

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 20/12

In the application of:

TREATMENT ACTION CAMPAIGN

First applicant for admission as *amicus curiae*

WITS JUSTICE PROJECT

Second applicant for admission as
amicus curiae

CENTRE FOR APPLIED LEGAL STUDIES

Third applicant for admission as *amicus curiae*

In re: Application for leave to appeal in the matter between:

DUDLEY LEE

Applicant

and

THE MINISTER OF CORRECTIONAL SERVICES

Respondent

FOUNDING AFFIDAVIT

I, the undersigned

NONKOSI ALVIRA CARMEN KHUMALO

do hereby make oath and say that:

INTRODUCTION

1. I am the Chairperson of the Treatment Action Campaign (TAC). I joined the TAC in 2001 as the Executive Secretary and was elected as Chairperson in 2008. I have been the Chairperson since, except for a brief period during which I was the acting General Secretary.
2. The facts alleged in this affidavit are true and correct, and, save where the context indicates to the contrary, are within my personal knowledge. Legal submissions are made on the advice of the applicants' legal representatives.

3. I am authorised to depose to this affidavit on behalf of the first applicant, the TAC, which has resolved to institute these proceedings as appears from **Annexure NK1**.
4. I am also authorised to depose to this affidavit on behalf of the second and third applicants, the Wits Justice Project (“WJP”) and the Centre for Applied Legal Studies (“CALs”).
5. This is a joint application by the TAC, the WJP and the CALS to seek, inter alia:
 - 5.1. leave to intervene in the above proceedings as *amici curiae* in terms of Rule 10 of the Rules of the Constitutional Court; and
 - 5.2. leave to introduce two documents in accordance with Rule 31(1) of the Rules of the Constitutional Court.
6. In this affidavit, I address the following:
 - 6.1. Background
 - 6.2. The applicants and their interest in this matter
 - 6.3. The nature of this application and grounds for condonation if necessary
 - 6.4. Consent of the parties to the application for admission as *amici curiae*
 - 6.5. Proposed terms and conditions of admission
 - 6.6. The stance of the applicants regarding the merits

6.7. Conclusion

BACKGROUND

7. The Applicant in the application for leave to appeal before this Honourable Court, Mr Dudley Lee, seeks leave to appeal to this Court against the Supreme Court of Appeal's ("SCA") denial of his delictual claim against the Minister of Correctional Services for negligently causing him to become infected with tuberculosis (TB).
8. Nugent JA, writing for the SCA, found in favour of Mr Lee on all elements of his claim except for one. The court found that the "negligent failure on the part of the authorities to have reasonably adequate precautions against contagion, which was the foundation of the claim, ought indeed to be categorised as wrongful ... ". (Judgment, paragraph 35) The court also found that "as a probable fact ... Mr Lee contracted tuberculosis while he was in prison" (Judgment, paragraph 52).
9. The court found, however, that Mr Lee's claim failed on "a narrow factual point" (Judgment, paragraph 68). The court described Mr Lee's shortcoming thus:

"The difficulty that is faced by Mr Lee is that he does not know the source of his infection. Had he known its source it is possible that he might have established a causal link between his infection and specific negligent conduct on the part of the prison authorities. Instead he has found himself cast back upon systemic

omission. But in the absence of proof that reasonable systemic adequacy would have altogether eliminated the risk of contagion, which would be a hard row to hoe, it cannot be found that but for the systemic omission he probably would not have contracted the disease. On that ground I think that the claim ought to have failed.” (Judgment, paragraph 64; emphasis added)

10. The court therefore dismissed the claim.

THE APPLICANTS AND THEIR INTERESTS

The Treatment Action Campaign

General interest

11. The first applicant is the TAC, a non-profit company established in terms of the Companies Act 71 of 2008, registration number 2000/0291811/08. The TAC has the capacity to sue and be sued. The TAC’s Memorandum of Incorporation and Constitution are available upon request.

