

**IN THE CONSTITUTIONAL COURT
OF SOUTH AFRICA**

CASE NO. CCT 15/02

HIGH CT CASE NO.: 21182/2001

In the matter between:

MINISTER OF HEALTH AND OTHERS

APPELLANTS

and

TREATMENT ACTION CAMPAIGN AND OTHERS

RESPONDENTS

In re:

MEC FOR HEALTH, KWAZULU-NATAL

APPELLANT

and

**THE GOVERNMENT OF KWAZULU-NATAL
REPRESENTED BY THE PREMIER**

RESPONDENT

NOTICE OF APPLICATION FOR LEAVE TO APPEAL

BE PLEASED TO TAKE NOTICE that the MEC for Health: KwaZulu-Natal province (the Appellant) hereby applies to the above Honourable Court for an order in the following terms:

- 1 Granting the Appellant leave to appeal against the decision of his lordship Mr Justice Botha made on 1st March 2002, wherein the Court substituted the Respondent herein as the Fifth Respondent in the main and the execution applications (the decision). The grounds upon which the application is brought are listed in the application for a certificate, in terms of Rule 18 of the Rules of

the above Honourable Court, which is annexed hereto.

- 2 Granting the Appellant leave to appeal against the decision on the grounds that the Court *a quo* erred:
 - 2.1 in substituting the Appellant with the Respondent, when no application for such substitution was before the Honourable Court;
 - 2.2 in finding that s 140 of the Constitution was not applicable;
 - 2.3 in applying the law of agency in circumstances where it was clear that the principles of the law of agency had no application in this matter;
 - 2.4 in failing to take into account that in terms of s 125 read together with s 140 of the Constitution the Appellant was, in any event, not the agent of the Premier;
 - 2.5 in misapplying the provisions of section 125 of the Constitution, in particular, in giving section 125(1) a meaning that is not consonant with its context and with section 125(2) of the Constitution.
- 3 Granting the Appellant further and/or alternative relief.

TAKE NOTICE FURTHER that the Appellant is represented by the attorney referred

to hereunder.

TAKE NOTICE FURTHER that the accompanying affidavit of the Appellant, Dr
Zwelini Lawrence Mkhize shall be used in support of this application.

DATED AT PRETORIA THIS THE 19TH DAY OF APRIL 2002.

STATE ATTORNEY
Appellant's Attorney
Fedsure Forum 4th Floor
South Tower
Cnr Pretorius & v d Walt Strs
Pretoria
(Ms G Behardien)

To: **THE REGISTRAR**
CONSTITUTIONAL COURT
Forum II
Braam Park
Hoofd Street
Braamfontein
JOHANNESBURG

And To: **LARSON BRUORTON AND FALCONER INC**
Responden'ts Attorney
3rd Floor Momentum House
Cnr Prince Alfred Street and Ordinance Road
Durban, 4001
Tel 031 387 1000
Fax 031 387 1077
c/o Friedland Hart & Partners
1st and 2nd Floors
Van der Stel Building
179 Pretorius Street
Pretoria
Fax 012 324 2178

In the matter between:

MINISTER OF HEALTH AND OTHERS

APPELLANTS

and

TREATMENT ACTION CAMPAIGN AND OTHERS

RESPONDENTS

In re:

MEC FOR HEALTH, KWAZULU-NATAL

APPELLANT

and

**THE GOVERNMENT OF KWAZULU-NATAL
REPRESENTED BY THE PREMIER**

RESPONDENT

AFFIDAVIT IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

I, the undersigned,

ZWELINI LAWRENCE MKHIZE

do hereby make oath and say:

4 I am an adult male and the MEC for Health in the KwaZulu-Natal Province and as such am the executing authority for health matters in that Province. I bring this application in my capacity as the MEC.

- 5 The facts deposed to herein are based on my personal knowledge and are true and correct. To the extent that I make submissions outside my area of speciality and in respect of law or procedure, I have been guided by the advice of the my attorney of record and counsel in this matter and make such submissions in reliance on such advice.
- 6 This is an application for leave to appeal directly to the above Honourable Court against the decision of the Botha J made on the 1st March 2002 which substituted me with the Government of KwaZulu Natal Province represented by the Premier of the KwaZulu Natal Province (the Premier) as the Fifth Respondent in the main application brought by the Respondents herein to, *inter alia*, compel me in my capacity as the MEC for Health in the KwaZulu-Natal Province, to provide Nevirapine to all pregnant women and their newborn babies in the KwaZulu-Natal Province where it was medically indicated (the decision).
- 7 The Respondent is the Government of the KwaZulu-Natal represented by the Premier.

The decision appealed against

- 8 The appeal is against the decision made on the 1st March 2002 referred to above.

9 The grounds of appeal are set forth in the Notice of Application for Leave to Appeal to which this affidavit is annexed and I respectfully adopt them in this affidavit.

Direct appeal to the Constitutional Court

10 I am advised that in terms of the provisions of Rule 18 of the Rules, the above Honourable Court may grant leave to appeal directly to it. This is an application to the Honourable Court to grant such leave to appeal.

11 On 16th April 2002 Mr Justice Botha granted me a positive certificate in terms of the provisions of Rule 18. A copy of the judgment and the accompanying certificate are annexed to this application.

12 I submit that the matter is of extreme importance to the functioning of the provincial executive council, the individual members of the executive council in their official capacities and the premier of the province in his official capacity.

13 Inasmuch as the appeal concerns:

13.1 an interpretation of sections 125 and 140 of the Constitution; and,

13.2 the issuing of executive decisions at Provincial Government level;

it is a purely constitutional issue.

11 This matter is also inextricably linked to the main appeal before the above Honourable Court, in that, it is sought herein to determine who the Fifth Appellant is and who is lawfully entitled to represent him.

12 I further respectfully submit that the constitutional issue raised in this matter is of national importance and this warrants the attention of the Constitutional Court.

13 I am advised that the evidence in this application is sufficient to enable the above Honourable Court to deal with and dispose of the matter without having to refer the matter back to the High Court for the adducing of further evidence.

14 I submit further that it is in the interests of justice that leave to appeal be granted in this matter.

15 I accordingly ask that an order be granted as indicated in the Notice of Application to which this affidavit is annexed.

16 I furthermore ask that the application and the appeal in this matter be heard before the main appeal, if at all possible, on or before 30 April 2002.

DEPONENT

Thus SWORN to and SIGNED by at _____ on this the _____ day of April 2002, the Deponent having acknowledged that he knows and understands the contents of this affidavit, and that he has no objection to taking the prescribed oath, and he considers the oath binding on his conscience.

COMMISSIONER OF OATHS

BEFORE ME
Name:
Designation:
Address: