IN THE SUPREME COURT OF APPEAL
(REPUBLIC OF SOUTH AFRICA)

SCA CASE NO:
852/2015
GPHC CASE NO:
27401/2015

In the matter between:

THE MINISTER OF JUSTICE AND CORECTIONAL SERVICES	First appellant
THE MINISTER OF HEALTH	Second appellant
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third appellant
THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA	Fourth appellant

And

ESTATE OF THE LATE ROBERT JAMES STRANSHAM-FORD	Respondent

and

DOCTORS FOR LIFE INTERNATIONAL PLC	*Amicus curiae*
DONRICH WILLEM JORDAAN	*Amicus curiae*
CAUSE FOR JUSTICE	*Amicus curiae*
CENTRE FOR APPLIED LEGAL STUDIES	*Amicus curiae*
JUSTICE ALLIANCE	*Amicus curiae*

HEADS OF ARGUMENT :

CAUSE FOR JUSTICE

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INTRODUCTION

1. This case originated as an application by an individual, Mr Stransham-Ford, invoking a right to terminate his own life with the assistance of a third party,[1] on the basis that such termination would preserve his dignity in circumstances where pain and suffering had caused an alleged diminished self-esteem.[2] Mr Stransham-Ford did not seek permission to end his own life; rather, he sought permission for another (a medical practitioner) to be actively involved in the ending of his life.

2. When the urgent application of the late Mr Stransham-Ford came before Fabricius J, he was sitting as a single judge and required to make an '*immediate decision*'.[3] This, in circumstances where Mr Stransham-Ford sought to dramatically change the law on assisted suicide and euthanasia, a matter that CFJ proposes best be dealt with by the legislature, to ensure that a matter as controversial and important as this is dealt with through carefully crafted law of general application that appropriately limits the ending of human life.

[1] Euthanasia is commonly defined as the practice or action of one person deliberately/intentionally killing another, not because of threat or punishment for a committed crime, but rather to bring about a painless and gentle death. Euthanasia can further be categorised to be either passive or active euthanasia. Passive euthanasia takes place by means of an omission, whereas active euthanasia occurs through a commission.
[2] NoM Record Vol 1 pp 1 - 6 and FA Record Vol 6 pp 7 - 41.
[3] Record Vol 6 p 861 *ll* 3, 9 - 10.

3. Mr Stransham-Ford passed away after argument had been heard, on the day that the order was granted,[4] but before judgment was handed down.

4. The court, unaware of Mr Stransham-Ford's passing, granted him the right to end his own life with the assistance of a medical practitioner.[5] It held the common law crimes of murder and culpable homicide to be inconsistent with the Constitution of the Republic of South Africa Act 108 of 1996 ('**the Constitution**') '*in the context of assisted suicide by medical practitioners*',[6] given rights to dignity and bodily integrity enshrined therein.[7]

5. But for the judgment *a quo*, assisted suicide (including voluntary active euthanasia) is unlawful:[8] in the absence of legislative intervention pursuant to recommendations of the South African Law Commission's 1998 report on euthanasia,[9] and in the absence of the Constitutional Court ('**CC**') addressing the

[4] Judgment para 3 Record Vol 6 p 864 *l* 6.
[5] Judgment Record Vol 6 pp 860 - 917.
[6] Judgment para 26 Record Vol 6 pp 914 – 915.
[7] Judgment Vol 6 pp 879 – 881, p 884, pp 896 – 901 and pp 859.1 – 859.2.
[8] *S v De Bellocq* 1975 (3) SA 538 (T) at 539D and *S v Marengo* 1991 (2) SACR 43 (W) at 47A-B, cited in Respondent's HOA footnote 10 p 7 in support of the recognition of this submission recorded in Respondent's HOA para 10 p 7.
[9] Record Vol 3 p 396 - Vol 4 p 668.

'right to die' the common law prohibition prevailed. This much was confirmed in *S v Agliotti*:[10]

> 'The conclusion one arrives at at the end of it all is that in South Africa, a person assisting any other person to commit suicide ... will be guilty of an offence(s). Consequently, anyone who conspires with aids and/or abets another to commit suicide, albeit it be called assisted suicide, will also be guilty of an offence(s).'

