CONSTITUTIONAL COURT OF SOUTH AFRICA

Minister of Health and Others v Treatment Action Campaign and Others (No 1)

(CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002)

Case CCT 9/02

MINISTER OF HEALTH AND OTHERS

Appellants

versus

TREATMENT ACTION CAMPAIGN AND OTHERS

Respondents

Heard on	:	3 April 2002
Decided on	:	4 April 2002
Reasons delivered on	:	5 July 2002

JUDGMENT

THE COURT:

[1] This judgment concerns interlocutory proceedings that were dealt with urgently in this Court pending an appeal against an order in the High Court. The

appeal itself has since been heard and the judgment in that matter[1] is being handed down together with this judgment. The terminology and context have been outlined in that main judgment.

[2] An issue arose between the TAC and the government as to whether the latter had to give effect, pending the appeal, to paragraph 2 of the order of the High Court, which directed it to make nevirapine available to mothers and their newborn babies in public health facilities in certain stated circumstances and under certain stated conditions. The ruling on the interim application was as follows:

> "1. Pending the appeal in this matter the first to fourth and the sixth to ninth respondents are ordered to give effect to paragraph 2 of the order of court granted in this matter on 14 December 2001.
> 2. The costs of this application shall be costs in the appeal."

Government, wishing to appeal this interim execution order, then applied for the necessary certificate[2] in respect of this interim order. The judge refused that certificate on three grounds. First, the order of execution was not appealable because it was a "purely interlocutory ruling based on a weighing up of the balance of convenience"; second, it did not dispose of any of the issues in the main application; and, third, it was not a matter which warranted the attention of this Court.

[3] The government then asked this Court for leave to appeal to it against

the interim order of execution. The TAC opposed the application and the matter was set down as a matter of urgency for hearing on 3 April 2002. At the hearing the appellants argued that the interim execution order (a) was appealable, (b) that it should be set aside because it was vague and uncertain, and (c) that the balance of convenience favoured setting the order aside. The TAC argued that the interim order was not appealable but that even if it were, it would not be appropriate to overturn the order made by the High Court. The following morning this Court handed down the following order and explanatory note:

> "[1] This is an application for leave to appeal against an interim execution order. It was heard as a matter of urgency. The applicants are referred to as 'the government' and the respondents as 'the TAC'.
> [2] On 14 December 2001, the High Court in Pretoria made an order relating to the programme of national and provincial governments in respect of the supply of Nevirapine to pregnant women with HIV, and to their babies, in public health facilities. Paragraph 2 of that order reads as follows:
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> > 'The first to ninth respondents are ordered to make Nevirapine available to pregnant women with HIV who give birth in the public sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, where in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled.'
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> An application for leave to appeal against the order of the High Court of 14 December 2001 is due to be heard in this Court on 2 and 3 May, 2002. At that hearing the merits of the main application will be considered. The record and written argument in that application have not yet been lodged in this Court. Accordingly, this

Court makes no decision today on any of the issues in those proceedings.

[3] The legal effect of noting the application for leave to appeal was automatically to suspend the order of the High Court. On 11 March 2002, upon application by the TAC, the High Court ordered that pending the final determination of the appeal the provisions of paragraph 2 of the order be implemented (the execution order).

[4] On 25 March 2002, the government applied to the High Court for the certificate needed to apply to this Court for leave to appeal against the execution order. That application was refused. On the same date, the High Court granted the TAC's counter- application for immediate implementation of the execution order.

[5] On 27 March 2002, the government applied to this Court for leave to appeal against the orders of both 11 March and 25 March 2002. The TAC has launched a counter-application in this Court once again seeking the immediate implementation of the execution order. Argument in both these applications was heard yesterday 3 April 2002. The parties were agreed that should the application for leave to appeal be dismissed, the counter-application should also be dismissed.

[6] Special considerations apply to applications for leave to appeal of this sort. Having deliberated overnight the Court herewith unanimously makes the following order:

1. The application for leave to appeal is dismissed, costs reserved.

2. The counter-application is dismissed.

Reasons for this order will be furnished in the Court's judgment in the main proceedings.

