



## EN and Others v. Government of RSA and Others (No. 1)

2006 (6) SA 543 (D); 2007 (1) BCLR 84 (D)

**Country:** South Africa

**Region:** Africa

**Year:** 2006

**Court:** High Court - Durban and Coast Local Division

**Health Topics:** Health care and health services, Health systems and financing, HIV/AIDS, Infectious diseases, Medicines, Poverty, Prisons

**Human Rights:** Right to health

### Facts

An urgent application was filed on behalf of fifteen prisoners living with HIV/AIDS who required antiretroviral (ARV) treatment while incarcerated at the Westville Correctional Centre (WCC) in KwaZulu-Natal province. The Applicants were acting in their individual capacities and as representatives of the class of prisoners incarcerated at WCC. The sixteenth applicant was the Treatment Action Campaign (TAC), which was acting in the public interest for the purposes of securing the effective enforcement of the constitutional rights of the prisoners. The Respondents were the Government of South Africa and representatives of National and Provincial Government departments responsible for the health of incarcerated persons.

The Applicants contended that they, along with the class of prisoners they represented, had a right to adequate medical treatment and that the Respondents bore a corresponding obligation to fulfil the right under articles 27 and 35(2)(e) of the Constitution. The Applicants also argued that the Respondents were in breach of their constitutional obligations by delaying, without good cause, to ensure the Applicants and other prisoners living with HIV incarcerated at WCC received adequate medical treatment.

The Applicants sought an order against the Respondents on the following terms:

To remove the restrictions preventing the Applicants, and all other similarly situated prisoners at WCC who met the criteria as set out in the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment in South Africa (the Operational Plan), from accessing ARV treatment at an accredited public health facility;

To ensure the Applicants, and all other similarly situated prisoners at WCC who met the criteria as set out in the Operational Plan, were immediately provided with ARV treatment at an accredited public health facility; and

To furnish the Registrar of the Court, within one week of the order being granted, with an affidavit setting out the manner in which compliance with the relief sought would be ensured.

The Respondents contended that they were not in breach of their constitutional obligations. They claimed they were taking reasonable steps to ensure the Applicants and other similarly situated prisoners living with HIV/AIDS at WCC received adequate medical treatment. The Respondents did not raise the issue of a lack of resources.

### Decision and Reasoning

The court held that the Respondents had not met their constitutional and legislative obligations to the Applicants and other prisoners living with HIV/AIDS at WCC. It held that the treatment and medical care provided to prisoners living with HIV/AIDS was neither adequate nor reasonable.

The court further held that the implementation of the laws and policies that pertained to the provision of adequate medical treatment to prisoners living with HIV/AIDS at WCC was unreasonable because it was inflexible and characterised by unjustified and unexplained delays. The court also declared that several steps taken by the Respondents in response to the institution of the legal proceedings were irrational. The court thus held that the Government is in breach of its constitutional obligations when it unreasonably implements an otherwise reasonable program aimed at the fulfilment of its constitutional obligations.

The Court ordered the Respondents: to immediately remove the restrictions preventing the Applicants and

other prisoners living with HIV/AIDS at WCC from accessing ARV treatment at an accredited public health facility; and to immediately provide ARV treatment, in accordance with the Operational Plan, to the Applicants and other similarly situated prisoners living with HIV/AIDS at WCC at an accredited public health facility.

## Decision Excerpts

“I accept without hesitation that the Court cannot prescribe treatment. That is the function of the medical fraternity. My understanding of the relief claimed, and what the applicants seek to do, is to remove impediments and to fast track the procedures because it is a matter of urgency that the first to fifteenth applicants and other similarly situated prisoners be assessed for ARV treatment in accordance with the Operational Plan and Guidelines. I do not see the applicants as seeking an order that the Court write out a medical prescription . . . My understanding is that what the applicants seek to do is to avoid unnecessary delays in the treatment of prisoners because such delays, especially in the context of their incarceration and vulnerability, compromise their already serious health status, which . . . are, “a matter of life and death.”<sup>TM</sup> Para. 18.

“The respondents have not made the lack of resources an issue. Their case is that they are complying with their obligations. The issue boils down to whether the respondents are taking reasonable steps or measures to ensure whether the applicants are receiving adequate medical treatment.” Para. 25.

“I am acutely conscious, speaking from my own experience, that when sentencing a prisoner to a long term of imprisonment, that his or her prospects of emerging from prison alive is seriously compromised because of the HIV/AIDS pandemic. I believe that that thought would also engage most of my colleagues in this division. Much has been said and continues to be said about severe overcrowding from official sources. This is something about which I believe I can take judicial notice of . . .” Para. 29.