12. The relevant strategic objectives of the TAC are:

12.1. To advocate for the implementation of an effective and comprehensive HIV and TB prevention, diagnosis, treatment, care and support programme;

- 12.2. To provide evidence-based prevention and treatment awareness and literacy for TAC members, at public health ARV facilities and for partner organizations;
 - 12.3. To advocate for the rights of women and communities affected by gender-based violence to access appropriate resources for health care and the prevention of HIV and TB; and
 - 12.4. To advocate for effective evidence-based HIV and health policies and an enabling policy environment.
13. The TAC acts not only to promote its own interests, but also to promote the interests of its members as well as the interests of the public. In particular, the TAC acts to protect the rights of those who are infected with TB or who are at risk of becoming infected with TB. This group includes people who are detained in conditions that facilitate the spread of TB because such detainees are at an especially high risk of becoming infected and TB is highly prevalent in prisons.
14. One of the TAC's strategic objectives is to "advocate for the implementation of an effective and comprehensive HIV and TB prevention, diagnosis, treatment, care and support programme." The TAC's pursuit of this objective includes the use of litigation, where necessary, to advance the rights of TB patients and those who are

at risk of contracting TB. This objective is especially important to the TAC members and all people living with HIV in South Africa because it is well established that HIV positive people are at an especially high risk of contracting TB.

15. The TAC's view is that the ruling from the SCA would allow the state to violate its constitutional and statutory duties with impunity and thereby compromise the TAC's ability to achieve this strategic objective. Therefore, this intervention is central to realising the TAC's objectives.

16. The TAC has a long history of campaigning for the right to access to health care services and advocating for the implementation of effective and comprehensive HIV and TB prevention, diagnosis, treatment, care and support programmes.

17. The TAC's relevant litigation experience includes:

17.1. The landmark case *Minister of Health v Treatment Action Campaign (TAC)* 2002 (5) SA 721 (CC), in which the Court held that the government's failure to develop and implement a comprehensive programme to prevent vertical transmission of HIV breached the constitutional guarantee of access to health care services, in particular the state's positive obligations in respect of that right as entrenched in section 27 of the Constitution of the Republic of South Africa, 1996 ("the Constitution"). The Court ordered the state to take a series of steps aimed toward ensuring access to comprehensive services to prevent

vertical transmission of HIV in the public health sector “without delay”. The TAC now argues that the common law, specifically the common law approach to the issue of causation, must be developed in light of section 27 and other constitutional rights and obligations as well the state’s failure to implement a TB Programme.

17.2. *EN and others v Government of the Republic of South Africa and Others* 2006 (6) SA 543 (D) (“the Westville Prison case”) in which the TAC intervened when prison authorities denied prisoners access to anti-retroviral (ARV) treatment in KwaZulu-Natal’s Westville Correctional Centre. The same rights at issue in the matter before this Court, the right to access to health care services and the right to be detained in conditions consistent with human dignity, amongst others, were at issue in the Westville Prison case. The court ordered the respondents to remove restrictions preventing prisoners who meet criteria set out in the National Department of Health’s Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa (“Operational Plan”), from accessing anti-retroviral treatment. The court also ordered that the Department of Correctional Services should fast-track the provision of anti-retroviral treatment to prisoners at Westville Correctional Centre.

18. The TAC has also been involved in many other cases pertaining to the right to access to health care services. Apart from litigation, the TAC also campaigns for the

implementation of effective and comprehensive TB prevention, diagnosis, treatment, care and support programmes in myriad other ways. Examples of these extra-judicial efforts include the TAC's activities around the previous HIV & AIDS and STI Strategic Plan for South Africa 2007-2011 and the current National Strategic Plan on HIV, STIs and TB, 2012-2016 (NSP 2012-2016).

19. The TAC actively provided input during the process of drafting the NSP 2012-2016 and is now involved in the process of implementing the plan as well as drafting provincial strategic plans in accordance with the national plan. One of the reasons for TAC's involvement with the NSP 2012-2016 is due to its emphasis on TB prevention, diagnosis, treatment, care and support, and particularly on prisons and the vulnerability of prisoners in regard to TB. The NSP 2012-2016 identifies prisoners as a key population at high risk of TB infection and identifies specific interventions in relation to them.

The TAC's specific interest in this matter

20. The TAC is engaged in assisting TB patients and family members of TB patients to claim their rights. Our interest in this matter, therefore, goes beyond the dispute between Mr Lee and the Minister of Correctional Services. Our interest extends to other cases in which we are supporting patients with TB as well as other chronic illnesses. One such matter involves a potential claim by the family of the late Mr Gabriel Leping, who was imprisoned at Johannesburg Medium B Prison before

being transferred to the Pretoria Central Prison. Mr Leping was sentenced on 8 December 2009 by the Orlando Regional Court. His conviction was overturned on appeal and he was released on 14 December 2011. He contracted TB during his incarceration. Upon his release, he was extremely ill and collapsed outside the prison. He died shortly after his release, on 18 January 2012. A confirmatory affidavit from Josephine Leping, Mr Leping's sister, will be attached as **Annexure NK2**. A newspaper article recounting Mr Leping's experience is attached as **Annexure NK3**.

21. The SCA judgment and any future judgment by this honourable Court will have a long-lasting impact on the future of such cases.

22. For all the above reasons, the TAC has a strong interest in these proceedings.

The Wits Justice Project

23. The second applicant is the University of the Witwatersrand, Johannesburg ("the University") acting through the WJP situated at University Corner, corner Bertha and Jorissen Streets, Braamfontein, Johannesburg.

24. The WJP is a centre that exists within the University. The WJP was founded in 2008 by Professor Anton Harber, who is the current Director. The University is a juristic person and tertiary education institution registered in terms of the Higher Education Act 101 of 1997, as amended by Section 25 of Act 23 of 2001.

25. The WJP's functions have been approved by the Vice-Chancellor of the University in terms of its rules, policies and procedures.

26. The WJP forms part of the Journalism Department at the University and aims to have significant impact on the lives of individuals within the criminal justice system by effecting systemic change.

27. The WJP aims to:

27.1. Be the leading authority on criminal justice issues within South Africa;

27.2. Creatively and effectively combine the use of journalism, advocacy, law and education to achieve its mission;

27.3. Contribute towards the improvement of the criminal justice system of South Africa and its conformity with the Constitution and international law; and

27.4. Assist individuals who are affected by miscarriages of justice.

28. The WJP has a particular interest in and focuses on issues concerning remand detainees, including the conditions of their detention and violations of their human rights. The WJP has a direct interest in ensuring that the rights of remand detainees,

such as the right to health and the right to dignity, are safeguarded and maintained. The WJP aims to assist these individuals through the combination of journalism, advocacy, law and education. The WJP hosts workshops and forums with a broad range of experts, organisations and individuals that have been involved in the criminal justice process and have been affected by remand detention issues.

29. The WJP creates awareness of the plight of remand detainees and aims to bring about systemic change in South African prisons through various strategies and partnerships. The WJP has and continues to work directly with remand detainees who have been affected, similarly to Dudley Lee, and has an interest in ensuring that these individuals are protected and that those charged with their protection carry out their functions in accordance with the law and policy. They have an interest in ensuring that where the law falls short in this regard, necessary reform and development of the law takes place.

The Centre for Applied Legal Studies

30. The third applicant is the CALS, a human rights centre at the University, located within the Wits Law School situated at 1 Jan Smuts Avenue, Braamfontein, Johannesburg.

31. The CALS is an accredited and certified law clinic with the Law Society of the Northern Provinces in terms of the provisions of the Attorneys Act, 1979 and Rule 115A of the Rules of the Law Society of the Northern Provinces.

32. The CALS seeks to strengthen constitutional democracy and its vision encompasses a country where human rights are respected, protected and fulfilled by the state, corporations, individuals and other repositories of power; the dismantling of systemic harm; and a rigorous dedication to justice. Part of the CALS' mission is:

32.1. To challenge and reform systems within South Africa which perpetuate harm, inequality and human rights violations;

32.2. To provide professional legal representation to victims and survivors of human rights abuses;

32.3. To actualise a politically, socially and economically just society;

32.4. Through a combination of strategic litigation, advocacy and research, to challenge systems of power and act on behalf of the vulnerable; and

32.5. To act with courage against impunity for non-compliance with human rights standards.

33. In carrying out its functions, the CALS undertakes litigation as well as research and advocacy, legal training and teaching.

34. The CALS has a particular interest in issues concerning the rights of individuals in detention. This interest is long-standing and dates back to before our present constitutional era, when the CALS was engaged in fighting for the recognition of the rights of detained individuals. Currently, the CALS is working on the conditions of remand detention across its focus areas of research, advocacy and litigation and therefore has a direct interest in this matter. Through this work, the CALS has and continues to engage with key stakeholders as well as remand detainees directly.

