

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 8/02

MINISTER OF HEALTH - First Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, EASTERN CAPE - Second Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, FREE STATE - Third Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, GAUTENG - Fourth Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, KWAZULU-NATAL - Fifth Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, MPUMALANGA - Sixth Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTHERN CAPE - Seventh Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTHERN PROVINCE – Eighth Appellant

MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, NORTH WEST - Ninth Appellant

versus

TREATMENT ACTION CAMPAIGN - First Respondent

DR HAROON SALOOJEE - Second Respondent

CHILDREN'S RIGHTS CENTRE - Third Respondent

Together with

INSTITUTE FOR DEMOCRACY IN SOUTH AFRICA - First Amicus Curiae

COMMUNITY LAW CENTRE - Second Amicus Curiae

COTLANDS BABY SANCTUARY - Third Amicus Curiae

Heard on : 2, 3 and 6 May 2002

Decided on : 5 July 2002

JUDGMENT

[19]Then, in paragraph 22, she summarises the applicants' case in the following terms:

"22. In summary, the Applicants' case is as follows: 22.1 The HIV/AIDS epidemic is a major public health problem in our country, and has reached catastrophic proportions. 22.2 One of the most common methods of transmission of HIV in children is from mother to child at and around birth. Government estimates are that since 1998, 70 000 children are infected in this manner every year. 22.3 The Medicines Control Council has the statutory duty to investigate whether medicines are suitable for the purpose for which they are intended, and the safety, quality and therapeutic efficacy of medicines. 22.4 The Medicines Control Council has registered Nevirapine for use to reduce the risk of mother-to-child transmission of HIV. This means that Nevirapine has been found to be suitable for this purpose, and that it is safe, of acceptable quality, and therapeutically efficacious. 22.5 The result is that doctors in the private profession can and do prescribe Nevirapine for their patients when, in their professional judgment, it is appropriate to do so. 22.6 In July 2000 the manufacturers of Nevirapine offered to make it available to the South African government free of charge for a period of five years, for the purposes of reducing the risk of mother-to-child transmission of HIV. 22.7 The government has formally decided to make Nevirapine available only at a limited number of pilot sites, which number two per province. 22.8 The result is that doctors in the public sector, who do not work at one of those pilot sites, are unable to prescribe this drug for their patients, even though it has been offered to the government for free. 22.9 The Applicants are aware of the desirability of a multiple-strategy approach to the prevention of mother-to-child transmission. However, they cannot and do not accept that this provides a rational or lawful basis for depriving patients at other sites of the undoubted benefits of Nevirapine, even if at this stage the provision can not be done as part of a broader integrated strategy - a point that is not conceded. 22.10 To the extent that there may be situations in which the use of Nevirapine is not indicated, this is the situation in both the private and the public sector. Whether or not to prescribe Nevirapine is a

matter of professional medical judgment, which can only be exercised on a case-by-case basis. It is not a matter which is capable of rational or appropriate decision on a blanket basis. 22.11 There is no rational or lawful basis for allowing doctors in the private sector to exercise their professional judgment in deciding when to prescribe Nevirapine, but effectively prohibiting doctors in the public sector from doing so.

22.12 In addition to refusing to make Nevirapine generally available in the public health sector, the government has failed over an extended period to implement a comprehensive programme for the prevention of mother-to-child transmission of HIV. 22.13 The result of this refusal and this failure is the mother-to-child transmission of HIV in situations where this was both predictable and avoidable. 22.14 This conduct of the government is irrational, in breach of the Bill of Rights, and contrary to the values and principles prescribed for public administration in section 195 of the Constitution. Furthermore, government conduct is in breach of its international obligations as contained in a number of conventions that it has both signed and ratified."

[20]The main response on behalf of government by Dr. Ntsaluba and Dr. Simelela is detailed and lengthy and raises numerous disputes, mostly as to emphasis, opinion or inference but occasionally also of fact. The reply on behalf of the applicants likewise raises many issues of one kind or another. Many of these disputes gave rise to a regrettable degree of animosity and disparagement, culminating in unsubstantiated and gratuitous allegations of untruthfulness being levelled at one of the attorneys on an insignificant side-issue. In our country the issue of HIV/AIDS has for some time been fraught with an unusual degree of political, ideological and emotional contention. This is perhaps unavoidable, having regard to the magnitude of the catastrophe we confront. Nevertheless it is regrettable that some of this contention and emotion has spilt over into this case. Not only does it bedevil future relations between government and non-governmental agencies that will perforce have to join in combating the common enemy, but it could also have rendered the resolution of this case more difficult.

