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CIVIL SOCIETY PRISON REFORM INITIATIVE
Project of the Community Law Centre

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Prisoners' access to anti-retroviral treatment [1]

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By Lukas Muntingh and Christopher Mbazira [2]

Case review of *EN and others v The Government of South Africa and others* (Durban High Court, Case No. 4576/2006) [unreported] (EN and others)

Prisoners are susceptible to a number of illness and diseases. This may relate to the conditions of prisons themselves (e.g. poor ventilation is associated with TB), life style (e.g. poor nutrition and substance abuse), and sexual violence (e.g. male rape in prison). From a healthcare perspective, prisons present a particular challenge. From 1996 to 2005, the number of prisoners dying from natural causes per year increased from 211 to 1507. HIV/Aids has contributed to this increase.

The rate of HIV infection amongst prisoners is unknown and the Department of Correctional Services (the Department) has commissioned a research project to establish this. In the absence of accurate and publicly accessible data, it is difficult to make any accurate assessment of the size and scope of HIV infection and persons living with AIDS in our prisons. What we do know is that prisoners' access to anti-retroviral treatment (ARV) is extremely limited. To date only one accredited ARV treatment centre has been established by the Department at Grootvlei Correctional Centre in the Free State.

In September 2005, the Department briefed the Parliamentary Portfolio Committee on Correctional Services regarding prisoners' access to ARV with reference to the "*HIV/Aids Policy for Offenders*". It reported that the Department was not accredited to provide ARV to prisoners. It also noted that the ARV roll-out centres were located off-site at the Department of Health facilities, which created security concerns as a result of lack of staff and logistics (e.g. transport).

In essence, the Department's position was that, while it would like to provide access to ARV, it lacked the resources (staff and infrastructure) to do so. The applicants in the present case sought to remove all obstacles preventing the prisoners from accessing ARV.

Facts

The AIDS Law Project (ALP) assisted 15 HIV/AIDS positive prisoners (the applicants) serving sentences at the Westville Correctional Centre (WCC) to bring an application to the Court:

- to compel the government to remove all obstacles preventing them (and other qualifying prisoners) from accessing ARV at accredited public healthcare facilities.
- to seek an order that they be provided with ARV in respect of the established government Operational Plan for Comprehensive HIV and AIDS Care (the Operational Plan)
- to require it to issue a structural interdict compelling the government to report to it within one week on the measures they will take to give effect to the relief granted.

The application was preceded by a fairly lengthy but largely unproductive process of meetings and correspondence between the ALP and the WCC and the Head Office of the Department of Correctional Services. This process began in October 2005 and by March 2006 the ALP came to the conclusion that it would bear no fruit. It launched the application in the Durban High Court on 12 April 2006.

The respondents were the Government of the Republic of South Africa, Head of Westville Correctional Centre, Minister of Correctional Services, Area Commissioner of Correctional Services, KZN, Minister of Health and MEC for Health (KZN). They apparently attempted to undermine the application by contesting some technical matters, such as the *locus standi* of the Applicants, the urgency of the application, and the validity of the founding papers. Justice Pillay dismissed these arguments.

Arguments

Applicants' arguments were simple and straightforward. They argued that the respondents had failed to meet two Constitutional obligations in respect of the right to health in sections 27(1)(a) and 35(2) of the Constitution. Section 27(1)(a) guarantees everyone the right of access to healthcare services, which the state must realise progressively subject to available resources. Section 35(2) guarantees to every detained person the right to conditions of detention which are consistent with human dignity, including medical treatment. The applicants argued that the Operational Plan had not been implemented reasonably owing to the lack of speed. All they sought was an order, compelling the respondents to fast track implementation of the Operational Plan to enable the applicants and similarly situated prisoners be assessed for ARV treatment.

As is often the case in socio-economic rights litigation, the respondents attempted to seek refuge in the doctrine of separation of powers. They argued that the applicants were asking the Court "to prescribe ARV", a task falling beyond the court's competence.

The respondents, while not contesting the principle that a court can grant a structural interdict, argued that it was not necessary in this case because they were implementing the Operational Plan. They also argued that the issuance of structural interdicts in certain circumstances may amount to unwarranted interference with the authority and discretion of the executive arm of government in violation of the doctrine of separation of powers.

The respondents also argued that the applicants were already being taken care of under what was described as a Wellness Programme. The applicants contested this assertion and no evidence was led by the respondents to substantiate their claim.

The decision

Judge Pillay dismissed the respondents' arguments. He focused on the urgency "*to remove all obstacles preventing the applicants (and other qualifying prisoners) from accessing ARV at an accredited public health facility"*. He stated that what was being sought was the removal of unnecessary delays in the treatment of the prisoners, as this was indeed a "*matter of life and death*".

According to the Judge, the question in the case was whether the Respondents were meeting their constitutional obligations by taking reasonable steps or measures to ensure that the applicants were receiving adequate medical treatment. There was no argument on the part of the respondents that they were constrained by resources in their endeavours to ensure adequate medical treatment for the applicants.

The judgment describes in detail the history of the case and the apparent lack of seriousness on the part of the respondents in dealing with the applicants' problem:

> *The dilatoriness and lack of commitment by the respondents as evidenced by the correspondence forming part of the founding affidavit is quite evident. It seems to me that but for the intervention of the State Attorney, who used his good offices to convene the round table meeting which took place on the 15th of December 2005, the ALP may well have had good cause to have launched this application earlier.*

The Judge castigated the respondents for their inflexibility, as exhibited in their argument that they were bound by the Operational Plan and its guidelines, which they were implementing. It was apparent to the Judge that the respondents were implementing the Operational Plan without due regard to the circumstances of prisoners, yet the plan itself had room for flexibility.

Relying on the precedent in *Government of the Republic of South Africa and Others v Grootboom and Others*2001 (1) SA 46 (CC) the Court held that the Respondent's implementation of the relevant laws and policies in this case was unreasonable as it was inflexible, characterised by unexplained and unjustified delays and irrationality.

The order

The Court granted the relief sought by ordering the respondents, with immediate effect, to remove the restrictions that prevent the applicants and similarly situated prisoners from accessing ARV. An order was also issued that ARV be provided to the applicants and similarly situated prisoners in accordance with the Operational Plan.

The Court made a structural interdict granting the relief sought (for example, the removal of obstacles) and ordered the respondents to submit to the Court by 7 July 2006 (two weeks after judgment) a plan as to how they intend to comply with the orders above. While acknowledging the sensitivity of a structural interdict, the Judge held that the case was one in which such an order was required. Nothing rational or workable had been done by the respondents for the applicants and similarly situated prisoners.

Concluding observations

This case reinforces the jurisprudence on socio-economic rights in the South Africa. It also affirms the longstanding principle that the rights of prisoners that can be limited are only those that are necessary for a sentence of the court to be administered. Prisoners retain all other rights.

The judgment gave a pronounced expression of the right of access to healthcare and the duty of the state to provide such access. The state has the primary responsibility to provide access to healthcare because these prisoners are placed in the care of the state and do not have the means or ability to access medical care on their own. A prisoner cannot approach a different hospital or arrange for his own transport – he or she is dependent on the state to provide this. This absolute dependency places prisoners in an extremely vulnerable situation. The duty of the state towards prisoners is therefore inescapable.

Interestingly, the respondents did not raise the issue of resources as was the case when the Department briefed the Portfolio Committee on Correctional Services in September 2005. This may have been done for two reasons. The first is that the "resources argument" is not a convincing one in some cases, and the Constitutional Court has already made this clear. The second is that the respondents believed that they were indeed meeting their constitutional obligations.

However, the key question here was whether they were taking reasonable steps or measures to ensure that the prisoners were receiving adequate medical care. The evidence showed that they were not. An arrangement for the treatment of prisoners was made with only one out of a possible seven hospitals and this hospital agreed to see four prisoners per week. This arrangement was regarded as inadequate as it would have taken more than 3 weeks to assess the applicants and more than a year to assess other similarly affected prisoners at WCC. It was therefore clearly not possible under this arrangement for qualifying prisoners to receive their weekly treatment.

The judgment also reflects on the fact that prisoners did not receive any special mention or attention in the Operational Plan and Guidelines. This was regarded as a shortcoming and probably one that could have been foreseen, given the high number of prison deaths.

