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By *moderator*

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URGENT

2 December 2002

The Human Rights Commission
The Chairperson: Mr Jody Kollapen
Private Bag 2700, Houghton 2041
Johannesburg
South Africa

BY HAND

CONTEMPT OF CONSTITUTIONAL COURT ORDER:
COMPLAINT AGAINST THE MEC FOR HEALTH IN MPUMALANGA:
REQUEST FOR AN URGENT INVESTIGATION

INTRODUCTION AND SUMMARY

1.The Treatment Action Campaign (TAC) is a voluntary association of individuals and organisations dedicated to ensuring access to affordable and quality treatment for all people with HIV/AIDS, to preventing and eliminating new HIV infections, and to improving the affordability and quality of health-care access for all.

2.In July 2002, the Constitutional Court ordered the Minister of Health and the provincial MECs for health to take certain very specific steps "without delay", in order to prevent the avoidable loss of the lives of infants born to women who are HIV-positive.

In summary, these steps are the following:

remove the existing restrictions on the provision of nevirapine to pregnant women, outside the existing pilot sites

permit and facilitate the use of nevirapine where, in the opinion of the medical practitioner in consultation with the medical superintendent of the facility concerned, this is medically indicated

if necessary, provide training for counsellors on the use of nevirapine for this purpose

take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine.

3. In Mpumalanga, there is continuing disregard and contempt of the order of the Constitutional Court.

4. The TAC hereby lodges a complaint against the MEC for health in Mpumalanga (the MEC), the Mpumalanga health department, the Mpumalanga provincial government, the national department of health and the Minister of Health (the Minister).

5. As will appear from this memorandum and the documents, which are attached, the TAC has attempted to obtain full information on the extent of compliance with the order of the Constitutional Court. The province has delayed inexcusably, and has produced conflicting answers on the question of what it has done. Certain of the information provided is demonstrably incorrect.

6. According to the information available to the TAC, individuals working in the public health sector in Mpumalanga are reluctant to answer requests for information, for fear of victimisation. The Commission is able to require the people concerned, to provide that information, and to protect them against victimisation if they do so.

7. We therefore request that the Commission carry out an urgent investigation, using its powers under section 10 of the Act. This investigation should, we respectfully suggest, consist of two elements:

The key people responsible, and in particular the MEC and the Minister, should be called to appear before the Commission to answer specifically what they have done to comply with each element of the order; and

The Commission should simultaneously send investigators to key sites in Mpumalanga, to obtain first-hand and reliable information from the officials concerned on what has been done and is being done "on the ground".

8. The complaint is submitted in terms of the provisions of the Human Rights Commission Act, 54 of 1994 (the Act) and, in particular, section 9 of the Act.

9. In order for the Commission to fully acquaint itself with the complaint, we now set out:

- a. The mandate of the TAC
- b. The background to the complaint - including the order of the Pretoria High Court and the interim execution order
- c. The Constitutional Court order that forms the basis of this complaint
- d. The evidence collected by the TAC and
- e. Why it is necessary for the Commission to conduct an urgent investigation.

10. We have also included a list of the contact details of individuals and organisations that can assist the Commission with its investigation. Please note that the list is by no means exhaustive.

The mandate of the Treatment Action Campaign (TAC)

11. The TAC is an association incorporated under section 21 of the Companies Act 61 of 1973 with its head office at 34 Main Road, Muizenberg, Cape Town.

12. The TAC's programme of action includes the promotion of treatment awareness and literacy, campaigning for the use of antiretroviral drugs to prevent the transmission of HIV from parent -to-child (PMTCT) and post-exposure prophylaxis for survivors of sexual assault. TAC together with COSATU, NACTU, FEDUSA, NGO's and faith based organisations is campaigning for the development and implementation of a national HIV/AIDS treatment plan in the

public and private health care sectors that effectively implements government policy on opportunistic infections and the provision of highly active antiretroviral therapy (HAART).

13. In early 2001, TAC through its legal representatives, the AIDS Law Project (ALP) made a crucial intervention in support of the Medicines and Related Substances Control Amendment Act, 90 of 1997 (the Medicines Act) which was challenged by the Pharmaceutical Manufacturers' Association of South Africa (PMA) and numerous multinational brand-name pharmaceutical companies.² Six weeks after the Pretoria High Court admitted TAC as *amicus curiae* in support of the Medicines Act, the PMA withdrew its case. It is widely recognised that TAC's intervention-which included significant local and international mobilisation-was central to the abandonment of the case.