6. Cause for Justice ('**CFJ**') submits that the court *a quo*, in (belatedly) granting Mr Strandsham-Ford the right to end his own life with the assistance of a medical practitioner, failed to strike an appropriate balance between individual interests and and societal interests. In consequence, voluntary active euthanasia has been legalised for the benefit of those with the means to bring *ad hoc* applications to grant them such a right. Nonetheless, the judgment does not provide legal certainty to either proponents or opponents of the practice.

7. CFJ is opposed to the haphazard legalisation of a practice that is considered controversial. *If* voluntary active euthanasia, or physician assisted suicide, is to be sanctioned in South Africa, it must be regulated properly to prevent abuse,[11] and ought not to be authorised by way of individual application. The South African Law Commission came to the same conclusion - *i.e.* that the legal

[10] 2011 (2) SACR 437 (GSJ) at para 21. The conclusion is based on an analysis of the available case law and the recommendations of the South African Law Commission in respect of euthanasia that is offered in para 20 of the *Agliotti* judgment.

[11] CFJ application for admission para 5. This submission is not to be read as a submission that regulation will necessarily render voluntary active euthanasia constitutional. In circumstances where no regulation is in place, the question of whether proposed regulation is appropriate, is simply not triggered in the present case.

position on euthanasia ought to be formalised in legislation,[12] and not developed on a case-by-case basis.[13]

8. CFJ associates itself with the position adopted by the appellants. CFJ particularly supports the analysis of the law and precedent offered by the fourth appellant ('**HPCSA**'). In these heads, CFJ elaborates on certain of these submissions, without repeating them.

THE ESSENCE AND EFFECT OF THE JUDGMENT *A QUO*

9. The judgment *a quo*, correctly, starts with the recognition that assisted suicide, or voluntary active euthanasia, ought preferably to be regulated by legislation, [14] if it is to be sanctioned. It recognised that appropriate safeguards would have to be built into such legislation.[15] This, in circumstances where it was unlawful at the time of the application.[16]

[12] SA Law Commission report para 6.1 Record Vol 4 p 647.
[13] The Commission, unable to reach a final answer to active euthanasia, made three alternative recommendations, *viz* that the present prohibition of euthanasia be confirmed, that medical practitioners be allowed to assist in suicides upon request; and that assisted suicide be sanctioned by an interdisciplinary committee upon request from the patient. No legislation has been passed in reaction to this report.
[14] Judgment para 1 Record Vol 6 p 861 *l* 12 - p 862 *l* 13.
[15] Judgment para 17 Record Vol 6 p 893 *ll* 9 - 12.
[16] Judgment para 10 Record Vol 6 p 873 *ll* 1 - 7.

10. Also at the outset the court noted the submission that '*Wider societal aspects need to be addressed'* and that '*All moral, legal and ethical aspects need to be discussed'* when the constitutionality of the prohibition on assisted suicide is considered,[17] particularly since palliative care options are available.[18]

11. A close reading of the judgment reveals the court's understanding of human dignity as a justiciable and enforceable human right and a basis upon which the right to die with dignity may be demanded. The court was also persuaded by academic writing concluding that properly regulated voluntary active euthanasia may be considered constitutionally defensible, on the basis of an appropriate balancing of rights.[19] (That the authors contemplated regulation by way of legislation was not considered, or at least not considered as a distinguishing factor).

12. Thus the court, faced with an application to insulate a medical practitioner from prosecution in consequence of giving assistance to Mr Stransham-Ford in ending his life by administering a lethal agent[20] took into account his individual circumstances,[21] quality of life,[22] treatment,[23] and '*imminent future'*, including his

[17] Judgment para 6 Record Vol 6 p 868 *ll* 1 - 3.
[18] Judgment para 6 Record Vol 6 p 868 *ll* 6 - 10.
[19] Judgment para 13 Record Vol 6 p 885 *l* 6 - p 886 *l* 5.
[20] Judgment para 4 Record Vol 6 p 865 *ll* 1 - 4.
[21] Judgment para 2 Record Vol 6 p 863 *l* 1 - p 864 *l* 4.
[22] Judgment para 7 Record Vol 6 p 869 *ll* 1 - 10
[23] Judgment para 8 Record Vol 6 p 870 *l* 1 - p 871 *l* 4.