[25]The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are.<sup>10</sup> The question is whether the applicants have shown that the measures adopted by the government to provide access to health care services for HIV-positive mothers and their newborn babies fall short of its obligations under the Constitution.

Minimum core

[26]Before outlining the applicants' legal submissions, it is necessary to consider a line of argument presented on behalf of the first and second amici. It was contended that section 27(1) of the Constitution establishes an individual right vested in everyone. This right, so the contention went, has a minimum core to which every person in need is entitled. The concept of "minimum core" was developed by the United Nations Committee on Economic, Social and Cultural Rights which is charged with monitoring the obligations undertaken by state parties to the International Covenant on Economic, Social and Cultural Rights. According to the Committee

"a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its *raison d'être*. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligations must also take account of resource constraints applying within the country concerned. Article 2(1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations."<sup>11</sup>

[27]Support for this contention was sought in the language of the Constitution and attention was drawn to the differences between sections 9(2), 12 24(b), 13 25(5) 14 and 25(8) 15 on the one hand, and sections 26 and 27 on the other.

[28]It was contended that section 25(5), which obliges the state to "take reasonable legislative and other measures, within its available resources" towards "access to land", imposes an obligation on the state, but is not associated with a self-standing right to have access to land. Section 24(b), on the other hand, confers on everyone a right "to have the environment protected . . . through reasonable legislative and other measures", but is not coupled with a separate duty on the state to take such measures. Sections 9(2) and 25(8) contain permissive powers to take reasonable measures but no obligation to do so. In the case of sections 26 and 27, however, rights and obligations are stated separately. There is accordingly a distinction between the self-standing rights in sections 26(1) and 27(1), to which everyone is entitled, and which in terms of section 7(2)

of the Constitution "[t]he state must respect, protect, promote and fulfil", and the independent obligations imposed on the state by sections 26(2) and 27(2). This minimum core might not be easy to define, but includes at least the minimum decencies of life consistent with human dignity. No one should be condemned to a life below the basic level of dignified human existence. The very notion of individual rights presupposes that anyone in that position should be able to obtain relief from a court.

[29]In effect what the argument comes down to is that sections 26 and 27 must be construed as imposing two positive obligations on the state: one an obligation to give effect to the 26(1) and 27(1) rights; the other a limited obligation to do so progressively through "reasonable legislative and other measures, within its available resources". Implicit in that contention is that the content of the right in subsection (1) differs from the content of the obligation in subsection (2). This argument fails to have regard to the way subsections (1) and (2) of both sections 26 and 27 are linked in the text of the Constitution itself, and to the way they have been interpreted by this Court in *Soobramoney* and *Grootboom*.

[30]Section 26(1) refers to the "right" to have access to housing. Section 26(2), dealing with the state's obligation in that regard, requires it to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right". The reference to "this right" is clearly a reference to the section 26(1) right. Similar language is used in section 27 which deals with health care services, including reproductive health care, sufficient food and water, and social security, including, if persons are unable to support themselves and their dependants, appropriate social assistance. Subsection (1) refers to the right everyone has to have "access" to these services; and subsection (2) obliges the state to take "reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights". The rights requiring progressive realisation are those referred to in sections 27(1)(a), (b) and (c).

[31]In *Soobramoney* it was said:

"What is apparent from these provisions is that the obligations imposed on the State by ss 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources."<sup>16</sup>

The obligations referred to in this passage are clearly the obligations referred to in sections 26(2) and 27(2), and the "corresponding rights" are the rights referred to in sections 26(1) and 27(1).

[32]This passage is cited in Grootboom.<sup>17</sup> It is made clear in that judgment that sections 26(1) and 26(2) "are related and must be read together".<sup>18</sup> Yacoob J said:

"The section has been carefully crafted. It contains three subsections. The first confers a general right of access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the State . . ."19

It is also made clear that "[s]ection 26 does not expect more of the State than is achievable within its available resources"<sup>20</sup> and does not confer an entitlement to "claim shelter or housing immediately upon demand"<sup>21</sup> and that as far as the rights of access to housing, health care, sufficient food and water, and social security for those unable to support themselves and their dependants are concerned, "the State is not obliged to go beyond available resources or to realise these rights immediately".<sup>22</sup>

[33]In Grootboom reliance was also placed on the provisions of the Covenant. Yacoob J held that in terms of our Constitution the question is "whether the measures taken by the State to realise the right afforded by s 26 are reasonable."<sup>23</sup>

[34]Although Yacoob J indicated that evidence in a particular case may show that there is a minimum core of a particular service that should be taken into account in determining whether measures adopted by the state are reasonable,<sup>24</sup> the socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them. Minimum core was thus treated as possibly being relevant to reasonableness under section 26(2), and not as a self-standing right conferred on everyone under section 26(1).<sup>25</sup>

