



FOR IMMEDIATE RELEASE

8 August 2012

Press Release: Public health, human rights and justice at the heart of case before the Constitutional Court

A case coming before the Constitutional Court holds serious consequences for public health and the fight against TB in South Africa. South Africa has one of the highest TB incidents in the world. TB is the leading cause of death in South Africa and has been for many years. HIV co-infection and the increasing prevalence of drug resistant TB add to the urgency of addressing the TB epidemic. Doing so should be a top priority of the state.

Prisons are especially conducive to TB transmission and detained people are at especially high risk of contracting TB. It is not possible to address TB in the general population without addressing it in the incarcerated population. Still, the Department of Correctional Services has utterly failed in its duty to prevent the spread of TB in prisons. A recent decision of the Supreme Court of Appeals (SCA) would allow this to continue without consequences for the Department.

On 6 August 2012, the Treatment Action Campaign, Centre for Applied Legal Studies, and Wits Justice Project, represented by SECTION27, were admitted as *amici curiae* (friends of the court) in the matter between Dudley Lee and the Minister of Correctional Services (Minister).

At the heart of the case are the rights to health and conditions of detention that are consistent with human dignity. The issue in the case is whether the law must be developed in order to give effect to these rights.

Dudley Lee entered Pollsmoor Prison as a healthy man in April 2000. In June 2003, he was diagnosed with TB. In September 2004—over four years after entering prison—Mr. Lee was acquitted of the charges against him and released. Mr. Lee then sued the Minister in the Western Cape High Court in Cape Town for negligently causing him to become infected with TB.

Prisoners and awaiting trial detainees are held in cells that are overcrowded, often over 200% occupancy, for up to 23 hours a day. They often go without access to health care. Because of this, prisoners and awaiting trial detainees are at an especially high risk of infection. A recent study of Pollsmoor Prison, the prison at which Dudley Lee was incarcerated, revealed that there is a 90% risk of TB transmission per annum at the prison.

The study also revealed that implementing current national cell occupancy recommendations alone would reduce transmission probabilities by 30%.¹

In the High Court, the Minister was unable to show that prison authorities took “any steps whatsoever to guard against the spread of TB”.

Mr. Lee won his case in the High Court, but lost in the SCA when the Minister appealed. The SCA agreed with the High Court that the prison authorities had been negligent by failing to take reasonable measures to prevent the spread of TB. However, it held that Mr. Lee could not prove that the Minister caused his infection. It held that Mr. Lee must either identify the “source” of his infection or show that there would have been no risk of becoming infected if the prison authorities had not been negligent.

The SCA thereby asked Mr. Lee to prove, that which is impossible to prove. Due to the limits of current diagnosis technologies and methods, it is not scientifically possible to prove the source of a TB infection in the way the SCA required. Moreover, the SCA itself found that “... whatever management strategies might be put into place, there will *always* be a risk of contagion”.

The SCA’s impossible standard creates the following results:

- Mr. Lee and many similarly situated people are left without the possibility of a remedy despite the violations of their rights;
- The prison authorities are permitted to violate the rights of prisoners and awaiting trial detainees and to neglect constitutional and statutory obligations with impunity; and
- Public health will continue to decline because of the failure to minimise TB transmission.

The Constitution requires that the law be developed to “promote the spirit, purport and objects of the Bill of Rights.” The amici curiae in this application urge the Court to fulfill this obligation by adapting the law so that, in these circumstances, causation can be established through a showing that the Minister’s negligence created a material increase of the risk that Mr. Lee would be infected. Justice requires the law to be adapted in this way in order to give effect to the rights threatened by the risk of TB transmission in prison.

TAC, WJP and CALS have entered as amici curiae in the matter to argue this point.

“A society should be judged not by how it treats its outstanding citizens but by how it treats its criminals.” – Fyodor Dostoevsky

For further comments please contact:

John Stephens: stephens@section27.org.za or 011 356 4100

Kathleen Hardy: Kathleen.Hardy@wits.ac.za or 082 556 5196

¹ *Tuberculosis in a South African prison—a transmission modelling analysis* Johnstone-Robertson *et al* (2011) 101 SAMJ

[ENDS]