35. The CALS believes that *amicus curiae* interventions offer an important mechanism of bringing expert and impartial evidence before the courts and in the course of its work, the CALS regularly seeks leave to intervene as an *amicus curiae* in instances where it believes such intervention will assist the court. The CALS has previously intervened as an *amicus curiae* in matters in which the development of the common law was argued. In line with its vision and mission, the CALS has a direct interest in matters that necessitate the development of the common law in order to realise constitutional rights.

THE NATURE OF THIS APPLICATION AND GROUNDS FOR CONDONATION IF NECESSARY

36. The applicants seek the Court's leave to be admitted as *amici curiae* in the above matter. The applicants remain, however, uncertain as to the stage in which these proceedings currently stand and as to which issues will be before the Court on 28 August 2012. On 7 May 2012, the Chief Justice issued directions inviting the parties to lodge written submissions on two preliminary questions. The directions also provided that "[f]urther directions *may* be issued" (emphasis added). The parties subsequently complied with the directions and lodged written submissions in response to the Court's questions.

37. Having received these submissions, the Court issued further directions on 30 May 2012. In these directions the Court set down the application for leave to appeal for hearing on 28 August 2012. The Court directed the parties to submit an agreed statement of facts by 22 June 2012. The Court also indicated that "[f]urther directions *will* be issued after Friday 22 June 2012" (emphasis added). The parties submitted an agreed statement of facts on 21 June 2012. No further directions have been issued. At this stage the applicants do not know whether the hearing on 28 August 2012 is intended to only address the question of the leave to appeal or whether the Court intends to hear the merits of the appeal as well. On 27 July 2012, the Respondent's attorneys wrote to the Senior Registrar expressing uncertainty along these same lines. This letter is attached as **Annexure NK4**.

38. Due to uncertainty as to the nature of the hearing, a representative of CALS, Kathleen Hardy, contacted the Registrar telephonically on 4 July 2012. Mr Delano

Louw informed her that, according to his understanding, the Statement of Agreed Factual Findings, which was submitted by the parties on 21 June 2012, constituted the parties' final written submissions and that no further directions were in the offing.

39. While the applicants were still of the opinion that the substantive issues presented by this case had not yet been sufficiently canvassed by the parties, the applicants nonetheless undertook to make this conditional application as quickly as possible. The process has been exacerbated by the fact that the parties have not submitted heads of argument on the merits, but have only addressed two procedural issues at the instruction of the Court. Ordinarily an *amicus curiae* intervention would arise after the *amicus curiae* has had the opportunity to peruse the substantive arguments. For present purposes it was considered appropriate to bring this application even at this early stage.

40. The applicants therefore request, as per the Notice of Motion, that the Court grant them leave to intervene as *amici curiae* in the event that the merits of this matter are to be heard on 28 August 2012. If the Court finds that this application is late, the applicants respectfully request condonation in light of the circumstances outlined above. If the Court intends to issue further directions requesting further written submissions from the parties, the applicants request the Court to allow them to supplement their papers at the appropriate time, if necessary, with consideration given to the written submissions of the parties. In particular the applicants note that

the record of the proceedings before the lower courts has not been filed with this Court.

CONSENT OF THE PARTIES

41. Both parties have consented to the applicants' admission as *amici curiae*. Letters indicating such consent are attached as **Annexure NK5** and **Annexure NK6**, respectively. The applicants' letters seeking such consent are attached as **Annexure NK7** and **Annexure NK8**, respectively. These consent letters were also lodged with the Registrar of the Court on 24 July 2012. However, the Respondent opposes the introduction of the two documents that the applicants wish to introduce, which are identified and explained below. The applicants replied to the Respondent's qualified consent in order to explain more fully the ambit and purpose of the submissions to which the Respondent objected. This letter is attached as **Annexure NK9**. The Respondent subsequently wrote to the applicants once more in this regard, reiterating similar objections. This letter is attached as **Annexure NK10**. Given the importance of these documents in relation to the legal arguments the applicants intend to present to the Court, the applicants seek the Court's leave to introduce these documents.

PROPOSED TERMS AND CONDITIONS OF ADMISSION

42. The applicants request the Court to consent to their participation on the same terms as consented to by Mr Lee and as described in this affidavit and the Notice of Motion. In addition to making written submissions, the applicants also wish to make brief oral submissions at the Court's discretion, but not exceeding 30 minutes.

