



Minister of Health v. Treatment Action Campaign (No. 2)

[2002] ZACC 15; 2002 (5) SA 721; 2002 (10) BCLR 1033

Country: South Africa

Region: Africa

Year: 2002

Court: Constitutional Court

Health Topics: Child and adolescent health, Health care and health services, Health systems and financing, HIV/AIDS, Hospitals, Infectious diseases, Medicines, Sexual and reproductive health

Human Rights: Right to health

Facts

The government of South Africa developed a national public health program to address mother-to-child transmission of HIV. The purpose of the program was to offer HIV-positive pregnant women nevirapine, a drug that prevents the transmission of HIV at birth, free of charge. The program was, however, limited in scope. It only offered nevirapine at certain pilot sites, none of which were public health institutions, and it did not set out a timeframe for national expansion of the program. The Treatment Action Campaign (TAC) filed a complaint in the High Court challenging the government's program alleging that the restrictions in scope violated sections 27 and 28 of the Constitution of South Africa. In relevant part, these sections guarantee the right of everyone to have access to public health care services and the right of children to be afforded special protection.

The High Court found that the Government had not taken reasonable steps to address the need to reduce mother-to-child transmission of HIV and thereby violated the Constitution of South Africa. The High Court ordered the Government to develop a comprehensive countryside program and to make nevirapine available in public health facilities, if necessary. The Government appealed.

Decision and Reasoning

The Court first examined whether socio-economic rights were enforceable under the Constitution of South Africa. Based on previous jurisprudence, it quickly stated that they were. The Court thus determined that the issue in this case was whether the Government was meeting its obligations with respect to those rights based on existing policies to provide access to health services for HIV-positive mothers and their newborn babies.

The Court then determined whether there was a "minimum core" of the rights in question that must be immediately provided for by the Government. It declined to recognize a "minimum core." Rather, it held that sections 27(1) and (2) must be read in conjunction and all that may be expected of the state was that it take reasonable steps to progressively realize the rights.

After these threshold determinations, the Court examined whether the High Court's ruling ought to be upheld. It considered whether it was reasonable for the Government to exclude access to free nevirapine from public hospitals and clinics where testing and counseling services were available and where the administration of the drug was medically indicated. Four issues were raised by the appellant: whether the drugs were efficacious; whether there were resistance concerns; whether there were safety concerns; and whether there were administrative capacity concerns. The Court dismissed each concern as unwarranted or hypothetical.

Regarding the reasonableness of restricting the Government program to certain pilot sites, the Court indicated that it was reasonable for the Government to gather evidence regarding the scalability of the program and to examine resistance and efficacy concerns associated with nevirapine. It was, however, not reasonable for the Government to wait until the best possible program was developed before expanding it to the national level, denying women and children access to the drug in the meantime. Moreover, the safety and efficacy of nevirapine had been established and the administration was relatively simple and well within the available resources of the Government. Under such circumstances, the Court stated that the provision of a single dose of nevirapine to mother and child where medically indicated was a simple, cheap and potentially lifesaving medical intervention. The Court thus held that the Government must remove the restrictions that prevented nevirapine from being made available at public hospitals and clinics pursuant to section 27(2), read with section 27(1)(a), of the Constitution.

The Court further held that the Government was obliged to ensure children were accorded the protection contemplated by section 28 that arises when parental or family care was lacking. These cases involve children born in public hospitals and clinics to indigent mothers unable to gain access to private medical treatment. The Court noted that these mothers and children were dependent upon the Government for health services.

The Court stated that it was implicit within its holding that a policy of waiting for a protracted period before taking a decision on whether the use of nevirapine beyond the dedicated research and training sites was also not reasonable within the meaning of section 27(2) of the Constitution. The Court therefore ordered the Government to take reasonable measures to extend the testing and counseling facilities at hospitals and clinics throughout the public health sector.

Finally, the Court further held that sections 27(1) and (2) of the Constitution required the government to devise and implement, within its available resources, a comprehensive and coordinated program to progressively realize the right of pregnant women and their newborn children to access health services to combat mother-to-child transmission of HIV. Such a program must include reasonable measures for counseling and testing pregnant women for HIV, counseling HIV-positive pregnant women on the options open to them to reduce the risk of mother-to-child transmission of HIV, and ensuring appropriate treatment was available to women for such purposes.

