did not already have was:
  - Obtain assistance from a medical practitioner

  - To obtain the blessing of the court for his actions
  - To set a judicial precedent
- The lobby group Dignity SA stated after his death that he was deliberately hanging on to life for the sake of the court case and died on exactly the day he predicted beforehand he would.
- The applicant was a lawyer, as is the similar applicant in New Zealand.
- The applicant's son published a poem about his fathers death with verse 'rage, rage against the dying of the light'.
- The evidence tends to suggest the real motivation of the applicant was not to obtain the right or assistance for suicide but to obtain a legacy through the court case and media publicity surrounding it.
- It is common for people to commit suicide at locations and in a manner that will make people remember them.

Subjective concept of dignity of the applicant

- The applicant begins his affidavit listing his exceptional physical and professional achievements, which would require a very high level of intellect.
- He argues that it would be intolerable to his dignity to die in an intellectually impaired and weak state dependent on others and thus prefers suicide while he still has some strength left.
- Nevertheless, this argument implies that others in this category, many of them for their whole lives do not have dignity, thus contradicting the Bill of Rights position on the equality of dignity of all.

Judge playing role of advocate

- The judge rebuked both the applicant and the respondent lawyers for lack of preparation and dismissed the reason of the respondents of insufficient time to prepare.

Judge introducing argument

- The judge proceeded to argue the case on behalf of the applicant, introducing his own arguments and citations.
- A journalist covering the case, not sympathetic to the anti-euthanasia lobby, tweeted from court "Judge is arguing case for lawyers as clearly they are not doing it".
- The judge asked a list of arguments in the form of rhetorical questions on the euthanasia debate in court. The answers to the questions are easily rebutted and commonly repeated in every discussion on the issue. Nevertheless, he did not give time for the opposition to rebut the arguments. It is possible he was aware of the answers, but failed to give them in court.

Judge introducing evidence

- Judge introduces multiple of his own document references and citations to support his argument.

Procedural decisions favour euthanasia advocacy group

Trial delayed at request of applicant

The trial was delayed from the initially set date by a week at the request of the applicants attorneys to allow them to obtain additional affidavits. Nevertheless, during this delay, the opposing amicus Doctors for Life were not given an opportunity to view the draft affidavits to prepare argument in defence. Therefore, the delay solely benefitted the applicant and not the equally the respondents and amicus. Given their late receipt of the affidavits, the amicus would have also benefited from more time to prepare a defence but no such delay to benefit the respondents was granted.

Extreme urgency ruled

- Extreme urgency was ruled for both the start of the trial and the duration of the trial – see above.

Doctors for Life not allowed to be respondents

- Doctors for Life, an organisation, which has a strong and direct interest in the matter, applied to become a respondent rather than just an amicus, but were refused. The interests of their members and their core mandate is directly affected by the decision. Members of Doctors for Life have been severely victimised by the State for their refusal to assist with abortion and the same could easily occur with euthanasia if legalised.
- This amicus status puts them in a weaker position than if they were respondents.
- Respondents have a right to appeal and to argue more strongly on procedural issues such as urgency, while amicus do not.

Refusal to suspend the order pending appeal

- Judge refused to suspend his court order pending appeal, which is normal in South African law.
- Even the 'Dignity SA' lobby group stated beforehand, they did not expect the judge would do this.
- Thankfully, the applicant reportedly died of natural causes before the court order was given, and so had no de-facto opportunity to make use of this court order allowing euthanasia.
  - Had he not done so, it would have created a real 'de-facto' precedent.

The case was really about the principle and not the individual applicant

- The lobby group 'Dignity SA' who orchestrated the lawsuit, and appointed the lawyers repeatedly stated before and after the trial that the applicant, Stransham-Ford was seeking to win the case 'in principle' rather than for his own personal benefit. If this is the case, then it was unnecessary for Judge Fabricius to fail to suspend the order pending appeal.

- In making his decision as a single just and allowing no suspension of the order pending appeal, Judge Fabricius made his decision de-facto absolute and unaccountable to anyone else.

Judge refused to declare the ruling moot

- Despite the fact the applicant died during the trial before the ruling and before the judgment, the judge refused the request of the State to declare the ruling moot.

Summary

In allowing a delay of a week, refusing to allow Doctors for Life to be respondents, ruling extreme urgency, refusing to suspend his decision pending appeal and refusal to declare the ruling moot, judge Fabricius demonstrated extreme procedural bias in favour of the applicant.

Judicial errors and controversial issues

Jurisdictional location of court

- The applicant, his carers, all his attending medical practitioners, the hospital in which he was treated, and most of his family reside in Cape Town as is evident from his filed affidavits. He stated he wished to commit suicide at home with his family (i.e. In Cape Town). All this points in favour of the jurisdiction of the lower court jurisdiction of the Cape High Court. Nevertheless, the application was filed in Pretoria (North Gauteng) High Court.
- Why did they file in Pretoria? Did they believe they would get a more favourable outcome in this court?