fear of suffering in dying.[24] It appears that the court was persuaded to grant the relief, at least in measure, because the applicant concerned was '*an educated individual of sound mind*'.[25] It dismissed concerns regarding the risks posed to the '*weak and vulnerable*',[26] because it was not considered '*an issue in the present application*'.[27] Similarly, the court dismissed submissions concerned with the inequality brought about by allowing only those with the means to bring applications to secure a so-called '*dignified death*', because they were considered to not be relevant '*in the present context*'.[28]

13. It did so on the basis of the constitutional injunction to develop the common law in order to give effect to a provision of the Bill of Rights where legislation does not give effect to such a right.[29] It found support in the Canadian judgment of *Carter v Canada*,[30] but its '*development*' appears to have been for the benefit of only the individual applicant, because the judgment appears to advocate for a case-by-case approach in the absence of legislation.[31] The order specifically records that it is not to be read as endorsing a particular position,[32] and apparently the order is not to be read as having a generalised effect on the

[24] Judgment para 9 Record Vol 6 p 871 *l* 5 - p 872 *l* 8.
[25] Judgment para 14 Record Vol 6 p 888 *l* 9.
[26] Judgment para 17 Record Vol 6 p 893 *ll* 4 - 5
[27] Judgment para 17 Record Vol 6 p 893 *l* 8.
[28] Judgment para 21 Record Vol 6 p 904 *l* 15 - p 905 *l* 7.
[29] Judgment para 10 Record Vol 6 p 874 *ll* 7 - 9, read with p 876 *ll* 1 - 3. See also Judgment para 22 Record Vol 6 p 909 *l* 7 - p 910 *l* 15.
[30] Judgment para 18 Record Vol 6 p 896 *l* 5 - p 901 *l* 8.
[31] Judgment para 19 Record Vol 6 p 902 *ll* 8 - 11.
[32] Order para 2 Record Vol 6 p 914 *ll* 9 - 12.

common law crimes of murder and culpable homicide in the context of assisted suicide by medical practitioners.[33]

14. Nonetheless, the court found more generally that there is not a distinction to be drawn between the withdrawal of care (passive euthanasia) and the administration of a lethal agent that brings about death.[34] In the course of its judgment, the court also made generalised findings on the content of the right to life and its interrelation with quality of life.[35] Also, in its order, the court made a generalised finding to the effect that the common law crimes of murder and culpable homicide in the context of assisted suicide by medical practitioners, insofar as they provide for an absolute prohibition, unjustifiably limit constitutional rights to human dignity and freedom of bodily and psychological integrity.[36]

15. The summary makes plain that the court sought to individualise the application to avoid dealing with arguments pertinently raising the societal interest. However, in doing so, the court failed to conduct an analysis that investigated the content of the rights to human dignity and freedom of bodily and psychological integrity, much less an analysis of the competing rights to life and equality that must have informed the balancing of fundamental rights required to

[33] Order para 4 Record Vol 6 p 915 *ll* 3 - 5.
[34] Judgment para 21 Record Vol 6 p 907 *l* 4 - p 908 *l* 12.
[35] Judgment para 23 Record Vol 6 p 911 *l* 13 - p 912 *l* 2.
[36] Order para 3 Record Vol 6 p 914 *ll* 13 - 16.

come to the conclusion that development of the common law was required. It is here that the central failure of the judgment *a quo* is to be found.

THE RESPONDENT'S POSITION

16. The respondent is correct in its submission that the legalisation or not of voluntary active euthanasia is a matter to be determined by the logical application of the relevant principles of the Constitution.[37] It is also correct that there is no duty to live[38] and even that a particular person's interests may well not be served by prolonging that individual's life.[39] But these submissions do not axiomatically translate into a constitutionally sanctioned right to demand the ending of one's life through the active assistance of a third party.