BACKGROUND TO THE COMPLAINT

14. In 2001, the TAC, through its legal representatives, the Legal Resources Centre (LRC), brought an application to the Pretoria High Court seeking an order to compel government to provide the drug nevirapine to pregnant women and their babies, to prevent the transmission of HIV from parent to child.

PRETORIA HIGH COURT ORDER

15. On 14 December 2001 the Pretoria High Court handed down its judgment.³ Judge Botha found in favour of the TAC and declared that a "countrywide MTCT programme is an ineluctable obligation of the state."⁴

16. Judge Botha instructed the government to allow nevirapine to be prescribed where in the opinion of the doctors acting in consultation with the medical superintendent it was "medically indicated", and there was capacity. He also ordered the government to develop an effective comprehensive national programme to prevent or reduce MTCT and return with this programme for further scrutiny by the court before 31 March 2002. The Minister appealed to the Constitutional Court.

17. The TAC then applied to the Pretoria High Court for an order of execution on the parts of Judge Botha's judgment that instructed that nevirapine be made available where capacity existed, pending the appeal.

18. On 11 March 2002 the execution order was granted.⁵ Judge Botha drew attention to the fact that up to ten lives a day could be saved by the execution of Orders 1 and 2.⁶

19. The Minister unsuccessfully appealed against the Execution order in the Pretoria High Court and thereafter in the Constitutional Court.⁷

CONSTITUTIONAL COURT ORDER

20. On 5 July 2002 the Constitutional Court handed down several judgments in the TAC case and in related matters.⁸

21. In a unanimous decision the court decided that government had not met its Constitutional obligations to provide people with access to health care services in a manner that is reasonable, and takes account of pressing social needs.

22. The Constitutional Court ordered government "without delay" to:

"a) Remove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites. (Our emphasis)

b) Permit and facilitate the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled. (Our emphasis)

c) Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of nevirapine to reduce the risk of mother-to-child

transmission of HIV.

d) Take reasonable measures to extend the testing and counselling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV."9

In addition, the Constitutional Court recognised that it "is essential that there be a concerted national effort to combat the HIV/AIDS pandemic", and that it is "important that all sectors of the community ? should co-operate in the steps taken to achieve this goal." 10

23.The Constitutional Court order does not require the attending medical practitioner and/or the superintendent to request permission to prescribe nevirapine to patients. The order makes it clear that if the attending medical practitioner, acting in consultation with the medical superintendent, considers that nevirapine is medically indicated, then the hospital or clinic in question must be able to prescribe nevirapine (coupled with voluntary counselling and testing). The order is equally clear that there is no need for any doctor and/or superintendent to apply for permission from the relevant health department to prescribe nevirapine.

CONSTITUTIONAL OBLIGATIONS

24.Government has a Constitutional obligation to give effect to the right of access to health care services, as entrenched in section 27 of the Constitution. In terms of section 27(2), government has a Constitutional obligation to take reasonable legislative and other measures progressively to realise the right of everyone to have the right to access health care services, including reproductive health care.

25.The Minister of Health and the respective MECs for health have a Constitutional duty to ensure that there is compliance with the court order in all provinces. Where a province is in contempt of a court order, the Minister has a Constitutional and statutory obligation to take the necessary action to remedy that contempt. To date the national department of health has not taken any effective steps to remedy the contempt that is occurring in a number of provinces.

EVIDENCE AND TAC INVESTIGATION

26.After the Constitutional Court judgment was handed down, TAC sought to ensure that all the provinces understood the implications of the order, and that they complied with the order.

27.Ms Nonkosi Khumalo, the TACs National Women's Health Programmes Co-ordinator, was responsible for overseeing and monitoring the implementation of the court order in all the provinces and for reporting to the TAC executive on compliance with the court order.

28.Ms Khumalo's investigation revealed that three provinces in particular were not complying with the court order: Eastern Cape, Limpopo and Mpumalanga. Mpumalanga is the worst offender. The TAC is considering taking action against Limpopo and the Eastern Cape. For now our complaint is limited to the province of Mpumalanga.

29.In addition, after the Constitutional ruling, the TACs legal representative in the case, Mr Geoff Budlender of the LRC, corresponded with the Minister of Health, the Director-General (D-G) of health, and the MECs for health in the different provinces. The exchange of numerous letters confirmed what Ms Khumalo had reported to the TAC executive - that is, there is evidence of outright contempt of the Constitutional Court's order in Mpumalanga.

30.Below we set out the details of the correspondence entered into between the TAC and various state officials. In addition, we summarise the findings of the TAC investigation referred to above.

CORRESPONDENCE AND INVESTIGATION

31.The TAC investigation has revealed that the MEC, Ms Sibongile Manana, is acting in contempt of a Constitutional Court order.