The structural interdict granted should be regarded as the result of the poor track record of the respondents in this case. Their lack of cooperation, tardiness and general unwillingness to show good faith in assisting with the applicants' problem created a situation where it would have bordered on irresponsibility on the part of the Court to have done otherwise. The willingness of the Court to intervene in this manner is seen as a positive development when vulnerable persons find themselves in need of protection. In this case, the state was compelled to deliver in a real and tangible manner on the right to adequate healthcare.

The judgment also recognises that it is indeed a matter of life and death and requires urgent action. It stated *"that the graver the threat to fundamental rights, the greater the responsibility on the duty bearer"*. Binding the respondents to a time frame in this case helped to underscore the significance of the violations at hand.

This judgment means that all qualifying prisoners are entitled to be given access to ARV. Unfortunately, however, the victory has been short-lived. The respondents have filed an appeal against the judgment. It is seeking leave to appeal to a full bench of the provincial division of the KwaZulu-Natal High Court. Sadly, this means that the successful applicants will have to wait until the legal battle is over before knowing whether or not they are entitled to ARVs.

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Update on EN and others v The Government of South Africa and others

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On 25 July 2006 Judge Thumba Pillay ordered the government to comply with his earlier judgment regarding access to ARV treatment at Westville Correctional Centre (WCC). Due to the fact that the government applied for leave to appeal against that judgment, the execution of Judge Pillay's order was suspended until the final determination of the appeal.

On 20 July, the lawyers for the prisoners argued that it would be unacceptable to allow the order to remain suspended until the appeal is finalized, as this may take a year or even longer. During this time the health of the 13 prisoners (and others at WCC who are in a similar position) would decline even further, and some may die. There is no doubt that the urgency here is one of life and death.

On 25 July 2006 Judge Pillay stated:
"*One cannot, on the one hand, hail the values of our Constitution which holds the right to life as sacrosanct and on the other, allow people to die in a situation when something can and should be done, certainly more diligently, to counter a pandemic which has been described as an 'incomprehensible calamity' and the 'most important challenge facing South Africa since the birth of our new democracy'*."

The Judge also noted that on the government's own version nine prisoners per month have died since 2005 of AIDS-related illnesses. This figure in itself demonstrates the urgency of the matter. If the government were complying with their constitutional obligations, as they say they are, why would there be this alarming AIDS-related death rate?

As a result, the Judge ordered that the 22 June 2006 judgment be implemented forthwith, and that the government's report (on the steps that they are taking to ensure access to ARV treatment at WCC) must be filed with the Court by 14 August 2006.

He also granted the government leave to appeal to the full bench of the Natal Provincial Division. Despite the fact that his order will be executed in the interim, he recommended that an expedited date should be allowed for the appeal hearing.

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SA Prisons at a glance

Figures indicated with * are for December 2005. All other figures are for March 2006.

Category	Feb-05	Mar-06	Increase / Decrease
Functioning prisons	233	238	2.1
Total prisoners	186823	158032	-15.4
Sentenced prisoners	135743	109226	-19.5
Unsentenced prisoners	51080	48806	-4.5
Male prisoners	182652	154481	-15.4
Female prisoners	4173	3551	-14.9
Children in prison	3035	2207	-27.3
Sentenced children	1423	1069	-24.9
Unsentenced children	1612	1138	-29.4
Total capacity of prisons	113825	*113825	0.0
Overcrowding	164	*139	-15.2
Most overcrowded			
Feb '05: Durban Med C	387%		
Dec '05: Middledrift		*387%	
Least overcrowded			
Apr '05: Emthonjeni	27.85%		
Dec '05: Emthonjeni		*18.00%	
Awaiting trial longer than 3 months	23132	*19277	-16.7
Infants in prison with mothers	228	136	-40.4

[1] This article first appeared in ESR Review, Vol 7 No. 2, July 2006. It is reproduced here with full acknowledgment and appreciation to ESR Review.
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[3] This update is based on a press statement issued by the Aids Law Project on 25 July 2006.

CSPRI welcomes your suggestions or comments for future topics on the email newsletter.
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