

Only a matter of time before overcrowding in prisons flood the courts

Recently before the Constitutional Court was an application for leave to appeal against a decision of the Supreme Court of Appeal overturning a decision of the Western Cape High Court.



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The High Court declared the respondent liable for the delictual damages suffered by the

applicant as a result of contracting tuberculosis (TB) while in detention. Having rejected the applicant's claim on a narrow factual point on the application of the test for causation, the Supreme Court of Appeal upheld the respondent's appeal and absolved her from liability. The Constitutional Court had a different view. The applicant, Mr Dudley Lee, was detained at Pollsmoor Prison from 1999 to 2004. The respondent is the Minister for Correctional Services. Lee was released on bail for a period of roughly two months in 2000.

He attended court on no fewer than 70 occasions. When inmates were transported to court, they were being conveyed in extremely overcrowded vans. At court they were placed into holding cells, which were beyond capacity. It was common cause that Mr Lee was not infected with TB when he arrived at Pollsmoor and that the responsible authorities were aware of the risk of inmates contracting TB as it is an airborne communicable disease, which spreads easily especially in confined, poorly ventilated and overcrowded environments. Pollsmoor is notoriously congested and inmates are confined to close contact for as much as 23 hours every day. Lee contracted tuberculosis (TB) while in prison.

He sued the Minister for damages on the basis that the poor prison health management resulted in him becoming infected. The Western Cape High Court ruled in the applicant's favour regarding the evidence pertaining to the breakdown of the health care system at Pollsmoor and the inadequacy of nutrition which played a role in the development and uncontrollable spread of TB during his incarceration. It held that the responsible authorities' omissions constituted a negligent breach of its constitutional and statutory duty to protect the applicant's rights. It further held that the evidence tendered established that TB could be curtailed by introducing certain measures. The high court concluded that factors such as shortage of staff at the prison contributed adversely throughout the time of Lee's incarceration.

A reasonable person in the Minister's position would have realised that adequate staffing was key to the prevention and control of TB and would have taken steps to improve staff shortages and would have isolated everyone in the infectious stage of TB. On appeal, the SCA found that, while the prison authorities failed to maintain reasonably adequate systems to manage the disease, the Minister was not liable. The question was causation. The court cautioned that it ought not to be overlooked that recognition of a delictual remedy will not impose obligations on the state that will be too burdensome to fulfil and, that what is required, is no more than reasonable conduct on its part.

The court further held that for the applicant to succeed he must establish that it is probable that the negligent conduct

caused the harm and that the test in this regard is "whether but for the negligent act or omission of the respondent the event giving rise to the harm in question would have occurred." It concluded that Lee's difficulty was that he did not know the source of his infection. Had he known it is possible that he might have established a causal link between his infection and specific negligent conduct on the part of the authorities. Instead he 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. In the Constitutional Court, the majority held that the SCA, in applying the test for factual causation adopted rigid deductive logic which necessitated the conclusion that because Lee did not know the exact source of his infection, his claim had to fail.

It held that our law has always recognised that the test for factual causation should not be applied inflexibly as was done by the SCA and that Lee had, in fact, sufficiently proven that he had contracted TB as a result of negligence on the part of the Department of Correctional Services. It held further that, based on the approach adopted by the SCA, no inmate would ever be able to overcome the hurdle of causation and further that no effective alternate remedy would be available to anyone in Lee's position.

The majority noted that there is a legal duty on the responsible authorities to provide adequate health care services as part of the constitutional right of all prisoners to conditions of detention that are consistent with human dignity. In upholding Lee's claim, the majority held that there is a probable chain of causation between the negligent omissions by the responsible authorities and Lee's infection TB with. The majority upheld the claim as did the high court. The minority, however, held that based on the existing test at common law it was not possible to prison authority negligence had "more probably than not caused Lee to contract TB." This is because of the unique characteristics of TB.

The minority found that Lee could not show that in his case, reasonable measures would probably have saved him from contracting TB. It agreed with the SCA that Lee could not satisfy the existing test for causation. It did find, however, "the resultant injustice in cases such as this, where the disease by its very nature defies the but for inquiry, required the Court to develop the common law. The minority concluded that it would not be possible, on the available evidence, for the Court to consider properly and justly all the avenues of possible development, and their implications for the parties' respective cases. The minority judgement would, therefore, have remitted the matter to the trial court, for it to consider the manner in which the common law ought to be developed." As a final remark, it is very likely that we will now see more cases of inmates who contract all sorts of diseases, including HIV, in our prisons.

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Lee was incarcerated for four years on charges of fraud, counterfeiting and money laundering, among others, before being acquitted of all counts against him. At the time Lee was in Pollsmoor the prison was over 200% full – each cell held between 40 and 60 men. On hearing about the Lee case Prof Robin Wood, one of the world's leading experts in TB, conducted a study of the conditions of detention at Pollsmoor. He found that the filthy, crowded conditions at the prison resulted in a TB, transmission risk of 90%. Lee awaits the decision on compensation. – Editor

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