32. The investigation has also revealed that the Mpumalanga health department is severely mismanaged and is probably also corrupt. The Commission may wish to refer these allegations to the special criminal investigation unit (the Scorpions) at the outset of the investigation or on completion thereof. The Star newspaper reported on corruption within the Mpumalanga health department on 28 November 2002 (copy attached). Many health officials and employees in Mpumalanga are too afraid to speak out, or to speak on the record, for fear of reprisals. This is confirmed by news reports from the African Eye News Service dated 19 September 2002 (copy attached).

33. In a letter dated 19 July 2002 (copy attached) the MEC wrote to the Chief Director of Health Services (Maureen Sithole) informing her of a directive to the effect that "all reporting from the HIV/AIDS Directorate", had to, from then on, be directed to the Head of Department (Riena Charles) and herself. This suggests that the MEC wished to maintain control of reporting processes. The letter confirms that the MEC cannot claim that she has no knowledge of the extent of non-compliance with the court order, because all reporting is directed to her office.

34. It is clear from the correspondence that the Mpumalanga health department has misrepresented the extent of the availability of nevirapine, and has failed to provide the information requested by the TAC. In particular, the MEC has failed to provide details of any action taken by the province to meet the following requirements of the court order:

Training of counselors

Making the programme known to patients

Making budgetary provision for the rollout of the PMTCT programme

Rolling out the PMTCT programme to hospitals and clinics in the province.

The TAC investigation shows that:

Outside the two originally designated formal pilot sites, Shongwe and Evander, no rollout of the PMTCT programme has taken place. Even at those sites, serious problems with implementation have emerged, occasioned by the failure to train staff on voluntary counselling and testing (VCT) as well as on the implementation of the PMTCT programme.

The MEC has misrepresented the extent of the rollout in Mpumalanga to the TAC and to the national department of health. For example, in correspondence with the Director-General of health, the MEC stated, "40 sites are receiving Nevirapine including Evander, Shongwe and Philadelphia hospitals". However, in response to questions asked by members of the Mpumalanga Provincial Legislature about which hospitals and clinics in Mpumalanga are currently prescribing nevirapine, the MEC replied: "Shongwe Hospital, Evander Hospital and Lebogang and Mbalanhle Clinic". These represent only four of the alleged forty sites.

The TAC has determined that contrary to the MEC's response to the provincial legislature, Lebogang and Mbalanhle do not have a PMTCT programme in place and have not received supplies of nevirapine.

Philadelphia Hospital uses nevirapine that was provided by the TAC. Even though Philadelphia indicated that it is ready to implement a PMTCT programme, there has been no official rollout, because the Mpumalanga health department refuses to permit Philadelphia to implement a PMTCT programme. A report by the African Eye News Service dated 19 September 2002 confirms this (copy attached).

Rob Ferreira Hospital has also not received its own supply of nevirapine. Surprisingly, the Mpumalanga government announced that Rob Ferreira has a PMTCT programme in place and that it constitutes the third designated pilot site in the province. However, we have established that at Rob Ferreira, there is no PMTCT programme in place. We should also point out that the former administrator of Rob Ferreira was dismissed in 2001 by the Mpumalanga health department. Dr von Mollendorff was dismissed for allowing volunteers to dispense free drugs and counselling to rape survivors. In this case, during 2001, the AIDS Law Project lodged a complaint with the Commission against the MEC (reference 21/2001/0500/MC).

TAC has learnt that at Themba clinic, there are no supplies of nevirapine, and they have therefore resorted to using

Shongwe's supplies of the drug. There is thus no official PMTCT programme in place at Themba.

Barberton and Tonga have no PMTCT programmes in place. The lack of access to nevirapine at Barberton was also highlighted and confirmed by a reporter from the Sowetan on 28 November 2002 (copy attached).

Philadelphia, Rob Ferreira and Witbank have applied to the relevant authorities for permission to proceed with PMTCT programmes in their respective hospitals (even though the Constitutional Court order does not require this). They were subsequently "assessed" by a task team appointed by the Mpumalanga health department. The task team resolved that all three sites did not comply "with the criteria". Ironically, Witbank is a tertiary institution that has the necessary infrastructure to immediately commence a PMTCT program. It is important to note that the superintendents at these hospitals took a decision that each of their respective hospitals was able to prescribe nevirapine and commence with a rollout of the PMTCT programme (Philadelphia is doing so with the TAC supply of drugs). It is therefore untrue that they would have "withdrawn" their applications. In any event, the Constitutional Court order does not require superintendents to apply for permission to provide nevirapine to antenatal patients. The order makes it clear that this decision is to be made by the medical practitioners acting in consultation with the superintendents.

