Published on *Treatment Action Campaign* (http://tac.org.za/community)

Minister of Correctional Services appeals court order to release report on death of HIV positive prisoner "MM"

By *moderator*
Created *2009/03/13 - 11:47am*
13 March, 2009 - 11:47 ? moderator

The Minister of Correctional Services (DCS) has applied for leave to appeal against the decision by the Northern Gauteng High Court in the ?MM? case. This case was brought by the Treatment Action Campaign (TAC) and our attorneys, the AIDS Law Project, to be given access to the report of the Judicial Inspectorate of Prisons (JIOP) regarding the premature and unnecessary death of ?MM?. A hearing regarding the appeal will take place on Friday 13 March 2009 at the Pretoria High Court.

This case is about accountability of Minister Balfour and his Department, and the public?s right to know the causes of death of a person in their custody. It is also about the waste of scarce public finances in a time where need for ARV treatment is great.

MM was an applicant in the case of the inmates at Westville Prison (2006) who could not access ARV treatment. He was initiated onto antiretroviral therapy after the case was launched, and a full 32 months after he had initially qualified for treatment. This was uncovered by TAC in a careful study of his medical records by an independent physician. TAC then demanded that the JIOP investigate culpability for his death and the deaths of over 100 inmates at Westville Prison in 2005.

The report was completed and, according to the law, had to be submitted to Minister Balfour. He denied TAC and the ALP access to the report after countless requests and a lawful access to information request. An application was made to the High Court for the report.

In his judgment of 30 January 2009[2], Justice Brian Southwood harshly rebuked the Minister for effectively forcing TAC to litigate. In ordering the MM report to be provided to TAC, Southwood commented on the shameful manner in which Minister Balfour and his department had handled the request for the document.

He awarded punitive costs against Minister Balfour. The report was then given to TAC and the ALP. Judge Nathan Erasmus?s report is little more than an apology for the Department of Correctional Services, and failed to comply with standards of gathering independent medical evidence. Regrettably, it appears that Judge Erasmus failed to uphold the independence of the JIOP at the expense of MM and inmates who are genuinely ill and dying.

The appeal ? a right of the Minister ? is a shameful waste of public resources. TAC and ALP therefore demand that Minister Ncgonde Balfour immediately disclose the full cost of this case and the one that proceeded it the Westville access to ART still on appeal.

This is a minister who is a law unto himself. TAC will strenuously oppose the Minister.

Background to the case:

MM[1], an inmate at Westville Correctional Centre (WCC), died in August 2006. MM?s medical records showed that

he was HIV-positive, but was given access to antiretroviral treatment (ART) only a few weeks before his death. According to government?s own ART guidelines, MM should have been initiated onto treatment in November of 2003 ? a full 32 months earlier.

JIOP report and findings:

On 10 February 2009, ALP received a copy of the MM report from the JIOP. Despite being requested by TAC to ?investigate culpability in the death of ?MM??[3] and more than 100 inmates of Westville Correctional Services.

In the tradition of apartheid inquest magistrates, Inspecting Judge Nathan Erasmus relied almost exclusively on an in-house ?investigation? conducted by the DCS. Most disturbingly, there is no evidence in his report to suggest that he consulted any independent experts to evaluate the circumstances surrounding MM?s death. In considering why it took 32 months for MM to be initiated on ART, the former inspecting judge appears to have relied largely ? if not exclusively ? on explanations provided by DCS and its officials. He failed to even mention the other 100 inmates.

Justice Erasmus?s report held no one in the DCS to account. Instead, some blame is apportioned to McCords Hospital, a not-for-profit private institution that assists the state by putting public sector patients onto ART. Without providing details of evidence to support his conclusion that McCords was "supposed to treat [MM]", and regardless of the fact that the facility is not a designated public sector site, Justice Erasmus nevertheless refers to it as the "designated hospital".

Despite numerous other failings, the report concludes with four important recommendations:

- HIV/AIDS in prisons must be addressed as a matter of urgency;
- Government agencies and departments must co-operate with and assist DCS to deal with HIV/AIDS in prisons;
- Access to ARV treatment and HIV testing services in prisons must be promoted as a matter of urgency;
- Medical parole provisions are not working and should be revisited.

TAC and the ALP welcome such recommendations and demand that they be taken into consideration by the DCS.

DCS Appeal:

Minister Balfour has applied for leave to appeal against Justice Southwood?s judgment and order. If leave to appeal is granted, the matter will not be argued until after the 22 April 2009 elections. By then, the current Minister ? against whom findings were made in his official capacity ? will likely be out of office. Furthermore, TAC and the ALP already have access to the report, which will soon be made public. Because of this, the appeal is unnecessary and a waste of public money.

Of greater concern than the appeal itself is the reality that PAIA, which is meant to give effect to the constitutional right of access to information, is frequently used by many government departments to frustrate access to information months without explanation and consequence. At most, courts may hand down a punitive costs order, as Justice Southwood did in this case. And was previously done against the former Minister of Health in the ?Annexure ?A? case?. This was an annexure to the ART roll-out plan in 2004 that was meant to contain targets and frameworks. Such delays, denials and unnecessary proceedings become the burden of the public purse. Unless and until Ministers are compelled to pay themselves, such frivolous orders will continue and will have no impact on such errant behaviour.

[1] We use the initials MM in order to protect the privacy of his family
[2] Treatment Action Campaign v Minister of Correctional Services and Another (18379/2008) [2009] ZAGPHC 10 (30 January 2009)
[3] Annexure AA2 to the founding affidavit at paragraph 1

- Westville Correctional Facility

- Westville Correctional Facility

Source URL (retrieved on *2016/12/03 - 3:44pm*): http://tac.org.za/community/node/2504