The documents that the applicants wish to introduce

43. The applicants wish to introduce two documents of a factual nature that are relevant to this matter. The first is an extract from the latest annual report of the Judicial Inspectorate for Correctional Centres (Judicial Inspectorate), "*Annual Report 2010/2011: Treatment of Inmates and Conditions in Correctional Centres*" (the "Annual Report"). The relevant extract is attached as **Annexure NK11**. The Annual Report, a copy of which has been provided to the Respondent, is relevant and important to these proceedings because it is, to my knowledge, the first time that the Judicial Inspectorate has reported in any systematic way on TB deaths in prisons. The Annual Report provides information on the ten Correctional Centre clusters reporting the most deaths. In seven of these ten, TB was the number one cause of natural deaths.

44. The Annual Report also contains important information on overcrowding, which is a primary driver of TB transmission, as is common cause between the parties. The Annual Report shows that 18 correctional centres "were critically overcrowded by 200% or more" as of 31 March 2011. Pollsmoor Prison is amongst these 18.

45. The Annual Report is an official document produced by an independent statutory body that is tasked with monitoring and reporting on the conditions in prisons. This attached extract of the Annual Report will allow the Court to develop a better understanding of the impact its decision will have beyond the parties in this case. The whole Annual Report has not been attached to this affidavit in order to avoid burdening the Court with unnecessary data, but will be made available upon request.

46. The second document that the applicants wish to introduce is a scientific study on the risk of TB contagion under prevailing conditions at Pollsmoor Prison that was published in the South African Medical Journal (“SAMJ”), *Tuberculosis in a South African prison—a transmission modelling analysis* Johnstone-Robertson *et al* (2011) 101 SAMJ. The SAMJ is a highly-regarded, peer-reviewed and indexed medical journal that has been published since 1884. Professor Wood is an international expert on TB and a co-author of the study. He provides a short affidavit to which the study is annexed. An unsigned copy of the affidavit is attached as **Annexure NK12**, the original signed and commissioned affidavit will be supplied at a later date. The original is currently being couriered from Cape Town. The main findings of the study are that:

46.1. Were the Department of Correctional Services (“the Department”) to implement its current national policy on cell occupancy and the management of TB, this alone would reduce the risk of transmission of TB by 30%.

46.2. Were the Department to include active case finding (as opposed to passive case finding, which is the current policy) the risk would be reduced by 50%.

46.3. Active case finding combined with international standards of incarceration would reduce the risk of transmission by 94%.

47. Professor Wood also explains why it is scientifically impossible to establish, with precision, the source of a TB infection.

48. I am advised that, in accordance with rule 31(1)(b) of the Rules of the Court, *amici curiae* properly admitted by the Court in these proceedings would be entitled to canvas factual material that is relevant to the determination of the issues before the Court and that does not specifically appear on the record, provided that such facts are of an official, scientific, technical or statistical nature capable of easy verification. It is applicants' contention that the evidence they wish to introduce falls within the ambit of this Rule.

THE STANCE OF THE APPLICANTS REGARDING THE MERITS

49. The primary position to be adopted by the applicants is that in circumstances such as those present in this matter, the SCA is required to develop the common law in

order to modify the common law approach to causation. This is necessary in order to ensure that justice is afforded to the injured party.

Legal submissions

50. Ordinarily, the legal submissions to be advanced by an amicus curiae would be influenced by the submissions advanced by the main parties. However, at this stage the parties have not submitted written argument on the merits, save in respect of two procedural issues. However, my legal advisors have had sight of the heads of argument before the SCA and I can say affirmatively that the submissions that we propose to advance before this Court will be significantly different from those advanced in the SCA in the respects more fully set out below.

51. The applicants contend that the standard applied by the SCA is impossible to meet. As is shown in the expert affidavit from Professor Wood, it is not possible to identify the precise source of a TB infection.

52. Furthermore, it is not possible to provide “proof that reasonable systemic adequacy would have *altogether eliminated* the risk of contagion” (Judgment, paragraph 64, emphasis added). The SCA acknowledged this when it wrote, “ ... whatever management strategies might be put into place, there will *always* be a risk of contagion” (Judgment paragraph 61, emphasis added).