A few weeks ago it was reported by the African Eye News Service that Mpumalanga has not ordered supplies of nevirapine from the pharmaceutical company that is donating the tablets and syrup to government (Boehringer Ingelheim Pharmaceuticals). We have not been able to confirm if this is correct. However, it usually takes about four months after an order has been submitted for the drug to be delivered. Please note that we are in the process of obtaining a copy of the report. We undertake to forward a copy to your offices shortly.

According to its 'business plans' (copies attached), the Mpumalanga health department has budgeted for purchasing nevirapine. This is confusing because nevirapine tablets and syrup have been donated to the public sector (government).

As part of TACs attempts to have a co-operative relationship with the MEC, on 27 August 2002, TAC met with the MEC to discuss inter alia implementation of the PMTCT programme in Mpumalanga. The MEC undertook to arrange a follow-up meeting with TAC. To date, this has not happened.

In addition, in the course of TACs investigation, numerous allegations of misadministration, corruption and nepotism have been made against the Mpumalanga health department, in particular, against Dr Manana (the MEC) and Dr Riena Charles (Head of Department). In respect of the misuse of public funds and the MECs response these allegations, attached please find a transcript of an interview that took place on 28 November between the MEC and Radio 702.

It has come to our attention that dedicated doctors with highly specialised skills and experience have resigned (Professor Bogaert), been fired (Dr von Mollendorff) or threatened with dismissal if they criticize the Mpumalanga health department. During this time, hundreds of babies have been and are being born with HIV when this could have been prevented.

In addition, following the Star expose, on 1 December 2002, the MEC placed an advert in the City Press where she stated that:

"Hence we are ready to implement in phases, the nevirapine roll out plan early next year, 2003.

The first phase will be the roll out to all major hospitals in the Province. Namely:
Themba, Rob Ferreira, Witbank, Philadelphia, Ermelo and Standerton hospitals

The second phase will be the roll out to all remaining hospitals with more than 150 beds

The third phase will be the roll out to Community Health Centers, clinics and hospitals that have less than 150 beds."
(Emphasis in original; copy attached)

This demonstrates two things: first, the information previously provided by the province is false; and second, some four months after the order of the Constitutional Court, the province has still not complied, and at best will partially do so early next year. The MEC continues to show a fundamental misunderstanding of the Constitutional Court ruling.

URGENT INVESTIGATION

35. There is ample and clear evidence from our investigation and the correspondence, that in Mpumalanga, there is widespread contempt of the Constitutional Court's order. There is evidence of deceit and willful misrepresentation by senior health officials in Mpumalanga.

36. An urgent investigation by the Commission is therefore warranted and necessary. The lives of many unborn and newborn infants are seriously at risk. This is why the proposed investigation must be done on an expedited basis.

COPIES OF LETTERS, DOCUMENTS AND MEDIA REPORTS

37. Attached for your convenience are copies of the letters sent by TAC to the Minister, the D-G of health as well as to the MEC, in so far as compliance with the court order is concerned. We have also enclosed, where applicable, responses received by various state officials. Also attached are copies of several documents and letters. For ease of reference, we have attached news reports and interviews related to this matter. An index is also enclosed for your convenience.

38. Below is a list of individuals and organisations that should be able to assist the Commission with its investigation. In any event, we trust that the Commission will make full use of its powers under the Act to take the necessary steps to ensure that key and relevant health officials, employees and individuals, who have any information related to this complaint, are questioned and interviewed.

39. We trust that the Commission will also take the necessary legal steps to ensure that there is compliance with the Constitutional Court order.

INDIVIDUALS AND ORGANISATIONS

- i. Dr Manto Tshabala Msimang Minister of Health
- ii. Dr Ayanda Ntsuluba Director-General of Health
- iii. Dr Nono Simelela National Director HIV/AIDS and STIs
- iv. Thembanani Shambungu TAC Mpumalanga co-ordinator
083 684 1038
- v. Ms Nonkosi Khumalo TAC National Women's Health Programme Coordinator 072 231 1422
- vi. Mr Geoff Budlender Legal Resources Centre
021 481 3000
- vii. Ms Fatima Hassan AIDS Law Project 011 717 8600
- viii. Mr Teboho Kekana AIDS Law Project 011 717 8600
- ix. Dr Sibongile Manana MEC for Health in Mpumalanga
- x. Dr Charles Nkabinde Director HIV/AIDS and STIs Mpumalanga 013 766 3440
- xi. Dr Riena Charles Head of Department Mpumalanga
- xii. Ms Maureen Sithole Chief Director of Health Services Mpumalanga
- xiii. Mr Muzi Madalane VCT Co-ordinator Mpumalanga
- xiv. Mr John Mlangeni Department of Health Spokesperson Mpumalanga
- xv. Mr L Mwale Mpumalanga Provincial Legislature
- xvi. Dr Sharon Nelson Witbank Hospital PMTCT coordinator
013 653 2374
- xvii. Dr Stefan Frerich Witbank Hospital Pediatrics
013 653 2218
- xviii. Professor Bogaert (in Holland) formerly Philadelphia Hospital BOGAERTJ@diacmeppel.nl
- xix. Dr Fikile Sithole Philadelphia Hospital, Gynecology

