IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: **531/2015**
GNP Case No.: 27401/2015

In the matter of:

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICE	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 LATE STRANSHAM-FORD, ROBERT JAMES	Respondent

and

DOCTORS FOR LIFE INTERNATIONAL NPC	*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 FOR THE AMICUS CURIAE: CENTRE FOR APPLIED LEGAL STUDIES

TABLE OF CONTENTS

I. INTRODUCTION

Background to this application

1 During April 2015 the late Robert James Stransham-Ford brought an urgent application requesting the High Court to order that a willing, qualified medical practitioner could assist him in dying and face no criminal sanctions in terms of South African law.[1] Mr Stransham-Ford, who had been diagnosed with Adenocarcinoma in 2013 and of Multiple Metastases in 2015,[2] described the progression of his terminal-illness as 'imminent intolerable and undignified suffering'.[3]

2 The High Court granted Mr Stransham-Ford's application to be assisted by a willing, qualified medical practitioner to end his life by either having the qualified medical practitioner administer the lethal agent or alternatively to administer it himself.[4] Judge Fabricius further ordered that the common law crimes of both murder and culpable homicide, in so far as they applied to physician-assisted death, were overbroad and in conflict with the Bill of Rights as they provided for an absolute prohibition that unjustifiably limited Mr Stransham-Ford's right to dignity, and freedom to bodily and psychological integrity.[5]

3 While Mr Stransham-Ford passed away without recourse to a physician-assisted, the appellants appeal the decision to prevent South African courts

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[1] Stransham-Ford, Robert James was the applicant in the *court a quo*, the North Gauteng High Court (case number 27401/2015), and in this matter before the Supreme Court of Appeal (case number 531/2015) the Estate Late Stransham-Ford, Robert James is the Respondent

[2] Supreme Court of Appeal - Record of Appeal ('Record of Appeal') page 21 para 17.1, page 23 para 18.6 and page 29 para 45.6

[3] Ibid page 28 para 26

[4] See note 4 at 26

[5] Ibid

granting applications by terminally-ill individuals to have a willing physician assist their dying, based on the possibility of *Stransham-Ford* being used as a precedent.

The Centre for Applied Legal Studies as Amicus Curiae

4 The Centre for Applied Legal Studies ("CALS') was admitted by the above Honourable Court as an *amicus curiae* on 29 March 2016.

5 CALS supports the findings of the court *a quo*, and the submissions of the respondent that being able to die with dignity is a fundamental human right encapsulating the rights to life, equality, and freedom and security of the person.

6 CALS focuses specifically on the right not to be tortured in any way[6] and the right not to be treated or punished in a cruel, inhuman or degrading way.[7]

7 CALS submits that denying a person, who is determined to be of sound mind and not influenced in her decision by other people, the right to end their life with the assistance of a willing physician, constitutes a violation of the right not to be tortured or treated in a cruel, inhuman or degrading manner.

8 The application in the court *a quo*, was in the main limited to the experience of Mr Stransham-Ford. CALS additionally brings an application to adduce evidence that was not before the court *a quo*:

[6] Constitution of the Republic of South Africa, 1996 section 12(1)(d). Hereinafter referred to as 'the Constitution'

[7] Ibid section 12(1)(e). For ease of reference the two rights are summarised as 'a right against torture'

8.1 Of three experts in their respective fields from the Netherlands and the United States of America where euthanasia and assisted dying respectively have been legalised – addressing:

8.1.1 the evolution of the Hippocratic Oath and its relevance to this matter in respect of medical ethics;

8.1.2 the nature of certain terminal illnesses where pain and discomfort cannot be adequately managed by palliative care;

8.1.3 the indistinct line between legally permissible palliative sedation and assisted dying.