17. As is the case with the analysis of the court *a quo,* the submissions of the respondent fail to engage with the content of the rights relied on and their interrelation with other rights. The respondent declines to engage upon a comprehensive proportionality analysis and offers no legal analysis by reference to the general limitation clause of the Constitution - it simply concludes without argument that a blanket prohibition on assisted suicide is '*unnecessry and*

[37] Respondent's HOA para 7 p 6.
[38] Respondent's HOA para 12 p 8.
[39] Respondent's HOA para 12 p 8.

disproportionate'.[40] Ultimately, the respondent seeks to import wholesale the reasoning of the Canadian Constitutional Court and thereby avoid the rigour of interpreting and applying the relevant provisions of the South African Constitution in its context. Because the respondent avoids the required analysis, it dismissed foreign case law that does accord with its own views[41]

THE CONSTITUTIONAL CONTEXT AND FOREIGN LAW

General

18. With the adoption of the Interim Constitution in 1993, South Africa turned its back on a society characterised by suffering and injustice and pursued a new order founded on the recognition of human rights. Those rights are now enshrined in the Constitution. As the disputes in this case evidence, however, there may be conflicting views of the content of the protection or entitlement provided for under particular provisions. In addition, the matter triggers a need to engage in a balance between rights, and to engage in an appropriate limitations analysis.

[40] Respondent's HOA para 67 p 33.
[41] Respondent's HOA para 54 p 28 and further.

19. This court is called upon to analyse the various rights and freedoms relied upon and to determine their purpose by reference to the character and the larger objects of the Bill of Rights, the language chosen to express them, their historical origins and their inter-relation so as to not give these rights legalistic meaning, but rather meaning aimed at fulfilling the purpose of the rights and at securing appropriate benefits under the Bill of Rights.[42]

20. The dispute, concerned as it is with the claimed entitlement to seek medical assistance to end one's own life, requires the court to strike the delicate balance between the right to life,[43] the right to respect for and protection of dignity,[44] the right to security in and control of one's body,[45] and the right to equality before the law and equal protection of the law.[46]

21. In engaging in this exercise, the court may be guided by foreign and international law.

21.1. The Constitution explicitly authorises courts to consider foreign law when interpreting the Bill of Rights,[47] and the CC has intimated that foreign

[42] *S v Makwanyane* 1995 (3) SA 391 (CC) ('***Makwanyane***') at para 9.
[43] Constitution s 11.
[44] Constitution s 10.
[45] Constitution s 12(2)(*b*).
[46] Constitution s 9.
[47] Constitution s 39(1)(*c*).

constitutional law will be a useful point of departure in instances where no local constitutional principles have emerged as yet.[48]

21.2. The interpretation of foreign constitutions with a content different from our own cannot dictate the adoption of principles that are inconsistent with the rights and values enshrined in the South African Constitution, against which all law must be tested for validity. Recognising the constitutional similarities and differences between particular foreign jurisdictions and South Africa is an important part of determining the usefulness of case precedent to the present analysis. For this reason, the court must be satisfied that foreign precedent on which reliance is placed is appropriate, in the sense that the constitutional context in which the precedent arises is comparable.[49]

21.3. Of course, it is trite that foreign law is not binding in any sense, and that it merely to be used to keep the judicial mind open to a variety of ideas, arguments and solutions. Ultimately judgment must depend on the proper interpretation of the South African Bill of Rights in its context. As Annemarie Strohwald ('**Strohwald**') explains in her thesis, *'Dignity in Death: A critical analysis of whether the right to human dignity serves as*

[48] *Mistry v Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC) para 3.
[49] *Ferreira v Levin* 1996 (1) SA 984 (CC) at para 175*ff*.

appropriate justification for the legalisation of assisted death',[50] *'Whether or not assisted death would be justifiable based on the right to human dignity will depend in part of the role that the right to human dignity plays in that specific jurisdiction's constitution and legislation. It is therefore important to take account that the legalisation of assisted death is case sensitive - meaning that one cannot simply apply the policy of one country directly to another. The specific legislation, public policy and conditions of the specific country will be vital to determining how assisted death can be legalised. It is therefore necessary to examine the role of human dignity in the South African context'*. Wholesale importation of foreign precedent simply cannot withstand scrutiny.