Decision Excerpts

“The crux of the problem, however, lies elsewhere: what is to happen to those mothers and their babies who cannot afford access to private health care and do not have access to the research and training sites? It is not clear on the papers how long it is planned to take before nevirapine will be made available outside these sites. Some of the provinces had not yet established any test sites by the time the application was launched in late August 2001. The first sites were established only in May 2001 following a meeting the previous month at which government had endorsed the establishment of the sites for a period of two years. These sites were to be selected according to stated criteria, one in an urban and one in a rural community in each province. Whether the programme was to be maintained strictly until the last of the provincial test sites had been functioning for two years or could possibly be extended beyond that period does not appear from the papers. What is plain, though, is that for a protracted period nevirapine would not be supplied at any public health institution other than one designated as part of a research site.” Page 13.

“This Court has had to consider claims for enforcement of socio-economic rights on two occasions. On both occasions it was recognised that the state is under a constitutional duty to comply with the positive obligations imposed on it by sections 26 and 27 of the Constitution. [...] The question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are.” Page 16-19.

“Although [...] 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, 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). [...] 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. [...] 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.” Page 27-28.

“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. [...] 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." Page 28-29.

"The state is obliged to ensure that children are accorded the protection contemplated by section 283[7] that arises when the implementation of the right to parental or family care is lacking.³[8] Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them." Page 48.

"Government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the state without any known harm to mother or child. In the circumstances we agree with the finding of the High Court that the policy of government in so far as it confines the use of nevirapine to hospitals and clinics which are research and training sites constitutes a breach of the state's obligations under section 27(2) read with section 27(1)(a) of the Constitution.[...] a policy of waiting for a protracted period before taking a decision on the use of nevirapine beyond the research and training sites is also not reasonable within the meaning of section 27(2) of the Constitution." Page 48-49.

"The primary duty of courts is to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. The Constitution requires the state to respect, protect, promote, and fulfil the rights in the Bill of Rights. Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. There is also no merit in the argument advanced on behalf of government that a distinction should be drawn between declaratory and mandatory orders against government. Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so." Page 58.

"[100] The rights that the state is obliged to respect, protect, promote and fulfil include the socio-economic rights in the Constitution." Page 59.

"A dispute concerning socio-economic rights is thus likely to require a court to evaluate state policy and to give judgment on whether or not it is consistent with the Constitution. If it finds that policy is inconsistent with the Constitution it is obliged in terms of section 172(1)(a) to make a declaration to that effect. But that is not all. Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant appropriate relief. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also make any order that is just and equitable." Page 60.

"We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement provide guidance as to the appropriate relief in a particular case. Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction." Page 61.

"In the present case we have identified aspects of government policy that are inconsistent with the Constitution. The decision not to make nevirapine available at hospitals and clinics other than the research and training sites is central to the entire policy. Once that restriction is removed, government will be able to devise and implement a more comprehensive policy that will give access to health care services to HIV-positive mothers and their newborn children, and will include the administration of nevirapine where that is appropriate. The policy as reformulated must meet the constitutional requirement of providing reasonable measures within available resources for the progressive realisation of the rights of such women and newborn children. This may also require, where that is necessary, that counsellors at places other than at the research and training sites be trained in counselling for the use of nevirapine. We will formulate a declaration to address these issues." Page 69.

"We do not underestimate the nature and extent of the problem facing government in its fight to combat HIV/AIDS and, in particular, to reduce the transmission of HIV from mother to child. We also understand the

need to exercise caution when dealing with a potent and a relatively unknown drug. But the nature of the problem is such that it demands urgent attention. Nevirapine is a potentially lifesaving drug. Its safety and efficacy have been established. There is a need to assess operational challenges for the best possible use of nevirapine on a comprehensive scale to reduce the risk of mother-to-child transmission of HIV. There is an additional need to monitor issues relevant to the safety and efficacy of and resistance to the use of nevirapine for this purpose. There is, however, also a pressing need to ensure that where possible loss of life is prevented in the meantime.â€• Page 73.

"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 counselling of the pregnant women concerned.
 - ii) The policy failed to make provision for counselors at hospitals and clinics other than at research and training sites to be trained in counseling for the use of nevirapine as a means of reducing the risk of mother-to-child transmission of HIV." Page 78-79.