RECENT DEVELOPMENTS

South African court rules on the state's obligation to prevent mother-to-child transmission of HIV

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Treatment Action Campaign and Others v Minister of Health and Others **Case no 21182/2001 TPD**

Editor's note

On 14 December 2001 Justice Chris Botha of the Pretoria High Court found in favour of the Treatment Action Campaign, the Children's Rights Centre and paediatricians represented by Dr Saloojee against the Minister of Health and the provincial Ministers of Health on the issue of mother-to-child HIV transmission.[1] *Five days later the Minister of Health responded that they will appeal to the Constitutional Court since "this judgment could have far-reaching implications in defining our constitutional democracy and in shaping the state's responsibility for the delivery of social services" and to "clarify a constitutional and jurisdictional matter which – if left vague – could throw executive policy making into disarray and create confusion about the principle of the separation of powers [between the judiciary and the executive]."*[2]

The issue decided in the High Court was whether the steps taken by the state with regard to the prevention of mother-to-child HIV transmission by establishing 18 pilot sites and confining the dispensing of Nevirapine (an antiretroviral medicine used to reduce the risk of HIV transmission) to those sites, could be considered to be compliance with the obligation of the state to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right to access to health care services (section 27(2) of the South African Constitution). Below is a brief comment on the context and controversies surrounding the justiciability of socio-economic rights by Geoff Budlender, who acted as attorney for the Treatment Action Campaign and the other applicants in this matter.

1 The court judgment and some of the court documents are available on the Treatment Action Campaign website: http://www.tac.org.za.

2 Department of Health Press release, 19 December 2001, available from the Department of Health website: http://196.36.153.56/doh/doc/pr/2001. On 11 March 2002, Justice Botha ordered that Nevirapine be made available to pregnant women with HIV, pending the outcome of the Appeal in the Constitutional Court in May 2002 (Case no CCT 8/02).

One of the apparent ironies of the pre-1994 constitutional negotiations was that, while the liberal-conservative parties opposed the introduction of social and economic rights, the African National Congress (ANC) – which clearly was the party which would govern, and would carry the primary burden of implementing them – insisted on their presence in the Bill of Rights.

The *TAC* judgment in the High Court shows the impact of the inclusion of these rights. They are not, as some opponents have said, mere pious hopes or aspirations. They are rights, which have a specific content and meaning. As the Constitutional Court said in *Grootboom*[3], they are enforceable: the only question is how they should be enforced.

There are many ways in which the rights can be enforced.

In some instances they will be negatively enforced by invalidating laws or prohibiting conduct which interfere with the exercise of the rights. This is very familiar territory for the courts.

In other instances they will be capable of immediate enforcement by a positive order for performance. The *TAC* case demonstrates this: if a life-saving and demonstrably safe medicine is immediately available at no or nominal cost, there is no reason at all why the government should not be ordered to make it available immediately at those places where the necessary staff and service infrastructure already exist, and where the medical professionals believe that this is in the interests of their patients.

The most heated debate usually takes place over a third category of cases, where the right can not immediately be fulfilled, and a programme is necessary to achieve this. In the *TAC* case, this is the position in respect of those public health facilities which are not yet in a position to provide Nevirapine – for example, because they are not yet able to offer voluntary counselling and testing. Here, the courts will rightly be reluctant to step into the shoes of the executive, which is responsible for designing and implementing governmental programmes. As the Supreme Court of Canada has observed, there is a 'myriad' of different ways in which government can perform its constitutional obligations – once it correctly understands what those obligations are.

A declaration of the right and the corresponding duty, and an order on government to give effect to it, is therefore appropriate. It is also appropriate that the government be required to submit that programme to the scrutiny of the court, so that the court can determine whether it falls within the framework permitted and required by the constitution. An order of this kind both ensures that government does not drag its feet and gives all parties the advantage of a determination, before implementation of a possibly expensive programme, that it meets the constitutional mandate.

All of this means that social and economic rights place burdens on the government. We should not be surprised if government officials should grumble that the courts are making 'policy' decisions which properly

3 *Government of the Republic of South Africa and others v Grootboom and others* 2001 (1) SA 46 (CC).

belong to the elected branches of government. But once social and economic rights have been included in the constitution, it is inevitable that courts will have to decide whether policies are consistent with the requirements of the constitution. In fact, this is an inevitable consequence of having a Bill of Rights at all. Even in the absence of social and economic rights, constitutional decisions have policy implications and consequences. One of the striking the aspects of the *TAC* case is that it could have been decided, with the same result, on a variety of other, more traditional, constitutional grounds – for example equality, or administrative justice, or rationality.

So why bother to have social and economic rights? And why did the ANC insist on this? Two main reasons are suggested.

First, social and economic rights compel the government to keep its focus on the most vulnerable and the most disadvantaged. This is one of the lessons of *Grootboom*. The more far-sighted of the ANC representatives at the constitutional negotiations recognised that in a country like ours, with its history of institutionalised dispossession and discrimination, a focus on addressing disadvantage and poverty has to be a fundamental goal and central purpose of government.

Secondly, the social and economic rights keep other rights in balance, and enable the government to do what it should do and wants to do. The pharmaceutical manufacturers attempted to prevent the government from making less expensive drugs available to South Africans. They relied in part on their property rights, which are constitutionally entrenched.[4] Part of the answer was found in the social and economic rights, which authorised government to take reasonable measures to achieve effective health services.

Social and economic rights are largely poor people's rights: the wealthy have achieved most of the benefits which they promise. A constitution without an effective right to health services would lead to a health system even more severely skewed towards the needs of the wealthy, and would impede the attempts of government to meet its historic mandate and duty.

The irony of the constitutional negotiations is therefore more apparent than real. It was to be expected that those who represent established and vested interests would want to exclude social and economic rights. Conversely, it was to be expected that those who represent the poor would see the need for social and economic rights in order to be able to achieve the fundamental transformation of our country.

4 See article by Heywood "Debunking 'Conglomo-talk': A case study of the *amicus curiae* as an instrument for advocacy, investigation and mobilisation".