21.4. In these circumstances it is of no assistance to the respondent to place reliance on the fact that active voluntary euthanasia is '*not unlawful'* in 12 '*foreign countries/states'* (including amongst the number some states within the United States of America).[51] Counting the number of states or countries in which voluntary active euthanasia has been legalised, without presenting an analysis of what makes the constitutional and historical context applicable to South Africa, cannot add to the debate. Furthermore, it is wholly inappropriate to argue this matter by seeking to convince the court that voluntary active euthanasia should be permitted simply because

[50] Research project presented in partial fulfilment of the requirements for the degree of Master of Laws at Stellenbosch University, January 2014.
[51] Respondent's HOA para 36 p 20.

the analysis of a Canadian court in the context of that jurisdiction came to the conclusion that such permission was appropriate there.

22. In this regard, CFJ offers the following observations:

22.1. The CC has acknowledged the relevance of German jurisprudence to the interpretation of the core values of human dignity, equality and freedom. In *Du Plessis v De Klerk*[52] Ackerman J pointed out that the '*German Basic Law was conceived in dire circumstances bearing sufficient resemblance to our own to make critical study and cautious application of its lessons to our situation and Constitution warranted. The GBL was no less a powerful response to totalitarianism, the degradation of human dignity and the denial of freedom and equality than our Constitution'*.[53]

22.2. The constitutional court of Germany considers human dignity as the highest constitutional value,[54] but authors have warned human dignity is not a '*magic wand'* capable of solving complex questions raised, for example, by advances in the medical sphere.[55] That recognition is appropriate in the South African context, where section 10 of the

[52] 1996 (3) SA 850 (CC)
[53] At para 92.
[54] See discussion of Botha *supra* at pp 179 - 182.
[55] Botha *supra* at p 183.

Constitution borrows from German law the notion that dignity must both be respected and protected, but which subjects it to the general limitations clause even though it occupies a special place in the new South African constitutional order. The recognition of human dignity in Germany is arguably stronger than it is in South Africa, so that greater limitation on the dignity right may be argued for in the South African context, particularly in the context of equality.

22.3. United States jurisprudence (and decision-making) is of limited value in the interpretation of South Africa's Bill of Rights, in circumstances where that country's constitution makes no reference to human dignity. In the circumstances, case law emanating from the United States cannot engage with the intersection and interrelation between the rights to life and dignity as is required in the proper interpretation of the South African Constitution. The right to life is also not unqualified in that country's constitution.

22.4. It is submitted that an appropriate jurisdiction to have regard to is Hungary. CFJ conducted extensive research on the approach to euthanasia in various jurisdictions and found the judgment of the Hungarian Constitutional Court to be the only one that engages with the intersection between life and human dignity.

The Hungarian position

22.5. Hungarian law does not recognise so-called '*active euthanasia'* - it is punishable as the crime of homicide or aid-in-dying. However, Act CLIV of 1997 on Health Care ('**Health Care Act**') recognises the right to refuse treatment (voluntary passive euthanasia). The regulation of euthanasia in the Health Care Act was considered by Hungarian Constitutional Court in its decision 22/2003 (IV 28). The petitioners cited several reasons for their position that the strict restriction on the scope of euthanasia was to be held unconstitutional. The Hungarian Constitutional Court examined the regulation of euthanasia from the perspective of the patient's right to self-determination and acknowledged that individuals may have the right to make decisions about their own death. However, that right is capable of restriction, on the basis that the state is obliged to protect life. This led the court to come to the conclusion that it is not unconstitutional to prohibit active euthanasia and to attach conditions to passive euthanasia.

22.6. As the court explained,

> 'On the other hand, the wish of a terminally ill patient to have his life ended not merely by the refusal of a life-supporting or life-saving medical intervention, but by the active aid of a physician cannot be considered from constitutional aspects

such an integral part of his right to self-determination about his life or death that could not be limited – or even completely prohibited – by the law in the interest of protecting any other fundamental right. In this case, another person becomes involved in the process as an active party, i.e. the physician attending the patient, when the patient decides to die in a manner reconcilable with his dignity. The role of the physician is not limited to performing the patient's will; he is necessarily involved – often substantially – in forming the patient's decision by informing the patient about the nature and the course of his illness, his life prospects, and the possibilities of controlling the pain and suffering resulting from the illness.'[56]

and

'the right to human dignity is only unrestrictable when manifesting itself in unity with human life ... Consequently, the right to die with dignity, in the constitutional context presented in the petitions, does not manifest itself in unity with the right to life; on the contrary: human dignity is violated by forcing a terminally ill patient to live on in a stage of life where the serious physical and mental sufferings that result from his illness, as well as the feeling of hopelessness and defencelessness cause a conflict between his life and his dignity.

