

**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*

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**CALS APPLICATION TO RESPOND TO NEW  
EVIDENCE OF FOURTH APPELLANT**

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I, the undersigned,

**SHEENA JUSTINE SWEMMER**

do hereby state under oath that:

1. I am an adult female attorney, practising at the Centre for Applied Legal Studies ("CALS"), situated at 1 Jan Smuts Avenue, Braamfontein. I am duly authorised to depose to this affidavit and to institute this application on behalf of CALS., the applicant for the admission of the reply to the evidence adduced by the Fourth Appellant.
2. Except where the context indicates otherwise, the facts contained in this affidavit are within my personal knowledge. To the best of my belief, they are both true and correct.
3. On 26 February 2016, CALS applied to the above Honourable Court to be admitted as an *amicus curiae* and to adduce evidence in the above appeal. On 29 March 2016 the above Honourable court admitted CALS as an *amicus curiae*, with the decision to admit CALS' evidence to be determined by the court hearing the matter.
4. On 6 May 2016 CALS received the Fourth Appellant's ("HPCSA's") application to adduce new evidence.
5. This is an application to the above honourable court in its discretion, to permit CALS to respond to the HPSCA's new evidence.

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## THE HPCSA NEW EVIDENCE

6. In its application to adduce evidence before this honourable court, CALS submitted three affidavits of Prof Suzanne van der Vathorst, Ann Jackson and Dr Peter Reagan, experts on the subject matter of euthanasia and physician-assisted dying respectively from the Netherlands and the United States of America.
7. The HPCSA in its application to adduce new evidence relies on various statistics and opinions provided by its experts, which differ considerably from the opinions, interpretations of statistics, and conclusions drawn by CALS' experts. It is submitted that a number of these opinions relied upon by the HPCSA are not substantiated by reputable resources or best available empirical research.
8. The HPCSA's application further contains a number of direct allegations against CALS' experts of misleading the court, in addition to a number of implicit attacks against their professional reputations and expertise, including:
  - 8.1. On page 75 at paragraph 294 of the HPCSA's application, Professor Letticia Mmaselodi Moja, Chairperson of the Medical and Dental Professions Board of the Fourth Appellant, in summarising the evidence that Professor Boer deposed to states, *'[i]n this regard, the expert for the Centre for CALS (sic) on the Netherlands, Dr Susan (sic) van der Vathorst fails to disclose to the SCA the sharp increase in the amount of*

*Alan* <sup>3</sup>SSS

*persons dying by euthanasia in the Netherlands in the last five years. This is puzzling, or rather unacceptable, since these statistics are available and Van der Vathorst makes use of them but arbitrarily stops at 2010'.*

8.2. On pages 75 to 76 at paragraphs 298 to 300 of the HPCSA's application, Prof Moja states that *'[i]t is also evident that there is not only an expansion of the categories of persons requesting physician assisted suicide under the Netherlands and Oregon laws, there is no real control of abuse. In paragraph 25 of her affidavit, Ann Jackson makes the extraordinary claim that in the 18 years in which 'it has been legal for terminally ill, mentally competent adults to have an assisted death... there have been no cases of abuse'.*

8.3. On page 323 at paragraph 1.4 of the HPCSA's application, Dr Kenneth Stevens after sketching the case of Michael Freeland, a young individual diagnosed with terminal lung cancer who was prescribed with barbiturates to bring about his death, states that *'[t]he assisted suicide doctor did nothing to care for his pain and his palliative care needs, but did offer to sit with him while he took the overdose. Prior to his discharge from the mental hospital unit, a palliative care consultant wrote that Mr Freeland probably needed attendant care at home, but providing for that additional care may be "a moot point" because he had "life-ending" medication. He was receiving poor advice and medical care because he had lethal drugs. The assisted suicide doctor's name was Peter Reagan.'*

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8.4. On page 434 at paragraph 17 of the HPCSA's application, attorney Margaret Dore uses a heading title '*The Jackson/Regan Affidavits are Materially Misleading*'.

9. Further supporting affidavits of Prof Suzanne van der Vathorst, Ann Jackson and Dr Peter Reagan are attached to this affidavit as annexures "SJS 1" to "SJS 3" respectively. In these affidavits they address the allegations against them, as well as the opinions and conclusions relied upon by the HPCSA that are not substantiated by accurate reliance on reputable resources or best available empirical research on the practice of euthanasia and medical aid-in-dying respectively in the Netherlands and the state of Oregon.