[7] While this order obliges government immediately to comply with paragraph 2 of the order made by the High Court on 14 December 2001, this is a temporary order only. It will apply until this Court gives judgment in the main proceedings to be heard on 2 and 3 May 2002. As Botha J made clear in his judgments, this order does not require the wholesale extension of the prescription of Nevirapine outside the pilot sites established by the government. It requires only that government make

> Nevirapine available in public health facilities where in the opinion of the attending medical practitioner in consultation with the medical superintendent of a clinic or hospital, it is medically indicated and the preconditions for its prescription already exist.
>
> [8] Nothing in the order made today prejudges the issues to be determined in the case to be heard on 2 and 3 May."

[4] We now provide our reasons for this interim order and dispose of the question of costs, which was reserved.

[5] The first question that arises is whether the interim execution order is appealable at all. In terms of both the common law and the Supreme Court Act 59 of 1959, an order granting leave to execute pending an appeal is considered to be purely interlocutory and not appealable.[3] There are important reasons of policy why this is so. In particular, the effect of granting leave to appeal against an order of interim execution will defeat the very purpose of that order.[4] The ordinary rule is that the noting of an appeal suspends the implementation of an order made by a court. An interim order of execution is therefore special relief granted by a court when it considers that the ordinary rule would render injustice in a particular case. Were the interim order to be the subject of an appeal, that, in turn, would suspend the order.

[6] Of course, the question whether a matter is appealable to this Court is

governed by the Constitution itself.[5] Section 167(6) of the Constitution provides that:

> "National legislation or the rules of the Constitutional Court must allow a person, when it is in the interests of justice and with leave of the Constitutional Court–
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> (a) . . . ; or
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> (b) to appeal directly to the Constitutional Court from any other court."

The relevant rule is Constitutional Court rule 18(1), which prescribes the procedure

> "in an application for leave to appeal directly to the Constitutional Court where a decision on a constitutional matter, other than an order of constitutional invalidity under section 172(2)(a) of the Constitution, has been given by any court other than the Supreme Court of Appeal . . . ."

Once it is clear that an application for leave to appeal concerns a "decision on a constitutional matter", the criterion by which the Court then determines whether it shall grant leave to appeal or not, is prescribed by section 167(6) of the Constitution, namely whether it is in the interests of justice to do so. The first question then is whether the interim execution order is a decision on a constitutional matter as contemplated by rule 18.

[7] Section 38 of the Constitution empowers a court to grant appropriate relief when it concludes that a breach or threatened breach of a person's rights under the Bill of Rights has been established. This provision is mirrored in section 172 of the Constitution which similarly empowers a court when deciding a constitutional matter within its jurisdiction to grant "just and equitable" relief. The interim

execution order required the government to implement paragraph 2 of the original order. In making the original order, the judge clearly considered it to constitute both appropriate relief as contemplated by section 38 of the Constitution and a "just and equitable" order as contemplated by section 172 of the Constitution. This flowed from his conclusion that government was in breach of its obligations in terms of section 27(2) of the Constitution. The decision that order 2 should be implemented immediately and pending the appeal was once again relief the judge considered to be "appropriate relief" within the meaning of section 38 of the Constitution. In the circumstances, it cannot be denied that the interim execution order flowed directly from the judge's powers under the Constitution to grant appropriate relief and constituted "a decision on a constitutional matter" as contemplated by rule 18. Similarly, an appeal against that order raises a constitutional matter.

[8] The next question that arises is whether it was in the interests of justice for the application for leave to appeal to be granted. What is in the interests of justice must be determined in each case in the light of its own facts.[6] The policy considerations that underlie the non-appealability of interim execution orders in terms of section 20 of the Supreme Court Act,[7] are also relevant to the decision whether it is in the interests of justice to grant an application for leave to appeal to this Court against an interim execution order. In particular, this Court will bear in mind that the effect of granting leave to appeal in such a case will generally defeat the effect of the

interim execution order.

