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# TAC and ALP win major court victory: Pretoria High Court orders Minister to hand over report into inmate's death

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Today, the Pretoria High Court handed down judgment in the matter of Treatment Action Campaign v Minister of Correctional Services and Another (case no. 18379/2008). The judgment is available online at [www.alp.org.za](http://www.alp.org.za). In short, Justice Southwood's decision provides as follows:

- It orders the Minister of Correctional Services ("the Minister") to furnish the Treatment Action Campaign (TAC) with unedited hard and electronic copies of a report of the Judicial Inspectorate of Prisons (JIOP) into the death of an inmate ("MM") in August 2006.
- It authorises the JIOP to furnish TAC with the JIOP report into MM's death.
- It orders the Minister to pay the costs of the application, including the costs of two counsel, on an attorney and own client scale (in other words, a punitive costs order).

## **Background to the application:**

MM, an inmate at Westville Correctional Centre (WCC) and an applicant in the case that resulted in the Minister of Correctional Services and others being compelled to ensure access to antiretroviral (ARV) treatment at WCC, died in August 2006. MM's medical records showed that he was HIV positive, but had only been put on ARV treatment a few weeks before his death. According to government's own ARV treatment guidelines, MM should have been initiated on ARV treatment in November of 2003 ? some 32 months earlier.

Shortly after MM's death, the TAC ? a co-applicant in the WCC case ? requested that the JIOP conduct an investigation into MM's death and other related matters at WCC. This investigation took place and was completed in or around December 2006. According to the JIOP, its report on the investigation (?the MM report?) was sent to the Minister of Correctional Services shortly thereafter. Repeated efforts on the part of the TAC's legal representatives ? the AIDS Law Project (ALP) ? to gain access to the MM report were unsuccessful.

As there is strong evidence to suggest that MM's death was caused by the delay in accessing ARV treatment, the TAC felt compelled to invoke legal proceedings to secure a copy of the MM report. After the provisions of the Promotion of Access to Information Act, 2000 (PAIA) were exhausted, the TAC instructed the ALP to file an application on its behalf in the Pretoria High Court to compel the Minister to provide it with a copy of the report. Amongst other things, the TAC requested the court to direct the Minister to ensure that it is provided with a copy of the MM report. No order was sought against the JIOP, the second respondent in the case. The JIOP did not oppose the application and was cited only for its interest in the matter.

## **Court dismisses procedural arguments made by the Minister**

The judgment, which runs to 56 pages, sets out the background to the application in great detail. It then dismisses each of the procedural defences raised by the Minister, making the following - amongst other - key findings:

1. The TAC had standing to bring the application.
2. The MM report was not sought for the purposes of existing civil or criminal proceedings.
3. Other than the requirement to bring the application within 30 days after the deemed dismissal of the internal appeal, the TAC complied with all the procedural requirements of PAIA.
4. The TAC has shown good cause for filing the application more than 30 days after the deemed dismissal of the internal appeal, having explained fully why it filed its application later than ordinarily required.

### **Court condemns the conduct of the Minister and his department**

The judgment is scathing in its condemnation of the Minister's conduct, as well as the conduct of many officials within his department. For example, it does not accept the Minister's denial that he received the MM report, nor does it accept "any suggestion" that the department did not receive it and was not in possession of it. Simply put, the Court holds that the Minister's version of the MM report's whereabouts "is so far-fetched and untenable that it must be rejected."

The judgment goes even further, describing the manner in which the Minister and his department showed "complete disregard for the Constitution and PAIA":

"The papers in this case demonstrate a complete disregard by the Minister and his department of the provisions of the Constitution and PAIA which require that records be made available. There is no indication in the first respondent's papers that the Department complied with its obligations under PAIA at any stage. ... Only after proceedings were instituted did the Minister and the Department attempt to justify failure to hand over the report and then on spurious grounds. It is disturbing that the first respondent has relied on technical points which have no merit and instead of complying with its constitutional obligations has waged a war of attrition in the court. This is not what is expected of a government Minister and a state department. In my view their conduct is not only inconsistent with the Constitution and PAIA but is reprehensible. It forces the applicant to litigate at considerable expense and is a waste of public funds."  
" (paragraph 36)

The judgment also takes issue with the manner in which the Minister responded to the application. In particular, it finds as unacceptable the Minister's bald denials, unsubstantiated by any evidence:

"The failure to call the information officer, the National Commissioner, to establish the material and essential facts that the Department had not received or was not in possession of the MM report and the failure to call Ms Jacobus, its Deputy Minister, to deny that she said what was alleged in the founding affidavit, justifies an inference adverse to the first respondent that they could not establish these facts. ... Apart from failing to call the obvious witnesses to establish that the Minister and the Department never received the MM report and were not in possession of the report the Minister's attempts to establish these facts are singularly unconvincing." (paragraph 31)

### **Court rejects the Minister's arguments about privacy**

Justice Southwood holds that the disclosure of the MM report to the TAC would not amount to the unreasonable disclosure of personal information of a third party, including a deceased individual. Instead, he labels the Minister's arguments about privacy as "pure speculation", further noting that these arguments did not take into account the provisions of PAIA that permit individuals' names being blacked out to ensure that they cannot be identified. In addition, the ALP and TAC have always used the initials MM in order to protect the privacy of the deceased's family. Both organisations continue to do so.

### **Conclusion**

This judgment was delivered almost two years after the ALP and TAC first requested the Minister to provide them with a copy of the MM report. It is replete with evidence of the Minister's sheer disregard for the Constitution in general and the right of access to information - which is entrenched in section 32 - in particular. As Justice Southwood notes:

"Section 32 of the Constitution provides that everyone has the right of access to any information held by the state. One

of the objects of PAIA is to give effect to this constitutional right of access. Another of the objects is to give effect to the constitutional obligations of the state of promoting a human rights culture and social justice. A further object is to enable persons to obtain access to records of public bodies as swiftly, inexpensively and effortlessly as reasonably possible. Generally the object of PAIA is to promote transparency, accountability and effective governance of all public bodies."

Instead of enabling access to information held by the state "as swiftly, inexpensively and effortlessly as reasonably possible", the Minister and his department used every opportunity to frustrate the ALP and TAC. Both organisations were forced to devote valuable time, money and energy to ensuring that a Cabinet Minister "obey, respect and uphold the Constitution and all other law of the Republic". Other less well-resourced organisations and individuals are not able to do so.

In ordering a punitive costs order, the Court indicated its disapproval of the Minister's conduct. The President can and should go one step beyond in holding the Minister to account. We trust that he will see fit to do so.

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