[35]A purposive reading of sections 26 and 27 does not lead to any other conclusion. It is impossible to give everyone access even to a "core" service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights identified in sections 26 and 27 on a progressive basis. In Grootboom the relevant context in which socio-economic rights need to be interpreted was said to be that

"[m]illions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted . . ."26

[36]The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, their function in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable. As this Court said in Grootboom, "[i]t is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations".<sup>27</sup>

[37]It should be borne in mind that in dealing with such matters the courts are not institutionally equipped to make the wide-ranging factual and political enquiries necessary for determining what the minimum-core standards called for by the first and second amici should be, nor for deciding how public revenues should most effectively be spent. There are many pressing demands on the public purse. As was said in Soobramoney:

"The State has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."<sup>28</sup>

[38]Courts are ill-suited to adjudicate upon issues where court orders could have multiple social and economic consequences for the community. The Constitution contemplates rather a restrained and focused role for the courts, namely, to require the state to take measures to meet its constitutional obligations and to subject the reasonableness of these measures to evaluation. Such determinations of reasonableness may in fact have budgetary implications, but are not in themselves directed at rearranging budgets. In this way the judicial, legislative and executive functions achieve appropriate constitutional balance.

[39]We therefore conclude that section 27(1) of the Constitution does not give rise to a self-standing and independent positive right enforceable irrespective of the considerations mentioned in section 27(2). Sections 27(1) and 27(2) must be read together as defining the scope of the positive rights that everyone has and the corresponding obligations on the state to "respect, protect, promote and fulfil" such rights. The rights conferred by sections 26(1) and 27(1) are to have "access" to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).

[45]The two questions are interrelated and a consequence of government's policy as it was when these proceedings were instituted. The use of nevirapine to reduce the risk of mother-to-child transmission of HIV was confined to mothers and newborn children at hospitals and clinics included in the research and training sites. At all other public hospitals and clinics the use of nevirapine for this purpose was not provided for.

Public hospitals and clinics outside the research and training sites were not supplied with nevirapine for doctors to prescribe for the prevention of mother-to-child transmission. Only later would a decision be taken as to whether nevirapine and the rest of the package would be made available elsewhere in the health system. That decision would depend upon the results at the research and training sites. The applicants contend that this is not reasonable and that government ought to have had a comprehensive national programme to prevent mother-to-child transmission of HIV, including voluntary counselling and testing, antiretroviral therapy and the option of substitute feeding.

[46]In *Grootboom*, relying on what is said in the First Certification Judgment,<sup>29</sup> this Court held that

"[a]lthough [section 26(1)] does not expressly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to adequate housing."<sup>30</sup>

That "negative obligation" applies equally to the section 27(1) right of access to "health care services, including reproductive health care". This is relevant to the challenges to the measures adopted by government for the provision of medical services to combat mother-to-child transmission of HIV.

[47]The applicants' contentions raise two questions, namely, is the policy of confining the supply of nevirapine reasonable in the circumstances; and does government have a comprehensive policy for the prevention of mother-to-child transmission of HIV.

[64]It is this that lies at the heart of government policy. There are obviously good reasons from the public health point of view to monitor the efficacy of the "full package" provided at the research and training sites and determine whether the costs involved are warranted by the efficacy of the treatment. There is a need to determine whether bottle-feeding will be implemented in practice when such advice is given and whether it will be implemented in a way that proves to be more effective than breastfeeding, bearing in mind the cultural problems associated with bottle-feeding, the absence of clean water in certain parts of the country and the fact that breastfeeding provides immunity from other hazards that infants growing up in poor households without access to adequate nutrition and sanitation are likely to encounter. However, this is not a reason for not allowing the administration of nevirapine elsewhere in the public health system when there is the capacity to administer it and its use is medically indicated.

Capacity [65]According to Dr Simelela, there have been significant problems even at the research and training sites in providing a comprehensive programme using nevirapine for the prevention of mother-to-child

transmission. A lack of adequately trained personnel, including counsellors, a shortage of space for conducting counseling and inadequate resources due to budgetary constraints made it impossible to provide such a programme.

[66]Although the concerns raised by Dr Simelela are relevant to the ability of government to make a "full package" available throughout the public health sector, they are not relevant to the question whether nevirapine should be used to reduce mother-to-child transmission of HIV at those public hospitals and clinics outside the research sites where facilities in fact exist for testing and counselling.

