



MEDICINE AND THE LAW

Compulsory HIV testing of alleged sex offenders

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Alleged sex offenders may be compelled to be tested for HIV at state expense without their consent. The Sexual Offences Act¹ (the Act) allows victims of sexual offences, interested persons on their behalf, and investigating officers of the South African Police Service (SAPS) to apply to a magistrate for such a court order.² To protect the alleged offender's constitutional right to privacy, special procedures exist to protect the confidentiality of the court application and the HIV test results.

A person's constitutional right to bodily integrity and privacy³ is violated if their blood is tested for HIV without their informed consent⁴ except when this is allowed by reasonable and justifiable legislation.⁵ For example, a health service may be provided to a person without consent when authorised in terms of a law or court order⁶ – as is allowed in terms of the Act.² Given the high incidence of sexual violence and HIV in South Africa, the compulsory testing of alleged sex offenders for HIV without their consent is reasonable and justifiable, provided that constitutional safeguards regarding confidentiality are maintained.

Applications for compulsory HIV testing of alleged sex offenders

Applications by victims or interested persons

The victim, or an interested person on their behalf, may apply to a magistrate for the compulsory HIV testing of an alleged sex offender.⁷ An 'interested person' is 'any person who has a material interest in the well-being of a victim, including a spouse, same sex or heterosexual permanent life partner, parent, guardian, family member, care giver, curator, counsellor, *medical practitioner, health service provider, social worker or teacher*', of a sexual offence.⁸ The application must be made within 90 days after the alleged sexual offence for the magistrate to consider it. However, an investigating officer may bring an application outside the 90-day period.⁹

Applications for compulsory HIV testing of an alleged offender must be made by sworn affidavit or solemn

declaration⁹ as soon as possible after a charge has been laid. The applicant must state that: (i) a sexual offence was committed against the victim by the alleged offender; (ii) this has been reported to the SAPS or a designated health establishment; (iii) the victim may have been exposed to the risk of infection with HIV; and (iv) less than 90 days have elapsed since the date of the alleged offence.⁹ The application may be made before or after the arrest of the alleged offender, and be handed to the investigating officer who must submit it to a magistrate in the magisterial district in which the alleged offence occurred.¹⁰

Additional requirements regarding applications by interested persons

An application for compulsory testing by an interested person must have the written consent of the victim, unless the victim is: under the age of 14 years; mentally disabled; unconscious; a person in respect of whom a curator has been appointed in terms of a court order; or a person whom the magistrate is satisfied is unable to provide consent.⁷ The application must also state: (i) the nature of the relationship between the interested person and the victim; and (ii) if the interested person is not the spouse, same sex or heterosexual permanent life partner or a parent of the victim, and the reason why the application is being brought.⁹

Applications by investigating officers

Applications by investigating officers do not have to be brought within the 90-day limit. They may apply for compulsory HIV testing of an alleged sex offender to a magistrate of the magisterial district in which the alleged sexual offence, or other alleged offence in which the HIV status of the alleged offender may be relevant, occurred.¹¹ The application may be brought at any stage after the alleged offence and must: (i) set out the grounds, based on information taken on oath or by solemn declaration, on the alleged sexual or other relevant offence committed by the alleged offender; and (ii) must be made after a charge has been laid. The application may be brought before or after an arrest has been effected, or after conviction.¹¹

Granting of a court order by a magistrate

Applications by victims or interested persons

The magistrate will issue the court order if satisfied that



there is *prima facie* evidence that: (i) a sexual offence has been committed against the victim by the alleged offender; (ii) the victim might have been exposed to the body fluids of the alleged offender; and (iii) no more than 90 days have elapsed since the date of the alleged offence.¹² The order must provide that the alleged offender be tested for HIV according to the state's norms and protocols, including: (i) the collection from the alleged offender of two prescribed body specimens to determine the presence or absence of HIV; and (ii) the performance of one or more HIV tests to determine the presence or absence of HIV infection. The order must also state that the HIV result should be disclosed in the prescribed manner to: (i) the victim or interested person; and (ii) the alleged offender.¹² Where the alleged offender has already been tested for HIV in terms of an application by the investigating officer, the magistrate may order that the HIV results be disclosed to the victim or interested person.¹²

A copy of the order must be handed to the investigating officer, who must: (i) inform the victim or interested person of the outcome of the application; and (ii) if an order is granted, hand the alleged offender a copy of the order and if necessary explain its contents.¹³

Applications by investigating officer

The magistrate must issue a court order if satisfied that there is *prima facie* evidence that: (i) a sexual offence or other relevant offence has been committed by the alleged offender; and (ii) HIV testing appears to be necessary for purposes of investigating or prosecuting the offence.¹⁴ It must state that: (i) the alleged offender be tested for HIV; (ii) two prescribed body specimens to determine the presence or absence of HIV be collected from the alleged offender; (iii) HIV tests to determine the presence or absence of HIV infection in the alleged offender be performed; (iv) the HIV test results be disclosed to the investigating officer or where applicable to a prosecutor for the purposes of prosecuting the case or any other court proceedings; and (v) the results be disclosed to the alleged offender who has not already received the results because of an application by the victim or an interested party.¹⁴