8.2 Legislation in other jurisdictions which have euthanasia or assisted dying laws; and practices that have developed where there is no law in place to give effect to people's wishes in this regard, but where *de facto* there are rarely prosecutions for assisted suicide.[8]

II. APPLICATIONS TO ADDUCE EVIDENCE AND TO RESPOND TO HPCSA'S NEW EVIDENCE

9 CALS submits that under section 22 of the Supreme Court Act 59 of 1959, this Court may grant leave to a party to adduce further evidence on appeal in exceptional circumstances where it is in the interest of justice to do so and sufficient explanation has been given for the failure to lead evidence before the High Court.

[8] Supreme Court of Appeal – Record of Appeal ('Record of Appeal') 'CALS 1' page 14 para 8.

10 In *Tofa v The State*, this Court stated that the well established test for the hearing of further evidence on appeal requires that:

> "*[T]here should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial; [T]here should be a prima facie likelihood of the truth of the evidence; [T]he evidence should be materially relevant to the outcome of the trial.*"[9]

11 CALS submits that these requirements are met in this case:

11.1 The matter in the High Court was brought as one of urgency, and CALS only became aware of it through the media after it was impossible to seek leave to intervene as an *amicus curiae* and to introduce evidence there;[10]

11.2 The evidence of CALS' experts of their experience and practices in jurisdictions that have legalised assisted dying is materially relevant for this court. The evidence from an ethicist, hospice organisation, and physician describes legislation and policy in in place in other jurisdictions and speaks to their experiences of the implementation of such laws in practice; and

11.3 Such evidence was not placed before the court *a quo* by any other party.

12 Subsequent to the filing of the application to adduce evidence, the Health Professions Counsel of South Africa ("HPCSA"), the fourth appellant, filed an application to adduce new evidence. In this application, it responds directly to the evidence of CALS' experts and draws a number of contrary conclusions,

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[9] *Tofa v The State* (20133/14) [2015] ZASCA 26 Unreported (20 March 2015) at para 4

[10] Supreme Court of Appeal - Record of Appeal ('Record of Appeal') 'Application to intervene as amicus curiae: to present oral argument and adduce evidence' page 11 para 22.

which it is submitted, are not substantiated on the evidence. It also includes a number of direct and implicit attacks on the professional contribution of CALS' experts.

13 CALS submits that it has a duty to this Honourable Court to ensure that the best evidence is placed before it and submits that it is in the interest of justice that it be afforded the opportunity to defend the professional contribution of its experts in this Honourable Court.

14 It is trite in South African law that we adopt the principle of *audi alterum partum*.[11]

15 The Constitutional Court in *De Lange v Smuts NO,* said the following:

> *"Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than chance".*[12]

16 CALS submits that it has a duty to point out to the court where the HPSCA draws on conclusions not substantiated by evidence as:

> "*[t]he role of advocacy in furthering the proper administration of justice also gives rise to duties that are owed to the court, primarily a duty upon an advocate not to deceive or mislead a court himself an advocate breaches his duty to the court not only by permitting evidence to be given knowing it to be false but also by failing to speak when he knows that the court is being*

[11] See *National Treasury and Another v Kubukeli* 2016 (2) SA 507 (SCA) at 20 quoting from *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) where Corbett CJ held the "*common-law principle of natural justice [is] encapsulated in the maxim audi alterum partem."*

[12] *De Lange v Smuts NO 1998* (3) SA 785 at para 131

misled." [13]

17 CALS submits that the evidence it seeks to adduce, and its response to the new evidence of the HPCSA, is relevant to the determination of this appeal, and will be of assistance to this court. CALS submits that the interests of justice compel its admission.

III. THE RIGHTS NOT TO BE TORTURED OR TO BE TREATED IN A CRUEL, INHUMAN OR DEGRADING WAY ENCOMPASS THE RIGHT TO DIE

The Prevention and Combating of Torture Act

18 Section 12(1)(d) of the Constitution states that everyone has the right 'not to be tortured in any way' and section 12(1)(e) states that everyone has the right 'not be treated or punished in a cruel, inhuman or degrading way'.