It follows from the above that the constitutional questions related to ending a terminally ill patient's life in harmony with his right to human dignity are – in contrast to the constitutional questions related to capital punishment or abortion – marked by the fact that the right to human dignity does not manifest itself in inseparable unity with the right to life, but conversely: *the enforcement of either right may result in limiting the other. Therefore, it cannot be established with due ground merely by reference to the unrestrictable nature of the right to human dignity in unity with the right to life as elaborated in earlier decisions of the Constitutional Court that a terminally ill patient has an unrestrictable right to self-determination also in respect of ending his life in a manner reconcilable with human dignity.*'[57]

[56] Para 7 p 19.
[57] At V para 1 p 34. Emphasis supplied.

23. Importantly, the court came to the conclusion that the desire of a terminally ill patient to have his death induced by a physician, for example, by supplying or administering an appropriate substance is beyond that part of the patient's right to self-determination that is unrestrictable, both in part or in whole, by the law, as in such cases, death is actively induced by another person, *i.e.* the physician. Therefore, so held the court, *'the possibility of a physician actively inducing the death of a terminally ill patient at the patient's request cannot be deduced from the general right to self-determination enjoyed by all patients'*. Importantly, the Hungarian court came to the conclusion that:

> 'in view of the significant differences between dispensing with an intervention necessary for sustaining the life of a terminally ill patient and actively inducing with the aid of a physician the death of such a patient, the fact that the former act is allowed by the law does not impose a constitutional obligation on the legislature to allow the latter one as well.'

24. That position is also consistent with the one applied under the European Convention for Human Rights, where it is expressly stated that no right to die or not to live exists.[58] In *Pretty v United Kingdom*[59] it was held that the ECHR does not grant a right to assisted suicide and that the state may have a positive obligation to ensure the protection of an individual whose life is at risk.[60] The

[58] ECHR Article 2.
[59] *Pretty v. United Kingdom* (2002) 35 E.H.R.R. 1.
[60] *Id.* at § 38.

judgment is dealt with in the heads for the HPCSA and the analysis there offered does not require repetition.

Conclusion

25. The Hungarian case law is useful because of the similarities with South African protections and the structure of the analysis. Nonetheless, CFJ submits that the conclusions of this court must be informed by the South African situation. This requires analysis of the relevant provisions of our Constitution and reliance on foreign analysis only where it is appropriate.

SOCIETY AND THE PROTECTION OF INDIVIDUAL RIGHTS

26. In the assisted death debate, patients rely on their right to human dignity to indicate that their illness affects their independence and autonomy in such a way that they no longer possess dignity. They say that their sense of self is affected by their circumstances in such a way that they feel they are living an undignified life - in other words, reliance is placed on their subjective experience of their own worth as individuals. The argument is therefore made that the way to

achieve dignity in death is to maintain some manner of control over the life that one has led by being able to make autonomous choices relating to death.

27. Equally, in the judgment *a quo* it was considered that the subjective content given to the dignity right by Mr Stransham-Ford in his application was to be upheld, and that it would have inappropriate to evaluate his claims objectively.[61] The court *a quo* relied on the right to the subjectively understood right to dignity to grant Mr Stransham-Ford the right to end his own life with the assistance of a medical practitioner. But, as Henk Botha explains in an article entitled '*Human Dignity in Comparative Perspective'*,[62] *'dignity is a contested concept'* and there is '*disagreement over the scope and meaning of dignity, its philosophical foundations, and its capacity to guide the interpretation of human rights and constrain judicial decision-making'*.[63] As this case illustrates, dignity '*has such a wide range of meanings that it can be invoked in defence of multiple, often directly conflicting, outcomes and presuppositions'*,[64] and the CC '*has given dignity both a content and a scope that make for a piece of jurisprudential Legoland - to be used in whatever form and shape is required by the demands of the judicial designer*'.[65]

[61] Judgment Vol 6 p 879 *l* 5 - 881 *l* 9.
[62] H Botha 'Human Dignity in Comparative Perspective' *Stell LR* 2009 2 171.
[63] At p 171, see also pp 182 - 183.
[64] At 172,
[65] D Davis 'Equality: The Majesty of Legoland Jurisprudence' 1999 *SALJ* 398 at 413, cited by Botha *supra*.

