

## **Law and human dignity at odds over assisted suicide**

By Rinie Steinmann

Respect for and protection of each individual's inherent human dignity as envisaged by s 10 of the Constitution is a foundational principle in our law. It has, therefore, come as no surprise that Fabricius J recently found in *Stransham-Ford v Minister of Justice and Correctional Services and Others* 2015 (4) SA 50 (GP) that the common law sanction against assisted suicide, infringes the right to human dignity of patients who find themselves in a state of constant, unbearable pain as a result of a terminal illness. This brave and ground-breaking judgment may be the first step in paving the way for the legalisation of assisted suicide in our law.

### **Background**

In April Robert James Stransham-Ford, who suffered from phase 4 prostate cancer and was left with but a few weeks to live, approached the court for an urgent order to direct a medical practitioner to lawfully end his life by the administration of a lethal agent. Mr Stransham-Ford relied, *inter alia*, on s 39 of the Constitution (the 'interpretation clause'); s 10 (human dignity) and s 12 (freedom and security of the person) and the provisions of a living will that he executed previously. The four respondents, being the Minister of Justice and Correctional Services, the Minister of Health, the Health Professional Council of South Africa and the National Director of Public Prosecution, collectively argued that Mr Stransham-Ford's human dignity was not compromised as a result of his illness, that his experience of pain was not only subjective but a natural process of life and that the state's duty to uphold life, trumps any purported undignified suffering and resulting death (at para 21).

Fabricius J granted the urgent application on 30 April, without knowing that the applicant had died peacefully some two hours earlier, and reasons for the judgment were delivered on 4 May, when the respondents presented oral argument for annulment of the order, as the applicant died prematurely and, therefore, no personal rights vested resulting from the ruling. Although the court was faced with the unique situation that the judgment was not enforceable, Fabricius J held that it was not moot because the ruling is based on development of the common law regarding legalisation of assisted suicide as a cause of action and, therefore, the judgment would not be rescinded (Jeanne-Marié Versluis 'Genadedood: Bevel leef voort' *Beeld* 5-5-2015 at 7). The respondents subsequently filed an application for leave to appeal against the judgment to the Supreme Court of Appeal (SCA).

### **Legal aspects of human dignity**

In South African constitutional law, human dignity functions both as a value (ss 1(a) and 39(1)(a)) and as a human right (s 10). These constitutional injunctions played a foundational role in the court's reasoning in the *Stranham-Ford* matter that to experience unbearable pain and suffering as a result of a terminal illness, and not being able to request assisted suicide, result in an infringement of dignity as a value and a right. Therefore, it is applicable to discuss the root meaning of human dignity and how it manifests in legalised assisted suicide.

Human dignity, in its most basic form, refers to an inherent attribute of humanity that every human being possesses, in equal measure. The universal idea that everybody has inherent human dignity is, in essence, the very antithesis of the concept of *dignitas* in private law, which is rooted in the idea that dignity refers to a person's status in society as applied in Roman law. In the aftermath of the Second World War and its atrocities, the *Universal Declaration of Human Rights* (1948) proclaims in its preamble and art 1 that each individual has inherent and equal human dignity. Thereafter, the notion of inherent human dignity was received in many international documents and national constitutions.

In constitutional use, three basic elements of the concept have crystallised and form part and parcel of the generic legal concept of human dignity and are applied as such across jurisdictions. They are:

- the ontological element, which holds that each individual has inherent human dignity;
- the relational claim that refers to the idea that each individual is entitled to recognition and respect of his inherent dignity, with regards to types of treatment by others that are inconsistent with a dignified existence; and
- the requirement that a state is progressively obliged to provide minimum living conditions for its inhabitants in the context of socio-economic rights.

(C McCrudden 'Human Dignity and Judicial Interpretation of Human Rights' (2008) 19.4 *European Journal of International Law* at 679.) These elements refer to the totality of what it means to be a human being and embody the value of human dignity in constitutional context.

The three basic elements as referred to above have not been specifically identified by the judges of the Constitutional Court (CC), but have been consistently applied in their rulings, as is evidenced by the *dictum* of O'Regan J in *S v Makwanyane and Another* 1995 (3) SA 391 at para 328:

'The importance of dignity as a founding value of the new Constitution cannot be overemphasised. Recognising a right to dignity is the acknowledgement of the intrinsic worth of human beings: Human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched... '

The basic elements of human dignity are embodied in s 10 of the Constitution, which proclaims that:

‘Everyone has inherent human dignity and the right to have their dignity respected and protected.’

Section 7(2) amplifies this instruction by mandating that the state must ‘respect, protect promote and fulfil the rights in the Bill of Rights.’ Former CC judge, Laurie Ackermann, explains that the first component of s 10, which refers to the ontological element, is enacted as an imperative based on a preconceived aspect of humanity that is inherent in everybody (Laurie Ackermann *Human Dignity: Lodestar for Equality in South Africa* 1ed (Cape Town: Juta 2012) at 95). As such, the ontological element is not subject to limitation and balancing in terms of s 36, whereas the right to respect and protection of dignity, as all other constitutional rights, is subject to limitation.