A copy of the order must be handed to the investigating officer, who must hand the alleged offender a copy and if necessary explain its contents.¹⁵

Execution of orders for compulsory HIV testing and disclosure of results

Taking of body specimens for compulsory HIV testing by medical practitioner or nurse

On receipt of an order, the investigating officer must request any medical practitioner or nurse to take two prescribed body specimens from the alleged offender, and must make the alleged offender available for this purpose.¹⁶ The medical

practitioner or nurse must take the specimens from the alleged offender and the investigating officer must deliver these to the head, or to a person designated by the head, of a designated health establishment.¹⁶

Should an alleged sex offender fail, refuse or avoid compliance with, or deliberately frustrate attempts to serve a court order requiring them to undergo compulsory HIV testing,¹⁷ this constitutes an offence subject to a penalty or a fine or imprisonment for a period not exceeding 3 years.¹⁸

Compulsory HIV testing of body specimens by head of designated health establishment or their designate

The head of a designated health establishment or designated person must: (i) perform HIV tests on the body specimens of the alleged offender to determine the presence or absence of HIV infection; (ii) record the results of the HIV test; (iii) provide the investigating officer with duplicate sealed records of the test results; and (iv) retain one sealed record as prescribed.¹⁶

Confidentiality and disclosure of HIV test results

Applications by victims or interested persons

Where the application for compulsory HIV testing was made by the victim or an interested person, the investigating officer must hand the sealed record of the test results to such person and the alleged offender. The officer must also provide the prescribed information on the confidentiality of, and how to deal with, the HIV results and if necessary explain its contents.¹⁶ If the charge is withdrawn by the prosecution at the request of the victim or interested person, the court order lapses and any specimens taken or HIV test results obtained before this date must be destroyed.¹⁹

Applications by investigating officers

Where the application for compulsory HIV testing was made by the investigating officer, he/she must hand the sealed record of the test results and the prescribed information on how to deal with the results to the alleged offender, and if necessary explain its contents.¹⁶ The test results must also be handed to the victim or an interested party.²⁰ The investigating officer must retain the other test results record or make them available to a prosecutor for the purposes of prosecution or any other court proceedings.¹⁶

Use and communication of HIV test results

The results of any compulsory HIV tests may only be used to inform the victim or interested person whether or not the alleged offender is infected with HIV, with a view to: (i) reducing secondary trauma and enabling the victim to make informed medical, lifestyle and other personal decisions; or (ii)



using the test results as evidence of ensuing civil proceedings. An investigating officer may also use the results to gather information for use as evidence in criminal proceedings.²⁰

The granting of a court order for compulsory HIV testing and the results of the test may not be communicated to parties other than: (i) the victim or an interested person who applied for the order; (ii) the alleged offender; and (iii) the investigating officer.²¹ However, granting of a court order for compulsory HIV testing may be communicated to: (i) the prosecutor; (ii) other persons who need the test results for criminal investigation or proceedings or civil proceedings; (iii) the medical practitioner or nurse who takes the body specimens from the alleged offender; and (iv) the head of a designated health establishment or a person designated by the head.²² The results of the compulsory HIV test may be communicated to: (i) the prosecutor if for use in criminal proceedings; and (ii) any other person who needs the test results for civil proceedings or an order of court.²³

Judges or magistrates, in proceedings under the Act or in ensuing criminal or civil proceedings, may make an order to give effect to the Act, including how the compulsorily obtained HIV test results should be kept confidential and the court record should be dealt with.²⁴

The National Commissioner of the SAPS must ensure that applications and court orders regarding compulsory HIV testing in terms of the Act are recorded in a register and that access to the register is limited.²⁵

Protection against malicious or grossly negligent violation of a sex offender's right to privacy

The Act makes it a criminal offence for a person with malicious intent or in a grossly negligent manner to: (i) lay a charge with the SAPS regarding an alleged sexual offence to ascertain the

HIV status of any person; or (ii) disclose the results of any HIV tests in contravention of the Act. Such offences will be subject to a penalty or a fine or imprisonment for a period not exceeding 3 years.¹⁸

1. Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
2. Section 28(1)(b) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
3. Sections 12 and 14 of the Constitution of the Republic of South Africa Act 108 of 1996.
4. See *C v Minister of Correctional Services* 1996 (4) SA 292 (T).
5. Section 36(1) of the Constitution of the Republic of South Africa Act 108 of 1996.
6. Section 7(1)(c) of the National Health Act No. 61 of 2003.
7. Section 30(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
8. Section 27 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
9. Section 30(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
10. Section 30(3) and (4) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
11. Section 32(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
12. Section 31(3) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
13. Section 31(4) and (5) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
14. Section 32(3) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
15. Section 32(4) and (5) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
16. Section 33(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
17. Section 38(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
18. Section 38(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
19. Section 33(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
20. Section 34 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
21. Sections 36 and 37 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
22. Section 36 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
23. Section 37(1) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
24. Section 37(2) of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.
25. Section 35 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act No. 32 of 2007.