53. The impossibility of meeting this standard creates the following results:

53.1. Mr Lee and many similarly situated people are left without the possibility of a remedy despite the violations of their rights;

53.2. 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

53.3. Public health will continue to decline because of the failure to minimise TB transmission.

Foreign Law

54. The applicants' legal submissions would canvass foreign law from several jurisdictions, with a focus on case law from the United Kingdom, in order to assist the Court. Comparative jurisdictions have developed the common law approach to causation when faced with cases presenting issues similar to that currently before the Court. The applicants believe that several other jurisdictions agree, in broad terms, on how these issues should be adjudicated and that the Court would benefit from having such jurisprudence before it. To the applicants' best knowledge, the parties have not previously canvassed this helpful body of law.

55. In brief and broad terms, the approach adopted in these cases, and which the applicants urge the Court to adopt, is that in certain circumstances, such as the one presented here, a showing that the Respondent's breach of duty materially increased the risk of the disease being contracted is sufficient to prove the causation element.

South African Law

56. The approach the applicants urge this Court to adopt should be considered in light of the constitutional and statutory rights and duties relevant to this case as well as relevant South African authority.

57. Section 27(1) of the Constitution entrenches the right of everyone to have access to health care services. Section 27(2) entrenches the corresponding obligations on the state to take reasonable legislative and other measures to realise the right.

58. Section 35(2)(e) entrenches the rights of detained persons, including sentenced and awaiting-trial prisoners:

“- to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment.”

59. The SCA is candid that the prison authorities have failed in their obligations in regard to these rights. The extent of the prison authorities' failure is well established. The health, financial and social consequences of that failure for incarcerated people and the public are devastating and frequently lethal.

60. Furthermore, in terms of section 34 of the Constitution:

“Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.”

61. The applicants are of the opinion, the reason for which will become apparent through application of Professor Wood's affidavit, that the approach taken by the SCA renders it impossible for Mr Lee and other similarly situated potential claimants to have any likelihood of success in a delictual claim of this nature. For the applicants, this would have a devastating impact on their ability to carry out their mandate in relation to TB in prisons. The applicants therefore submit that the approach fails to promote the spirit, purport and objects of the Bill of Rights in regard to section 34 of the Constitution.

62. Section 39 of the Constitution provides:

“1. When interpreting the Bill of Rights, a court, tribunal or forum—

- a. must promote the values that underlie and open and democratic society based on human dignity equality, and freedom;
 - b. must consider international law; and
 - c. may consider foreign law.
2. When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.”

63. The SCA’s approach to and interpretation of the causation question fails to promote the spirit, purport and objects of the Bill of Rights in regard to sections 27, 34 and 35 in terms of section 39(2) read with sections 172 and 173. Also, the judgment effectively limits the rights in sections 27, 34 and 35 in terms inconsistent with section 36.

The affidavit of Professor Robin Wood

64. I am familiar with the affidavit of Professor Wood and the important study that he has co-authored. Professor Wood’s Affidavit is attached as **Annexure NK12**.

65. Professor Wood’s research analysed factual findings and data regarding conditions at Pollsmoor Prison as taken from the evidence adduced during trial in the Western

Cape High Court in these proceedings. In its briefest recounting, Professor Wood's research shows that current conditions of detention for awaiting-trial prisoners are highly conducive to the spread of TB, including drug-resistant TB. The research revealed that there is a 90% risk of TB transmission per annum at Pollsmoor Prison.

66. Professor Wood's research concludes, "current conditions of detention for awaiting trial prisoners are highly conducive for spread of drug-sensitive and drug-resistant TB. Combinations of simple well-established scientific control measures should be implemented urgently".

67. Professor Wood also concludes "overlooking TB prevention and control in prisons carries serious health consequences for both prisoners and the general community".

68. Professor Wood's research is important in that it confirms and quantifies the nature and extent of the risk created by the conditions of imprisonment that Mr Lee endured, and to which many others continue to be subjected. Therefore, it speaks to the applicants' legal argument regarding the necessity of developing the common law to promote the spirit, purport and objects of the Bill of Rights.

CONCLUSION

69. For all of the above reasons, I pray for an order in terms of the Notice of Motion.

DEPONENT

SIGNED and SWORN to before me at _____ on the _____ day of _____ 2012, after the deponent stated that she is aware of the content of this statement and considers the oath to be binding on her conscience. I certify that the regulations provided for in the Government Gazette Notice R. 1258 of 21 July 1972, as amended and Government Notice No. R 1648 of 17 August 1977, as amended having been complied with.

COMMISSIONER OF OATHS