The right to dignity forms the basis of the remaining constitutional rights (*Makwanyane* at para 328), therefore, dignity overlaps with rights such as equality and autonomy. In cases of complimentary overlapping, the right to dignity serves to strengthen the overlapping rights. Dignity as a right can also conflict with other constitutional rights, such as with the right to life in cases of the death penalty, euthanasia and abortion. In cases of conflicting overlapping, the principles of balancing and proportionality as prescribed by s 36 of the Constitution are to be applied (Aharon Barak *Human Dignity: The Constitutional Value and the Constitutional Right* 1ed (Cambridge: Cambridge University Press 2015) at 157).

Furthermore, the judges of the CC employed dignity as a rights-generating mechanism to find constitutional rights that were not specifically included in the Bill of Rights, as a derivative (or ‘daughter-right’) from the primary ‘mother-right’, being human dignity (*Barak op cit*), such as family rights as in *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 (3) SA 936 (CC) and *Dladla and Others v City of Johannesburg Metropolitan Municipality and Another* [2014] (4) All SA 51 (GJ).

### **Human dignity and assisted suicide**

The first and second elements of the concept of human dignity as discussed above are applicable to Mr Stransham-Ford’s claim that his dignity was infringed (this being not a case pertaining to socio-economic rights). Fabricius J applied the first element of s 10 that everyone has inherent dignity, as well as the second element that the state (in this instance) has to respect and protect dignity (para 12) to Mr Stransham-Ford’s claim. Contrary to the respondents’ contentions, however, the court held that the suffering endured by Mr Stransham-Ford constitutes an infringement of his right to dignity in terms of the second element, because it impacted on his quality of life (para 14). The court conceptualised the idea of undignified suffering by holding, at para 15, ‘that there is no dignity in:

- 15.1 Having severe pain all over one's body;
- 15.2 being dulled with opioid medication;
- 15.3 being unaware of your surroundings and loved ones;
- 15.4 being confused and dissociative;
- 15.5 being unable to care for one's own hygiene;
- 15.6 dying in a hospital or hospice away from the familiarity of one's own home;
- 15.7 dying, at any moment, in a dissociative state unaware of one's loved ones being there to say good bye'.

Mr Stransham-Ford's right to dignity forms the basis of and overlaps with the right to freedom and security of the person (s 12). This right underscores the common law principle, which endorses a patient's autonomous decisions in the framework of informed consent to choose or refuse treatment. Fabricius J held that a person's decision on when to end life is a manifestation of their own sense of dignity and personal integrity (para 18). Yet a directive to hasten death is not acknowledged in terms of the common law, in light of the state's obligations to guarantee life in terms of s 11. Consequently, the anomalous position arises that not only may an expectant mother terminate her pregnancy under the provisions of the Choice of Termination of Pregnancy Act 92 of 1996, but capital punishment is an unconstitutional and unjustifiable limitation on the right to life. In the abortion cases, the mother's right to bodily and physical integrity trumps the right to life. However, dignity as the basis of fundamental rights is mutually supportive of the right to life, and not mutually exclusive. In this respect Fabricius J (para 12) referred to the *dictum* of O'Regan J in *Makwanyane* at para 326:

'The right to life, thus understood, incorporates the right to dignity. So the rights to dignity and to life are entwined. The right to life is more than existence, it is a right to be treated as a human being with dignity: Without dignity, human life is substantially diminished. Without life, there cannot be dignity.'

The court did not specifically deal with the conflict between the rights to dignity and the state's duty to protect life, but held that the current constitutional framework with its emphasis on the value of human dignity (among others) supports euthanasia (para 14). Although the court did not formulate a daughter 'right to die' as a derivative of the 'mother-right' to human dignity (in the absence of legislation that regulates euthanasia) Fabricius J gave effect to a 'once-off' development of the common law in accordance with the injunction of s 39(2) that courts must develop the common law to reflect the principles and values of the Constitution. This decision is in accordance with the maxim *iudicis est ius dicere non dare* (it is the task of a judge to interpret the law not to make it).

## **Conclusion**

A terminally ill patient has inherent human dignity as posited by the first component of s 10 being a preconceived value of humanity. The second component of this section provides that such a patient's dignity is to be respected and protected by everyone, including the state, by allowing the patient to choose the mechanism of assisted suicide. Dignity is infringed when a terminally ill patient cannot choose to have his life terminated as a result of the indignity of his suffering. It is hoped that the Supreme Court of Appeal (or CC if applicable) would develop the common law to endorse the right to die with dignity as a derivative of the mother right to dignity and direct Parliament to regulate this right through legislation. In the interim, attorneys are advised to discuss the possibility of executing living wills, and their prospective legal effect, with their clients.

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