19 In addition to the Constitutional prohibition, South Africa has enacted the Prevention and Combating of Torture of Persons Act 13 of 2013 ('the Torture Act') to fulfill its obligations in terms of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('the Convention')[14] and to give substance to section 12(1)(d) and 12(1)(e) of the Constitution by enacting enabling legislation. However, the Torture Act does not cover the field.

20 CALS submits that the degree of pain, and the debilitating and excruciating demise that often accompany terminal illnesses, can be torturous. It is CALS'

[13] *Van der Berg v General Council of the Bar of South Africa* (270/06) [2007] ZASCA 16; [2007] SCA 16 (RSA); [2007] 2 All SA 499 (SCA) at paras 16 and 17

[14] The Convention came into force in June 1987 and was ratified by South Africa in 1998

submission that the refusal to allow an individual to choose when and how to die when terminally-ill and suffering, constitutes a violation of the provisions against torture and cruel, inhuman or degrading treatment.

21 In the application Mr Stransham-Ford described his day-to-day experience of constant extreme pain; being bedridden; being unable to eat; suffering from anxiety; inability to sleep without morphine and pain killers; and having to have constant care in being bathed, getting up from bed, eating, and brushing his teeth.[15]

22 In addition to the physical pain that may be unbearable, torture also includes mental pain and suffering as a self-standing form of torture.[16] It is submitted that it amounts to severe pain and suffering when an individual is daily faced with the symptoms described by Mr Stransham-Ford of increasing levels of pain; a lack of autonomy; knowledge that there will be no recovery; the spectre of further deterioration and increased pain; dependence on others to remain clean, sanitised and free of bodily excretion, somnambulism; distress that loved ones will remember only the illness and not the individual in the prime of her life.

23 The Torture Act describes torture as:

> *'any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person -*
>
> *(a) for such purposes as to –*
>
> *(i) obtain information or a confession from him or her or any other person; or*

[15] *Record of Appeal* at page 21 para 23 and page 23 at para 28

[16] Section 3 *The Prevention and Combating of Torture of Persons Act 13 of 2013 (*'Torture Act')

(ii) punish him or her for an act he or she or any other person may have committed, is suspected of having committed or is planning to commit; or

(iii) intimidate or coerce him or her or any other person to do, or refrain from doing, anything;

(b) or for any reason based on discrimination of any kind,

when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity, but does not include pain or suffering arising from, inherent in or incidental to lawful sanctions'.[17]

24 There are four requirements that must be met for the prolonging of the terminally-ill person's death and suffering to be deemed torture under section 3 of the Torture Act:

i. An intentional act which inflicts severe pain or suffering

25 First, there must be an intentional act which inflicts severe pain or suffering (this can be physical or mental). In the case of the terminally-ill individual this can take the form of both an act or an omission or both.[18] The act in this instance is done through prolonging the death of the individual by refusing an aid-in-dying request lengthening the period of time a person endures severe pain and / or suffering.

[17] Section 3 of the Torture Act.

[18] Whilst section 3 of the Torture Act does not explicitly include torture by omission, it is implicit in the meaning of an 'act'. The reason for this is two-fold: in international law it is not disputed that an act of depriving an individual of something they require to live is still torture (this can be deprivation of food, water, sleep or sensory deprivation) (see *The Republic of Ireland v The United Kingdom* (5310/71) [1978] ECHR 1 (18 January 1978); *Malawi African Association and Others v Mauritania* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000). the second reason is that in terms of section 39(2) of the Constitution '[w]hen interpreting any legislation...every court... must promote the spirit, purport and objects of the Bill of Rights'. In promoting the spirit, purport and objects of the Bill of Rights it is undeniable that the dignity and equality of an individual who has endured torture by an omission is then doubly violated, by such torture and the law, if it is not acknowldged as such in our legislation. On the issue of omission Snyman states '[a]n omission is only punishable if there is a legal duty upon somebody to perform a certain type of active conduct' (CR Snyman *Criminal Law* (4ed, 2006) 59) this duty would be created by the Torture Act insofar as there is a negative duty on the state, police, doctors not to torture individuals and thus a positive duty on each to ensure individuals are not tortured whilst in their care.

