



## Minister of Health v. Treatment Action Campaign (No. 1)

(CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)

**Country:** South Africa

**Region:** Africa

**Year:** 2002

**Court:** Constitutional Court

**Health Topics:** Child and adolescent health, Health care and health services, Health systems and financing, HIV/AIDS, Hospitals, Infectious diseases, Medicines, Sexual and reproductive health

**Human Rights:** Right to health

### Facts

The Constitutional Court was asked to determine whether the appellant (Government) was required to give effect, pending an appeal, to an order of the High Court which directed it to make the drug nevirapine available to mothers and their newborn babies in public health facilities under certain circumstances and conditions. The order concerned the programme of national and provincial governments with respect to the supply of nevirapine to HIV-positive pregnant women and to their children in order to prevent the transmission of HIV from mother to child. The appellant asked the Constitutional Court for leave to appeal against the decision of the High Court (interim execution order). The Treatment Action Campaign (TAC), the respondent, opposed the application.

### Decision and Reasoning

The Court first determined whether the interim order granted was appealable. The Government argued that the interim execution order was appealable and that it should be set aside on the grounds that it was vague and uncertain. TAC contended that the order was not appealable and that, even if it was appealable, it was not appropriate to overturn the order of the High Court. TAC also launched a counter-application seeking immediate application of the interim execution order.

The court dismissed both the government's application for leave to appeal and TAC's counter-application. It made it clear that the order of the High Court did not require the wholesale extension of the prescription of nevirapine outside the pilot sites established by the government. The order only required government to make nevirapine available in public health facilities whenever it was medically indicated.

The Court highlighted the fact that in terms of both common law and the Supreme Court Act, 1959, an order granting leave to execute pending an appeal is considered to be purely interlocutory and not appealable. The reason for this is that it would defeat the purpose of the interim execution order for the court to grant leave to appeal against that order because of the rule that the noting of an appeal suspends the implementation of a court order.

The Court highlighted further that it was undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance. It concluded that the interest of justice did not warrant the granting of the leave to appeal sought by the government.

### Decision Excerpts

“This Court has already identified a range of general considerations relevant to determining the interests of justice for the purposes of applications for leave to appeal to it. First, it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance. Second, the Court has held that a reasonable prospect of success will often, but not always, be a determinative consideration relevant to the interests of justice.” Para. 9.

“All these considerations make it plain that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution. Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted – a matter which would, by definition, have been considered by the court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to

appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned.â€• Para. 12.

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