#### **THE INTERESTS OF JUSTICE FAVOUR A RESPONSE**

11. It is trite in South African law that we adopt the principle of *audi alterum partem*. The above honourable court quotes Corbett CJ when he stated that the 'common-law principle of natural justice [is] encapsulated in the maxim *audi alterum partem*'.<sup>1</sup> The principle has also been described as 'sacred' and equated with fundamental fairness.<sup>2</sup>

12. 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*

<sup>1</sup> *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) p230

<sup>2</sup> *Sachs v Minister of Justice* 1934 AD 11 at 38 and *Winter v Administrator-in-Executive Committee* 1973 (1) SA 873 (A) at 89. C Hoexter and M Olivier *The Judiciary in South Africa* 1ed (2014) at p50



*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".<sup>3</sup>*

13. The principle of *audi alterum partem* applies in all matters before a court, this would undoubtedly include matters where there is a direct or implicit attack against an individual's professional conduct. In the matter of *Khumalo and Others v Holomisa*, O'Reagan J quotes Corbett CJ in so far as he said '[t]he law does not allow the unjustified savaging of an individual's reputation'.<sup>4</sup>

14. In light of the importance of reputation as set out by our courts and in terms of the principle *audi alteram partem*, CALS' submits that the further affidavits of its experts ought to be admitted in order that they be permitted to respond to the attacks against their professional conduct and reputations.

15. In respect of the reliance placed by the HPCSA on the opinions and conclusions of its experts, where these differ substantially with those of CALS's experts, CALS submits that its duty not to mislead or misinform the court requires it to bring these instances to the attention of the court.

16. The duty not to mislead or misinform the court was referred to by Nugent J in this honourable court, when he stated that '*[a]n advocate breaches his duty to the court not only by permitting evidence to be given knowing it to be*

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<sup>3</sup> *De Lange v Smuts NO* 1998 (3) SA 785 (CC) at 131

<sup>4</sup> *Khumalo and Others v Holomisa* (CCT53/01) [2002] ZACC 12; 2002 (5) SA 401; 2002 (8) BCLR 771 at 6.

AM SJS

*false but also by failing to speak when he knows that the court is being misled.*<sup>5</sup>

17. The further affidavits which CALS seeks to have admitted are material to the conclusions relied upon by the HPCSA in its arguments before this court, and for the court's determination of the appeal.

18. It is respectfully submitted that the court in its discretion ought to permit CALS through its experts a right of response in order for the court to adjudicate upon all the facts relevant to the issues in dispute. In addition, it is submitted that the HPCSA's evidence produces special circumstances which ought to afford CALS' experts the opportunity to defend their professional reputations.

#### **CONDONATION FOR DELAY**

19. CALS seeks condonation for the delay in bringing this application.

#### ***No wilful default***

20. This application was brought as quickly as was possible and there was no wilful delay:

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<sup>5</sup> *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 17

- 20.1. The application by the HPCSA to adduce evidence is comprised of 636 pages which includes numerous expert affidavits and published articles;
- 20.2. The application required detailed consideration and further consultation, by and with CALS' experts;
- 20.3. This additionally included consultation amongst CALS' experts and the respective bodies and organisations with which they are associated;
- 20.4. This process was further lengthened by the nature of consultations with experts abroad and across different time zones.
- 20.5. In terms of time it was not possible to file the above application simultaneously with the heads of argument. The application will be filed with the court as soon as all notarised expert affidavits arrive from the US and the Netherlands.

***No Prejudice***

21. CALS submits that the application to respond will not unfairly prejudice any of the parties in the matter:
  - 21.1. There is as yet no allocated hearing date;
  - 21.2. Given the application granted by this court in favour of the HPCSA to access the respondent's medical records, it is anticipated that further pleadings and heads of argument may be filed by the HPCSA, which may include a response to this application;

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21.3. It is respectfully submitted that this application does not affect the filing of any further pleadings or amendment of heads of argument by any other party.

22. It is respectfully submitted that a proper case has been made out for condonation for delay in the filing of this application.

### CONCLUSION

23. I respectfully submit that the interests of justice favour the granting of the application to respond to the evidence of the Fourth Appellant, for the supporting affidavits attached to this application to be admitted and form part of the record for consideration in the appeal.



  
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**SHEENA JUSTINE SWEMMER**

SIGNED and SWORN to BEFORE ME at JOHANNESBURG this 05  
day of July 2016, the deponent having acknowledged that she knows and understands the contents of this affidavit, that she has no objection to taking the prescribed oath and that she considers the said oath to be binding on her conscience.

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**COMMISSIONER OF OATHS**