28. The debate on the content of the human dignity right is a particularly complex one, and the dismissive approach of the court below to submissions on societal interests informing the interpretation of fundamental rights is inconsistent with the case law of the CC, including *Khumalo v Holomisa*[66] which explicitly recognises the interrelation of societal interests with the the dignity right.[67]

29. The judgment in *SAPS v Solidarity obo Barnard*[68] is infused with the recognition that the subjective experience and understanding of the human dignity right is not determinative. Societal interests - in that case the interest in the promotion of equality through affirmative action measures - may be relied upon to curtail the subjective understanding of the dignity right. In a minority judgment, Justice Van der Westhuizen dealt particularly with the understanding of the dignity right[69] in the context of a recognition that it might yet come into competition with other fundamental rights.[70] He made the point that '*an exceedingly narrow and subjective view of dignity by overly focusing on how a litigant felt about an impugned law or conduct is not, without more, appropriate in this context'* and that '*Dignity has a more objective and broader dimension'*.[71] He also observed

[66] 2002 (5) SA 401 (CC).
[67] At para 27.
[68] 2014 (6) SA 123 (CC).
[69] At para 168*ff*.
[70] See para 169.
[71] At para 170.

that '*Aspects of a person's right to dignity may sometimes have to yield to the importance of promoting the full equality our Constitution envisages*'.[72]

30. A proper analysis and understanding of these judgments leads one to the conclusion that the right to dignity may be interpreted objectively - and thus more narrowly - by reference to societal interests, or that it may appropriately be limited under s 36 of the Constitution, on the basis of a societal interest. The societal interest of foremost importance in the South African context is the protection and preservation of life (and the root of the dignity right, for it is only when life exists that we can be concerned with how to make it worth living and to prevent it from being undermined by various acts and omissions that endanger it.)

31. The right to life in the South African Constitution is textually unqualified, which distinguishes it from the protection of the right to life in jurisdictions such as the United States, Canada, Hungary and India. The constitutions of these countries and certain international instruments qualify the right to life (usually by providing that the right to life may not be deprived arbitrarily or other than in accordance with a sentence of a court of law), but the South African Constitution foresees limitation of the right to life *only* in terms of the general limitations

[72] At para 169.

clause. In *Makwanyane*[73] the unqualified nature of the right to life was used to support an argument that the right to life is given stronger protection in South Africa than in other jurisdictions and human rights instruments, even stronger than the protection afforded by the Hungarian Constitution.[74]

32. The strength of the right to life provision, coupled with a state interest in the preservation of life, the prohibition of intentional killing, protection of the integrity and ethics of the medical profession and protection of vulnerable groups from being pressured into end-of-life decisions, suggest that a simple, subjective interpretation of the dignity right to allow for voluntary active euthanasia is not appropriate. In addition, section 7(2) of the Constitution places on the state the obligation to respect, protect, promote and fulfil the rights in the Bill of Rights, including the right to life. The state must demonstrate respect for the right to life in everything that it does, and sanctioning active euthanasia evidences a failure to demonstrate such respect.

33. This more objective approach is not inconsistent with judicial interference in individual preference in, for example, in cases concerned with sexual choice.[75] Whilst recognising differing philosophical approaches, the courts have found a state interest in making certain decisions for its citizens, even though those decisions might interfere with what the individuals consider to be an appropriate

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[73] *Supra*.

[74] Supra Par [85] Our Constitution does not contain the qualification found in section 54(1) of the Hungarian Constitution, which prohibits only the *arbitrary* deprivation of life. To that extent, therefore, the right to life in section 9 of our Constitution is given greater protection than it is by the Hungarian Constitution.