26 The omission (or act) on the other hand exists where a legal system prohibits an individual from choosing to end the enduring severe pain and suffering she experiences, by having a willing, qualified medical assist her in dying peacefully and ensuring a dignified death.[19]

ii. Intention

27 Intention is the second definitional element of torture. There need not be direct intention in relation to bringing about the torture and thus *dolus eventualis* will suffice.[20]

28 Thus, in administering a terminally-ill individual with only enough pain medication so as to 'manage' their pain, yet allow for the prolonging of the severe pain and suffering both physically and mentally, the state must forsee that the pain medication will not 'cure' the severe pain and suffering endured by the terminally-ill individual. This amounts to the intentional prolonging of severe pain and suffering which must be classified as torture. Furthermore, by denying an individual the right to choose to die, the requirements of *dolus evantualis* are met in so far as the state can forsee that this denial will result in the terminally-ill individual being tortured.

iii. Reason for torturous conduct

[19] The use of the phrase 'dignified death' is intentional. Being afforded a concoction of specific medicines to bring about a willing individual's death is dignified, as opposed to a death where an individual is forced to take her own life by suicide through potentially very violent means is not peaceful, or safe, or appropriate in the presence of loved ones.

[20] Snyman states on the different forms of intention that 'there is not a crime of intention in respect of which for example only direct intention is required, just as there is not crime of intention requiring for example only *dolus eventualis',* as long as one of the forms of intention is proven it is sufficient. See S v *Nkombani and Another* 1963 4 SA 877 (A) 883D, S v *De Bruyn* 1968 4 SA 498 (A) and *Snyman* at 180

29 The third definitional element required is that of a reason for the torturous conduct. The reason may include 'any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity '.

30 Importantly the Torture Act describes discrimination as 'discrimination of any kind'.[21] In using the phrase 'any kind', without qualification, the Torture Act should be interpreted as having a broad meaning to include any and all forms of discrimination.

31 The category of people who would suffer as a result of the unfair discrimination is terminally ill people who wish to end their life with the assistance of a physician. The seemingly neutral position of prohibiting the right to die has a disproportionate and negative effect on this category of people. In addition, there is no justification for this discrimination.

32 It is possible, as CALS' evidence shows, to regulate the right to die without opening up space for medical practitioners and family members to terminate a patient's life without her consent.

33 If however, it is found that in applying the generous-purposive approach, that the phrase 'any kind' should not be given an expansive meaning then we submit the use of the 'any other ground' as set out in section 1 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA') defines discrimination as "any act or omission, including a policy, law, rule,

[21] Torture Act section 3

practice, condition or situation which directly or indirectly- (a) imposes burdens, obligations or disadvantage on; or (b) withholds benefits, opportunities or advantages from, any person on one or more of the prohibited grounds'.

34 Prohibited grounds in terms of PEPUDA include '(a) race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, **conscience, belief**, culture, language and birth; **or (b) any other ground where discrimination based on that other ground- (i) causes or perpetuates systemic disadvantage; (ii) undermines human dignity**; or (iii) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a ground in paragraph (a)'.[22] [Emphasis added]

iv. Instigation, consent or acquiescence of public official

35 The fourth definitional element is 'the instigation of, or with the consent or acquiescence of a public official or other person acting in an official capacity'.[23] The 'public official or person acting in an official capacity is the state, specifically, government bodies such as the Department of Health, the Department of Justice and Constitutional Development and the National Prosecuting Authority.