Considerations relevant to reasonableness [67]The policy of confining nevirapine to research and training sites fails to address the needs of mothers and their newborn children who do not have access to these sites. It fails to distinguish between the evaluation of programmes for reducing mother-to-child transmission and the need to provide access to health care services required by those who do not have access to the sites.

[68]In *Grootboom* this Court held that

"[t]o be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."<sup>32</sup>

The fact that the research and training sites will provide crucial data on which a comprehensive programme for mother-to-child transmission can be developed and, if financially feasible, implemented is clearly of importance to government and to the country. So too is ongoing research into safety, efficacy and resistance. This does not mean, however, that until the best programme has been formulated and the necessary funds and infrastructure provided for the implementation of that programme, nevirapine must be withheld from mothers and children who do not have access to the research and training sites. Nor can it reasonably be withheld until medical research has been completed. A programme for the realisation of socio-economic rights must

"be balanced and flexible and make appropriate provision for attention to . . . crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said to be reasonable."<sup>33</sup>

[94]We are also conscious of the daunting problems confronting government as a result of the pandemic. And besides the pandemic, the state faces huge demands in relation to access to education, land, housing, health care, food, water and social security. These are the socio-economic rights entrenched in the Constitution, and the state is obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of our history this is an extraordinarily difficult task. Nonetheless it is an obligation imposed on the state by the Constitution.

[95]The rigidity of government's approach when these proceedings commenced affected its policy as a whole. If, as we have held, it was not reasonable to restrict the use of nevirapine to the research and training sites, the policy as a whole will have to be reviewed. Hospitals and clinics that have testing and counselling facilities should be able to prescribe nevirapine where that is medically indicated. The training of counsellors ought now to include training for counseling on the use of nevirapine. As previously indicated, this is not a complex task and it should not be difficult to equip existing counsellors with the necessary additional knowledge. In addition, government will need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector beyond the test sites to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

[125]It is essential that there be a concerted national effort to combat the HIV/AIDS pandemic. The government has committed itself to such an effort. We have held that its policy fails to meet constitutional standards because it excludes those who could reasonably be included where such treatment is medically indicated to combat mother-to-child transmission of HIV. That does not mean that everyone can immediately claim access to such treatment, although the ideal, as Dr Ntsaluba says, is to achieve that goal. Every effort must, however, be made to do so as soon as reasonably possible. The increases in the budget to which we have referred will facilitate this.

## Orders

[135]We accordingly make the following orders:

1. The orders made by the High Court are set aside and the following orders are substituted.
2. It is declared that:
  - a) Sections 27(1) and (2) of the Constitution require the government to devise and implement within its available resources a comprehensive and co-ordinated programme to realise progressively the rights of

pregnant women and their newborn children to have access to health services to combat mother-to-child transmission of HIV.

b) The programme to be realised progressively within available resources must include reasonable measures for counselling and testing pregnant women for HIV, counselling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and making appropriate treatment available to them for such purposes.

c) The policy for reducing the risk of mother-to-child transmission of HIV as formulated and implemented by government fell short of compliance with the requirements in subparagraphs (a) and (b) in that:

i) Doctors at public hospitals and clinics other than the research and training sites were not enabled to prescribe nevirapine to reduce the risk of mother-to-child transmission of HIV even where it was medically indicated and adequate facilities existed for the testing and counseling of the pregnant women concerned.

ii) The policy failed to make provision for counsellors at hospitals and clinics other than at research and training sites to be trained in counselling for the use of nevirapine as a means of reducing the risk of mother-to-child transmission of HIV.

3. Government is ordered without delay to:

a) Remove the restrictions that prevent nevirapine from being made available for the purpose of reducing the risk of mother-to-child transmission of HIV at public hospitals and clinics that are not research and training sites.

b) Permit and facilitate the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV and to make it available for this purpose at hospitals and clinics when in the judgment of the attending medical practitioner acting in consultation with the medical superintendent of the facility concerned this is medically indicated, which shall if necessary include that the mother concerned has been appropriately tested and counselled.

c) Make provision if necessary for counsellors based at public hospitals and clinics other than the research and training sites to be trained for the counselling necessary for the use of nevirapine to reduce the risk of mother-to-child transmission of HIV.

d) Take reasonable measures to extend the testing and counseling facilities at hospitals and clinics throughout the public health sector to facilitate and expedite the use of nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

4. The orders made in paragraph 3 do not preclude government from adapting its policy in a manner consistent with the Constitution if equally appropriate or better methods become available to it for the prevention of mother-to-child transmission of HIV.

5. The government must pay the applicants' costs, including the costs of two counsel.

6. The application by government to adduce further evidence is refused.