- xx.Superintendents: Of each hospital and clinic
- xxi.Head Matron: Of each hospital and clinic
- xxii.Sister Aneece Salya Barberton St Johns AIDS Care Centre
- xxiii.Sister Marie Snyman Umjindi Municipal Council Clinic
- xxiv.Mr John Dutton Special Investigative Unit (medicines theft) 083 703 1737
- xxv.'Rila' Women in Need - NGO in Barberton 083 476 6774
- xxvi.Charlotte Mtetwa AIDS Orphans Home 013 796 0377
- xxvii.Boehringer Ingelheim Pharmaceuticals (BI)
- xxviii.The CEOs of a cluster of hospitals in Mpumalanga:
Dr Mokola: CEO for Themba, Rob Ferreira and Bongani 083 243 1470

CONCLUSION

We trust that the information provided above adequately sets out the basis of our complaint and that we have accordingly substantiated why the Commission should conduct an urgent investigation.

If the Commission requires any additional information please do not hesitate to contact Mr Geoff Budlender (LRC) on 021 481 3000 or Fatima Hassan (ALP) on 011 717 8600.

We look forward to hearing from your offices shortly.

Yours faithfully

3.Mr Mark Heywood
National Secretary - Treatment Action Campaign

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1. Letter dated 26 August 2002 from Mpumalanga Province Department of Health to Mr L Mwale, Mpumalanga Province.
 2. Letter dated 4 November 2002 from Legal Resources Centre to Dr A Ntsaluba, Director-General, Department of Health.
 3. Letter dated 4 November 2002 from Legal Resources Centre to Mr R Charles, Department of Health Mpumalanga.
 4. Letter dated 4 November 2002 from Mpumalanga Province Department of Health to Legal Resources Centre.
 5. Fax dated 28 October 2002 from Treatment Action Campaign to MEC Health, Mpumalanga.
 6. Letter dated 11 October 2002 from Legal Resources Centre to Dr R Charles.
 7. Letter dated 6 October 2002 from Legal Resources Centre to Dr A Ntsaluba.
 8. Letter dated 4 October 2002 from Director-General, Department of Health to Legal Resources Centre.
- Report by Department of Health - implementation by various provinces of individual elements of court order;
Contact details - Heads of Departments;
Media release dated 16 April 2002;
Circular minutes on prevention of mother-to-child transmission of HIV;
Contact details of members of National PMTCT task team.
9. Letter dated 4 September 2002 from Treatment Action Campaign to MEC Health, Mpumalanga Province.

10. Letter dated 30 August 2002 from Department of Health Mpumalanga Province to Nonkosi Khumalo, Treatment Action Campaign.
11. Letter dated 20 August 2002 from Department of Health Mpumalanga Province to Teboho Kekana, Treatment Action Campaign.
12. Letter dated 19 July 2002 from Department of Health Mpumalanga Province to Chief Director, Health Services.
13. 'Voluntary Counselling and Testing: Business Plan 2002/2003 (Amended Final Draft) - Department of Health HIV/AIDS & STIs Directorate.'
14. 'Prevention of Mother-to-Child Transmission of HIV/AIDS Business Plan for the year 2002/3- Mpumalanga Province.'
15. 'Mpumalanga Province Department of Health - Implementation Plan February 2002.'
16. 'No drug for Aids. so children die', Sowetan dated 26 November 2002.
17. AENS: 'Nevirapine to be widely available in Mpumalanga in four months', dated 15 August 2002.
18. AENS: 'Major hospitals finally get nevirapine', dated 20 September 2002.
19. AENS: 'AIDS Story', dated 19 September 2002.
20. 'Top ANC doc in big drug bust', City Press dated 24 November 2002.
21. Transcript of interview between the MEC and Radio 702 held on 28 November 2002.
22. Exposed, R6 AIDS Scandal, Star Newspaper, 28 November 2002.
23. Advert by the MEC, City Press, 1 December 2002.

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