Cruel, Inhuman or Degrading treatment

36 In addition, even if the prolonging of a terminally-ill individual's death and suffering is not deemed as torture under the Torture Act, prohibiting the right to

[22] Section 1 PEPUDA

[23] Torture Act section 3

die should be considered to fall under the definition of cruel, inhuman or degrading treatment as set out in section 12(1)(e) of the Constitution and developed in case law.[24]

37 In *S v Williams and Others*[25] in discussing what constitutes cruel, inhuman or degrading treatment the Constitutional Court stated that:

> *'[t]he interpretation of the concepts contained in section 11(2) of the Constitution involves the making of a value judgment which "requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the ... people as expressed in its national institutions and its Constitution... our ultimate definition of these concepts must necessarily reflect our own experience and contemporary circumstances as the South African community...'*[26]

38 The court went further to hold that in determining the meaning of cruel, inhuman or degrading treatment one must look at the values which underlie our

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[24] While 'cruel, inhuman or degrading treatment' is not included in the Torture Act, it is referred to in the UN Convention Against Torture not only in its very title 'Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment' but also in its preamble when it states '[*h]aving regard to article 5 of the Universal Declaration of Human Rights and article 7 of the International Covenant on Civil and Political Rights, both of which provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment*' and when it states as an objective *'[d]esiring to make more effective the struggle against torture and other cruel, inhuman or degrading treatment or punishment throughout the world*'.

Furthermore, article 16 of the Convention states '1. *Each State Party shall undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture as defined in article I, when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. In particular, the obligations contained in articles 10, 11, 12 and 13 shall apply with the substitution for references to torture of references to other forms of cruel, inhuman or degrading treatment or punishment. 2. The provisions of this Convention are without prejudice to the provisions of any other international instrument or national law which prohibits cruel, inhuman or degrading treatment or punishment or which relates to extradition or expulsion.*'

It is thus undeniable that cruel, inhuman or degrading treatment is equated with torture in the Convention and should be similarly equated so in our domestic law. South Africa has ratified the Convention Against Torture.

[25] *S v Williams and Others* [1995] ZACC 6; 1995 (3) SA 632 ; 1995 (7) BCLR 861 (CC). The court in this matter dealt with cruel, inhuman or degrading punishment as it appeared in section 11(2) of the Interim Constitution Act 200 of 1993 which stated '[n]o person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment'.

[26] At paras 22

Constitution, these being dignity, equality, and human freedom as set out in section 1 of the Constitution.[27]

39 In the matter of *S v Niemand,*[28] the court made the following comment on a non-specified sentence handed to an accused:

> *'[b]ecause the legislation does not provide for a maximum period of incarceration, the habitual criminal could be detained for the rest of his/her life.* ***The mere possibility of detention for the rest of his/her life*** *for crimes which do not constitute violence or a danger to society could, in the circumstances,* ***amount to punishment which is grossly disproportionate to the offence and as such constitute cruel, inhuman or degrading punishment****.'*[29] [Emphasis added]

And furthermore:

> ***"The indeterminacy of the sentence also exacerbates the cruel, inhuman or degrading nature of the punishment on the grounds that the maximum period of incarceration remains at all times unknown to the prisoner and the period of his/her incarceration is dependent on the Executive. This is, no doubt, the cause of considerable torment****. I therefore conclude that to sentence a person to what may potentially constitute a life-long imprisonment, infringes the right of such person not to be subjected to cruel, inhuman or degrading treatment or punishment."*[30] [Emphasis added]

40 The indeterminacy experienced by an inmate who has not been informed of the duration of her incarceration and the considerable torment caused by not knowing when this incarceration will end can be comparable to the individual

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[27] At para 37

[28] *S v Niemand* 2002 (1) SA 21 (CC)

[29] At para 19

[30] At para 26

who is terminally-ill and experiencing severe pain and suffering being unable to know, or more importantly, to choose when she will die and having to be restricted to being in a bed (similar to a cell) and furthermore having to bare prolonged severe pain and suffering. This type of suffering and torment is arguably worse than that of a convicted prisoner serving a sentence, and ought to be considered to be defined as cruel, inhuman or degrading treatment.