[9] This Court has already identified a range of general considerations relevant to determining the interests of justice for the purposes of applications for leave to appeal to it. First, it is undesirable to fragment a case by bringing appeals on individual aspects of the case prior to the proper resolution of the matter in the court of first instance.[8] Second, the Court has held that a reasonable prospect of success will often,[9] but not always,[10] be a determinative consideration relevant to the interests of justice.

[10] In our view, this is another case where prospects of success will not necessarily be determinative of the interests of justice. The appellants sought leave to appeal against an interim execution order. Such orders are discretionary orders. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545C-G, Corbett JA identified the considerations relevant to the grant of an application for leave to execute pending appeal in the following manner:

> "The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet,* 49.7.3; *Ruby's Cash Store (Pty) Ltd v Estate Marks and Another* [1961 (2) SA 118 (T)] at p. 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control

> its own judgments (cf. *Fismer v Thornton* 1929 AD 17 at p.19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:
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> > (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
> > (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
> > (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the *bona fide* intention of seeking to reverse the judgment but for some indirect purpose, e.g., to gain time or harass the other party; and
> > (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be."

Before making an order to execute pending appeal, therefore, a court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties, as the judge clearly did in this case. Having granted leave to execute, permitting an aggrieved litigant to appeal that execution order pending the final appeal would generally result not only in the piecemeal determination of the appeal, but would "stultify the very order . . . made".[11]

[11] Moreover, as has been indicated above, an order to execute pending appeal is an interlocutory order. As such, it is an order which may be varied by the court which granted it in the light of changed circumstances.[12] To the extent,

therefore, that a litigant considers that new circumstances have arisen which would impact upon the court's decision to order execution pending appeal, the litigant may approach that court once again to seek a variation or, where appropriate, clarification of the order.

[12] All these considerations make it plain that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution. Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted – a matter which would, by definition, have been considered by the court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned.

[13] In this case, the government argued that leave to appeal against the interim order of execution should be granted for the following reasons. First, they argued that the effect of the interim execution order was irreversible and that its making rendered a substantial portion of the appeal academic. Second, government argued that the order was vague and uncertain; third, that it was dangerously

prescriptive; fourth, that it undermined the principles of good governance in the public health sector; and finally, that it invalidly made a policy choice for the appellants.

[14] In our view, these arguments were largely based on a misreading of the terms of the order. Paragraph 2 of the order, which had to be implemented, required government

> ". . . to make Nevirapine available to pregnant women with HIV who give birth in the public sector, and to their babies, in public health facilities to which the respondents' present programme for the prevention of mother-to-child transmission of HIV has not yet been extended, *where in the opinion of the attending medical practitioner, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the woman concerned has been appropriately tested and counselled."* (Italics added.)

[15] In our view, this order requires government to make nevirapine available in public health facilities:

* not yet covered by the comprehensive prevention of mother-to-child transmission programme introduced at two sites per province from May 2001 onwards; and
* where the attending doctor, acting in consultation with the superintendent of the health facility –
    * considers that it is medically indicated;
    * in circumstances where the mother concerned has been appropriately tested and counselled.

We cannot accept that the interim implementation of such an order would result in irreversible harm to government. It may possibly cause inconvenience, but there can be no doubt that requiring government to provide nevirapine where attending doctors consider it medically indicated, superintendents consider it appropriate and where facilities for testing and counselling already exist can cause no serious harm to the public health services. It was common cause that the cost of nevirapine itself was not an issue, the main harm for the appellants, they argued, resulted from the implications caused to good governance in the public health sector by permitting attending doctors and superintendents to decide when nevirapine could be administered, which we deal with below. Whatever the scale of this harm, it cannot be irreparable.

[16] Although counsel for the government argued that the terms of the order are vague, in our view they are not. Counsel relied in particular on the phrase "medically indicated" which he submitted was not capable of clear definition. We disagree. Indeed, it is a term which government itself used in the affidavits filed on its behalf in this Court. A medication is "medically indicated" where a consulting medical practitioner considers that a patient he or she is treating would in all the circumstances of health and social circumstances benefit from the administration of the medication. In the case of nevirapine, this would involve the medical practitioner familiarising himself or herself with the risks and benefits associated with administering the drug to pregnant mothers and their babies. These risks and benefits

are set out in some detail in the package insert as required by the Medicines Control Council. It is also clear from the High Court judgment that the medical practitioner concerned must take into account in deciding whether nevirapine is medically indicated or not, the question whether the pregnant mother has been appropriately tested for HIV, and counselled thereupon and upon the benefits and risks of nevirapine.