[75] *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (6) BCLR 726 (W) at 751B-D; *S v M* 2004 (1) BCLR 97 (O) at paras 15 & 24.

expression of their individuality, and thus their human dignity. These judgments are an expression of the Kantian position aptly summarised by Strohwald:[76]

'To Kant the killing of another, even with the latter's consent, would be the antithesis of respecting that individual's human dignity. Kant believed suicide to be contrary to respecting human dignity as it meant treating oneself as a means to an end. For Kant, a moral law exists which serves as the guiding force of human will - it reveals what matters most and how to act accordingly. The free will that each human possesses and the autonomy that accompanies our free will, must nonetheless still adhere to the moral law. In terms of the moral law, Kant argues that no one is at another's arbitrary disposal - not even as his own disposal. This argument is founded on the belief that these actions contradict the notion that human beings are ends in themselves. This means that even though classical Kantian thought is grounded on autonomy, it does not mean that our autonomy is absolute. Autonomy can consequently only function properly in accordance with the moral law'.

34. In South Africa that moral law particularly includes the right to equality before the law. When the subjective interest in the pursuit of dignified death is invoked, the demand must be evaluated with due reference to its effect on the equality right. The court *a quo*'s failure to bring into account the limitation on the dignity right and the freedom and security of the person right that must be brought about by considerations of unequal access to (the argued for) dignity in dying, must operate against the judgment being upheld. The court's recordal that the particular individual was educated and therefore deemed to be able to make life-ending decisions carried with it an implicit reservation for the educated to assert the right to die with dignity. Such a carve-out cannot be accepted and thus, for as long as provision cannot be made for equality in the pursuit of dignified death by voluntary active euthanasia, a proper justification for the limitation

[76] *Supra* at pp 38 - 39.

on the asserted right to demand it must be found to exist. In the same vein, the risks to the weak and vulnerable could never have been left out of account in the determination that it was appropriate to develop the common law. The common law was not to be developed if an appropriate limitation militated against the development.

35. The conclusion that must be reached is that competing rights and interests must be balanced with a view to ensuring that the public interest in the orderly regulation of societal matters does not yield unnecessarily to private interests.

THE NEW EVIDENCE APPLICATION

36. CFJ has made application for the admission of an affidavit by Prof Etienne Montero ('**Prof Montero**') of Belgium. Prof Montero describes and highlights findings of his research, and expresses an opinion on his experience in the application of euthanasia legislation in Belgium, a jurisdiction where euthanasia has been legalised for a period of almost 14 years. Because euthanasia has been legalised in that jurisdiction for a significant period of time, practical experience gained from it is of use to jurisdictions where the proper approach to euthanasia is being debated, even if the circumstances in the jurisdictions are somewhat distinct.

37. As is explained fully in the application for the admission of CFJ as *amicus curiae*, it was not possible in circumstances of urgency to obtain the evidence of Prof Montero (or any other expert) when the matter initially came before the High Court. CFJ has now obtained the affidavit of Prof Montero, and it seeks to introduce the evidence contained therein, in the interests of justice, and to ensure that the Court is placed in a position to consider relevant comparative experience. CFJ agrees with the HPCSA that evidence such as that of Prof Montero ought to have been taken into account by the court *a quo* when it took its decision in a matter of fundamental importance concerning complex issues.[77]

38. It is noted that the affidavit of Prof Montero is relied upon by the HPCSA,[78] and its relevance to the debate before this court is supported by this fact. The assessment of the constitutional legitimacy of a deprivation of the right to insist on physician assisted suicide (or not) is not uncontroversial and the experience of Prof Montero has the capacity to be of assistance to this court. CFJ accordingly asks for the inclusion of the evidence, in accordance with the notice of motion.

39. CFJ asks that the evidence be considered in its entirety and accordingly it refrains from basing only particular submissions on the evidence as presented.

[77] HPCSA HOA para 10 p 6 and para 13 pp 6 - 7.
[78] HPCSA HOA para 152 p 148 and para 184 p 57.

CONCLUSION

40. CFJ moves for the admission of Prof Montero's affidavit, and for consideration of that evidence by the court. In addition, CFJ submits to this court that the position adopted by the appellants is sound and it supports the appellants in their quest to overturn the judgment of the court *a quo*.

MJ Engelbrecht

A Montzinger

Counsel for Cause for Justice

Chambers, Sandton and Cape Town

30 June 2016