International Law and Foreign Jurisprudence

41 In the matter of *S v Williams* the court stated that 'there is no disputing that valuable insights may be gained from the manner in which concepts are dealt with in public international law as well as in foreign case law.'[31] This echoes section 39(1)(c) of the Constitution which states '[w]hen interpreting the Bill of Rights, a court ... must consider international law; and may consider foreign law'.

42 Torture and the right not to be treated in a cruel, inhuman or degrading way, can take the form of a deprivation of a need that an individual requires for normal healthy functioning as a human being and without which, the result will be torture or cruel, inhuman or degrading treatment. Sleep deprivation, sensory deprivation and deprivation of medication / medical assistance are examples of such deprivation.

43 In *The Republic of Ireland v The United Kingdom*[32] the European Court of

[31] See *Williams*, at paras 22 – 23

[32] *The Republic of Ireland v The United Kingdom* (5310/71) [1978] ECHR 1 (18 January 1978). The British Government received threats and acts of terrorism by members of the Irish Republican Army (IRA). The British Government introduced special powers of arrest and detention without trial.

Human Rights considered whether the 'five techniques'[33] used by the United Kingdom amounted to torture or inhuman and degrading treatment in terms of Article 3 of the European Convention on Human Rights ('the European Convention').[34] Four of the five techniques involved in the interrogation procedures relied on deprivation, these were: hooding, subjection to noise, sleep deprivation, and deprivation of food and drink.[35]

44 The court in this instance found that the 'five techniques' amounted to inhuman and degrading treatment in terms of Article 3 of the European Convention.[36]

45 In the matter of *Malawi African Association and Others v Mauritania,*[37] the African Commission on Human and Peoples' Rights found that where detainees were denied the opportunity to sleep it constituted a breach of *Article 5 of African Charter on Human and Peoples' Rights, which states 'Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or*

[33] The 'five techniques' included – (a) wall-standing: forcing the detainees to remain for periods of some hours in a 'stress position', described by those who underwent it as being ' spread-eagled against the wall, with their fingers put high above the head against the wall, the legs spread apart and the feet back, causing them to stand on their toes with the weight of the body mainly on the fingers';

(b) hooding: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation;

(c) subjection to noise: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise;

(d) deprivation of sleep: pending their interrogations, depriving the detainees of sleep;

(e) deprivation of food and drink: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations. Ibid 96.

[34] Article 3 states '[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

[35] At para 96

[36] At para 159

[37] *Malawi African Association and Others v Mauritania* Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000)

degrading punishment and treatment shall be prohibited'.[38]

46 The United Nations Special Rapporteur on Torture and other Cruel, Inhuman or degrading Treatment or Punishment has emphasised that everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.[39] The Rapporteur considered the capacity of the patient and the ability of persons to consent, and observed that informed consent is not simple acceptance of a medical intervention, but a voluntary and sufficiently informed decision.[40]

47 The Rapporteur has held that informed consent is a fundamental feature of respecting an individual's autonomy, self-determination and human dignity in an appropriate continuum of voluntary health-care services,[41] and has also recognized that medical treatments of an intrusive and irreversible nature, when lacking a therapeutic purpose, may constitute torture or ill-treatment when enforced or administered without the free and informed consent of the person concerned.[42]

48 Torture, as the most serious violation of the human right to personal integrity and dignity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person.[43] It is respectfully submitted that this situation prevails where a terminally ill patient is deprived legally from choosing

[38] Ibid 115

[39] Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment, Juan Ernesto Mendez A/70/303 page 7, para 28. Hereinafter referred to as ("*Report of the Special Rapporteur")*

[40] Ibid

[41] *Report of the Special Rapporteur* at para 18

[42] *Report of the Special Rapporteur* at para 32

[43] *Report of the Special Rapporteur* at para. 50

to end their own life with dignity.