[17] Government also suggested that on its interpretation of the order it would immediately have to make nevirapine available in every public health facility in the country regardless of the availability of counselling or testing at that facility. This interpretation is wrong, as appears above. All the order requires is that nevirapine be made available at those public health facilities where testing and counselling for pregnant mothers already exist. We therefore cannot agree that the terms of the order are too vague to be capable of implementation.

[18] What is clear from the order, is that the decision whether nevirapine should or should not be administered to a particular pregnant mother is a decision to be taken by the attending medical practitioner in the circumstances of each particular case and not a sweeping and general decision by the Department of Health at national or provincial level. Accordingly, once a superintendent of a medical facility where facilities for testing and counselling already exist requests government to provide

nevirapine to a particular facility for prescription, government cannot refuse.

[19] Government accepted that the effect of the order was to remove the decision concerning the prescription of nevirapine from government health-authorities at national or provincial level, and place that decision in the hands of superintendents and doctors. It was this effect that is said to be destructive of good governance in public health services. Although there can be no doubt that it is important that good governance requires broad policy decisions to be taken concerning the provision of health services by provincial and national governments, we do not accept that this order undermines such practice. The precise medication to be prescribed for any individual patient will always be a matter of on-the-spot medical decision-making. The range of medications to be prescribed may, indeed will be, curtailed by broad policy-making, but the final decision in any case will require the exercise of professional judgment by the attending practitioner. All order 2 achieves, is to make it clear that nevirapine is an option for medical doctors in the public sector outside the government test sites where it is medically indicated and where appropriate counselling and testing are available to the pregnant mother. In our view, therefore, the argument on behalf of government that the effect of order 2 will be to undermine seriously good governance in the provision of public health services is without foundation.

[20] The appellants also argued that the order was a nullity in that it was in breach of the separation of powers. This argument has been fully dealt with in the judgment on the main appeal and does not require repetition here. Suffice it to say that it has no merit. The Constitution requires government to comply with the obligations imposed upon it. Should a court find the government to be in breach of these obligations, the court is required to provide effective relief to remedy that breach.[13] In formulating that relief, the Court will be alert both to the proper functions of the legislature or executive under our Constitution, and to the need to ensure that constitutional rights are vindicated. There can be no argument that order 2 improperly trespasses on the exclusive domain of the legislature or executive. There was no basis, therefore, for attacking order 2 as being in breach of the separation of powers.

[21] In the circumstances, government failed to show any cogent reason why it should not commence implementing the order of the High Court while pursuing its appeal against that order. It can do so and will suffer no irreparable harm by having to do so. This Court therefore refused the application for leave to appeal.

Costs

[22] In the order of 4 April 2002 the question of costs was reserved. The time has now come to resolve this question. There can be little doubt that the

corresponding order as to costs in the main case (paragraph 5 of that order) should be echoed here. Government failed no less comprehensively in its attempt to stay its interim obligation to comply with the implementation order than it did in the main appeal. The application to stay the execution order precipitated the opposing counter-application and the costs of the latter should accordingly be dealt with in the same way.

Order

[23] It is therefore ordered that government pays the costs of the application for leave to appeal to this Court against the interim execution order of the High Court and of the counter-application, such costs to include the costs of two counsel.

Chaskalson CJ Langa DCJ Ackermann J Du Plessis

AJ

Goldstone J	Kriegler J	Madala J	Ngcobo J
O'Regan J	Sachs J	Skweyiya AJ	

For the Appellants: MTK Moerane SC, P Coppin and B Vally instructed by the State Attorney.

For the Respondents: GJ Marcus SC and B Majola instructed by the Legal

Resources Centre.