



NM v. Smith

[2007] ZACC 6; Case CCT 69/05

Country: South Africa

Region: Africa

Year: 2007

Court: Constitutional Court

Health Topics: Health information, HIV/AIDS, Informed consent

Human Rights: Right to privacy

Facts

A publishing company published a biography on a South African member of parliament that disclosed the names of three women who were HIV-positive. The three women alleged that their names had been published in the book without their prior consent having been obtained. They had participated in clinical trials, known as the FTC 302 trials, directed at determining the efficiency of a combination of drugs that could decrease a patient's HIV level. For the clinical trials, they signed a consent form indicating that they had been informed of the nature, benefits, side effects, and the risks of the clinical trials. The consent forms did not permit full public disclosure of the identity of the three women and the fact that they were living with HIV/AIDS, but only permitted limited disclosure for the purposes of the clinical trials.

Because the member of parliament was active in HIV/AIDS policy and prevention, her book was to include a chapter on her work in this area. The author of her biography received a report on the trials, saw nothing in the report that suggested that it was confidential, and included the names of the three HIV-positive women in the biography.

The three women claimed that their constitutional rights to privacy, dignity and psychological integrity had been violated.

The High Court dismissed the action against the author and the woman about whom the biography was written, and the HIV-positive women appealed to the Constitutional Court.

Decision and Reasoning

The Court held that the disclosure of the three women's HIV status without their consent by the author and her publisher in the book violated the women's constitutional right to privacy.

The Court first decided whether there was a constitutional issue at stake, holding that there was because the case involved balancing the interests of the media, in advocating freedom of expression, and the privacy and dignity of the HIV-positive women. The Court then held that, in order for the right to privacy to be interfered with, there must be a pressing social need. In the case of the publication of the biography, there was no such pressing social need. The author could have used pseudonyms, for example, to protect the women's right to privacy. Moreover, the Court noted that maintaining confidentiality of people's HIV status is particularly important given the stigma and discrimination that persons living with HIV often face in South Africa. Confidentiality is key to encouraging people to seek testing and treatment for HIV, and recognizing autonomy and respecting private medical information may result in the improvement of public policies on HIV/AIDS.

Decision Excerpts

"Individuals value the privacy of confidential medical information because of the vast number of people who could have access to the information and the potential harmful effects that may result from disclosure. The lack of respect for private medical information and its subsequent disclosure may result in fear jeopardising an individual's right to make certain fundamental choices that he/she has a right to make. There is therefore a strong privacy interest in maintaining confidentiality." Para. 41.

"The disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure. The affirmation of secure privacy rights

within our Constitution may encourage individuals to seek treatment and divulge information encouraging disclosure of HIV which has previously been hindered by fear of ostracism and stigmatisation. The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV/AIDS." Para. 42.

"As a result, it is imperative and necessary that all private and confidential medical information should receive protection against unauthorised disclosure. The involved parties should weigh the need for access against the privacy interest in every instance and not only when there is an implication of another fundamental right, in this case the right to freedom of expression." Para. 43.

"The assumption that others are allowed access to private medical information once it has left the hands of authorised physicians and other personnel involved in the facilitation of medical care, is fundamentally flawed. It fails to take into account an individual's desire to control information about him or herself and to keep it confidential from others. It does not follow that an individual automatically consents to or expects the release of information to others outside the administration of health care. As appears from what has gone on before there is nothing on the record to suggest that the applicants' HIV status had become a matter of public knowledge." Para. 44.

"The High Court held that the [author] and [member of parliament] were not liable for any damage suffered at the time of publication of the book. I disagree with this finding of the High Court. The [author] did not sufficiently pursue her efforts to establish if the necessary consents had been obtained, despite having ample time to do so. More importantly she could have used pseudonyms instead of the real names of the applicants. The use of pseudonyms would not have rendered the book less authentic." Para. 46.

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