IV. PROHIBITION OF TORTURE A PEREMPTORY NORM

49 In *National Commissioner of South African Police Service v Southern African Human Rights Litigation Centre and Another,*[44] the above honourable court stated that:

> *[t]orture, even if not committed on the scale of crimes against humanity, is regarded as a crime which threatens "the good order not only of particular states but of the international community as a whole". **Coupled with treaty obligations, the ban on torture has the customary international status of a peremptory norm from which no derogation is possible**."*[45] [Emphasis added]

50 The ban on torture as a peremptory norm and the fact that there is absolutely no derogation possible was supported by the Constitutional Court in the matter of *S v Williams*[46] when it stated that:

> *[i]t is clear that when the words of section 11(2) of the Constitution are read disjunctively, as they should be, the provision refers to seven distinct modes of conduct, namely: torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment or degrading punishment. In common with many of the rights entrenched in the Constitution, the wording of this section conforms to a large extent with most international human rights instruments. Generally, the right is guaranteed in absolute, non-derogable and unqualified terms; justification in those instances is not possible.*[47]

51 In the event that the court finds that a prohibition against a terminally-ill patient being afforded the opportunity to choose aid-in-dying constitutes torture or

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[44] Comissioner of *South African Police Service v Southern African Human Rights Litigation Centre and Another* [2014] ZACC 30

[45] Ibid 35

[46] See *Williams at* para 22

[47] See *Williams* at paras 20 – 21

alternatively, treatment which is cruel, inhuman or degrading, it is respectfully submitted that a court then has no choice but to find such prohibition unlawful and unconstitutional, on the basis that the prohibition against torture is a peremptory norm and not justifiable.

V. CONCLUSION

52 In addition to the findings of the court *a quo*, and the arguments of the respondent in the appeal, we submit that denying a terminally-ill person of sound mind and without undue pressure, the autonomy to choose to end their life in dignity with the assistance of a physician, amounts to torture, and or cruel, inhuman and degrading treatment.

53 We respectfully submit that the appeal ought to be dismissed.

HAMILTON MAENETJE SC
GINA SNYMAN

Counsel for Amicus Curiae: CALS
Johannesburg
30 June 2016

TABLE OF AUTHORTIES

South Africa

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UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment Adopted by the General Assembly of the United Nations on 10 December 1984

European Convention on Human Rights entered into force on 3 September 1953

Jurisprudence of Regional Bodies

Malawi African Association and Others v Mauritania Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000)

The Republic of Ireland v The United Kingdom (5310/71) [1978] ECHR 1

IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

SCA CASE NO: **531/2015**
GNP Case No.: 27401/2015

In the matter of:

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICE	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 LATE STRANSHAM-FORD, ROBERT JAMES	Respondent

and

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

PRACTICE NOTE: AMICUS CURIAE: CALS

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1. **Nature of appeal**

We agree with the Respondent's counsel on the nature of the appeal.

2. Issues on appeal

In addition to legal argument, the Centre for Applied Legal Studies seeks leave to adduce evidence, and to respond to application of the Fourth Appellant to adduce new evidence.

3. Estimated duration of argument

1 hour

4. Parts of the record, which in Counsels' opinion, are necessary for the determination of the appeal

We agree with the Fourth Appellant and the Respondent's counsel.
In addition we refer the court to:

- CALS' application to adduce evidence
- CALS' application to respond to the application of the Fourth Respondent to adduce new evidence

5. Summary of argument

We submit that denying a terminally-ill person of sound mind and without undue pressure, the autonomy to choose to end their life in dignity with the assistance of a physician, amounts to torture, and or cruel, inhuman and degrading treatment, which is impermissible under the Constitution and international law.

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JUSTICE ALLIANCE	*Amicus Curiae*

CERTIFICATE IN TERMS OF RULE 10A(b)

We hereby certify that the *amicus curiae:* Centre for Applied Legal Studies has complied with the provisions of Rule 10 and Rule 10A(a) of the Rules of the above honourable court.

HAMILTON MAENETJE SC

GINA SNYMAN

Counsel for Amicus Curiae: CALS
Johannesburg
30 June 2016