Role of the lower court versus the higher Court

- In South Africa, there are four tiers of court: Magistrates court, High court, Supreme court of Appeal and Constitutional court. This is a second tier or 'High Court' ruling. The role of the lower court within the hierarchy is normally to uphold the existing law, with setting aside of existing law only being considered on appeal by a higher court. The exception would be in the instance of a provincial law, where it may be appropriate for the High Court to make such a ruling.
- Nevertheless, in this instance the radical departure from existing law was made by a 'second tier' court. Such lower courts are usually much more conservative in making changes to the existing legal dispensation.

Judge fails to consider the guilt or innocence of the applicant

- The judge failed to consider guilt or innocence of the applicant which is the normal criteria for punishment (in this case death). In doing so, he condemns a person without finding them guilty.

Manufactured and reckless urgency

Applicants delayed filing case until last minute

- The applicant was diagnosed with terminal cancer in February 2014.
- The lobby group Dignity SA announced their intention to take the matter to the Constitutional Court in August 2014.
- The applicant began working with the lobby group to prepare for the case in November 2014.
- The applicants legal affidavits, apart from supplementary medical affidavits were completed in March 2014.
- The case was only filed towards the end of April 2014.
- It is thus argued that the urgency was created artificially by the applicants and they should have filed earlier if they were so concerned about urgency.

Inadequate time for respondents and amicus to prepare

Only three working days for opposition to prepare

- The trial started with only three working days from filing of founding affidavit to start of trail.
- The applicant lobby group and attorneys refused to release their affidavit to anti-euthanasia amicus or interest groups, despite numerous requests citing weak excuses.
- The applicants attorney when asked by a writer covering the case to see the affidavit asked if it would be shown to the principal amicus Doctors for Life. This appears to indicate a deliberate intention to hide information from their opposition.
- The respondents (the State and Health Professions Council of South Africa) were served notice and given sight of the draft affidavits with six working days before the trial.
- The reason given for last minute filing of affidavit was that they were waiting for a final medical affidavit. Nevertheless, they could have released the remainder of the affidavits in the interim.

Urgency followed by trial delay to benefit one side only and then urgency resumed

- The trial date was delayed a week to allow the applicants doctor to take legal advice. The initial trial date was argued as urgent. This delay was condoned to benefit the applicant, but the opposition was not allowed to use the time to see the remainder of the affidavit. When the opposition wanted more time, it was not granted.

- The question is if the case urgent at the time of the original trial date, why did the applicant delay it by a week?

No time to collect and file expert affidavits

- A trial of this nature requires the collection of the numerous expert affidavits to support argument. Nevertheless, the time frames did not allow the respondents and amicus to receive or file all the expert affidavits they had in process. Even one more day would have made a significant difference but was not allowed by the judge.

Duration of trial

- **Urgency ruling:** The judge ruled the case as urgent, before 11 am (i.e. within an hour of the start of the trial at 10 am), while the urgency itself should have been a seriously debated issue.
- **Indication on merits:** By 11 am (i.e. within an hour of the start of the trial) the judge had begun speaking to the merits of the case and it was already evident before he had heard argument on the merits that he was going to rule in favour of the applicant.
- **Court order:** The entire trial lasted only one day, with the court order only being postponed to the next day on request of the state advocate to consult on certain matters with the state. A case of national and international significance was thus decided de-facto in one day.

Real admitted reason for urgency

The real reason for urgency was not actually that the applicant was afraid of imminent loss of dignity and pain as his health deteriorated. The real reason was they feared their applicant would die before the case got to court, as had their previous candidate applicant. They announced after his death that he had deliberately tried to stay alive till the court date.

Urgency ruling

- Despite the fact that two amicus joined the case, urgency was ruled. Usually, when additional parties join a case, it automatically slows down 'urgency' to allow for a more considered decision.
- It was not possible within the time frames for certain evidence to be filed.
- Usually such urgency is only ruled in instances where life, property and reputation are at imminent risk, which was not the case in this instance.
- The extreme urgency ruled on at the start of the trial, effectively assumed the outcome of the whole case.

Failure of the applicants to notify opposition of the application

- A long list of interested organisations submitted formal objections to the South African Law Reform Commission when consulted in 1997 against proposals to legalise euthanasia. This list was sent to the attorneys of the applicant with the request they be notified. They were not notified. Further, there are numerous organisations opposing euthanasia and assisted suicide which maintain a high public profile in the media, on the internet and in various lawsuits. None of these were notified by the applicant. Many more may have wished to join the case.
- The ruling applied for does not only impact the right to life, but the right of professional bodies to take disciplinary action against their own membership. Other professional bodies may wish to join the case but were not notifed.
- It appears the applicants were deliberately trying to slip the case in quickly 'under the radar' to avoid giving the opposition time to respond.