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Access to Information (Annexure A) Case

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Access to Information (Anne Access

Case No: 215991/04, Transvaal High Court (2004)

1st Applicant: Treatment Action Campaign (TAC)
Vs.
1st Respondent: Minister of Health

On 19 November 2003, the Cabinet approved the National Operational Plan on Comprehensive Care and Treatment for HIV (Operational Plan). This committed government to implement a national ARV treatment rollout scheme, hiring an additional 22 000 employees to bolster the ailing public health care sector, providing nutritional programs for all those living with HIV, improving access to voluntary counseling and testing (VCT), and significantly developing prevention of mother-to-child transmission of HIV (PMTCT) services. Despite this plan being relatively well articulated at the outset, it would soon become apparent that it lacked a formal implementation timetable to ensure targets were met, which resulted in the program falling well short of its target of 54 000 people on treatment by March 2004 (at which time only 15 000 people were receiving treatment).
The Operational Plan contained various clauses which referred to an additional document known as ?Annexure A? which was believed to contain such an implementation timetable, but was being kept out of the public domain. The annexure was referred to as two documents with one allegedly containing a schedule of the core-implementation period

(?A1?) and the second containing a week-by-week schedule of the implementation timeframe (?A2?). Based on the constitutional right to information, the TAC approached the Department of Health on 20 February 2004 to demand the release of this information crucial to the success of the Operational Plan ? a demand ignored by the Minister.

Annexure References an ?Oversight?

The TAC submitted numerous further formal and informal written requests, as well as an internal appeal under the Access to Information Act to acquire these documents. After these attempts failed, the TAC initiated legal action to clarify the issue of costs by stating that the respondents? failure to provide the information requested on 2 March 2004 was in contravention of the Promotion to Access of Information Act, and inconsistent with the Constitution. The Minister filed her responding affidavit seven weeks late on 29 September 2004, which stated that any reference to the annexures in the Operational Plan were a mistake as no such annexures existed. The Minister further mentioned that, while timeframes were discussed and designed (spearheaded by the Clinton Foundation which was serving as a consultant for the Government), they were not adopted by the task team and therefore excluded from the eventual Operational Plan. An ?oversight? had resulted in all references to these documents being erroneously included in the final published document.
After the TAC became aware of this development, it promptly contacted government lawyers to inform them that the application for the acquisition of these documents would be withdrawn on the condition that the Minister of Health agree to cover the applicant?s costs on an attorney and client scale. It was argued that the court action was initially launched on the belief that the annexures existed, and that the Minister?s refusal to communicate caused considerable confusion and subsequent expense when she could have simply announced the actual scenario at the time of the TAC?s initial request almost ten months earlier. The offer was ignored by the Minister, at which time the TAC filed its replying affidavit seeking an order from the court to compel the respondent to cover these costs. Government argued that such a ruling would be unreasonable as the TAC had technically failed in its application, and as such the applicant should in fact field the costs of the respondent. They further argued that the initial request for the release of the annexures was ?frivolous and vexatious?, alleging that, had the documents been acquired, they would serve no real purpose if released into the public domain.

Unconstitutional Behavior

Judge Ranchod of the Pretoria High Court felt that the above line of argument from counsel for the respondent was, to a large extent, trivial given that the oversight on the part of the Department of Health and the Minister could have been announced as early as 20 February 2004 (when TAC first sent a letter to the Minister demanding said documents), which would have unquestionably resulted in TAC not lodging its application. The Court rejected the Minister?s assertion that she had no knowledge of the annexures as being invalid, as a Minister should always bear ultimate responsibility for his/her department. The Judge held that Section 195 of the Constitution, which states that public administration must always be governed by the ?democratic values and principles entrenched in the Constitution? which include a high standard of professional ethics, accountability, and transparency ? values that extend to all administrations, organs of state, and public enterprises, had been violated. He agreed that the Minister and the Department of Health had clearly failed to meet these obligations, by failing to correct the erroneous inclusion of published references to the annexures for many months after they were aware of its non-existence.
In terms of the Respondent?s claim that the Applicant?s withdrawal of their case suggests they should cover attorney and client scale costs, Judge Ranchod emphasized that in his view there existed a likely possibility that the TAC would have succeeded in its application for the release of the annexures (had they existed). While he acknowledged that common practice dictates that costs be awarded to the successful party, the court has the ability to award costs at their

discretion, and in exceptional cases to the unsuccessful party. The Court ruled that the constitutional infringements and common law principles of liability for costs required that the Minister of Health be ordered to cover the TAC?s punitive costs on an attorney and client scale. The Minister did not appeal.

TAC was represented by:

· AIDS Law Project
· Fatima Hassan
· Advocate Matthew Chaskalson

More Information:

- **Founding Affidavit in Court Case**
- **State's answering affidavit**
- **Ray Mabope's answering affidavit on behalf of the state**
- **TAC's replying affidavit (12 October 2004)**

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