EN and Others v *Government of the RSA and Others*
2007 (1) BCLR 84 (SAHC Durban 2006)

IN THE HIGH COURT OF SOUTH AFRICA
DURBAN AND COAST LOCAL DIVISION

Case No.: **4576/2006**

In the matter between:

EN	1st Applicant
BM	2nd Applicant
DM	3rd Applicant
EJM	4th Applicant
LMI	5th Applicant
MAZ	6th Applicant
MSM	7th Applicant
N D	8th Applicant
N S	9th Applicant
SEM	10th Applicant
TJX	11th Applicant
T S	12th Applicant
VPM	13th Applicant
ZPM	14th Applicant
LM2	15th Applicant
TREATMENT ACTION CAMPAIGN	16th Applicant

and

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
HEAD, WESTVILLE CORRECTIONAL CENTRE	2nd Respondent
MINISTER OF CORRECTIONAL SERVICES	3rd Respondent
AREA COMMISSIONER OF CORRECTIONAL SERVICES, KZN	4th Respondent
MINISTER OF HEALTH	5th Respondent
MEC FOR HEALTH, KZN	6th Respondent

J U D G M E N T

1. APLICATION FOR LEAVE TO APPEAL
2. APPLICATION IN TERMS OF RULE 49(11) OF THE UNIFORM RULES OF THE HIGH COURT FOR EXECUTION OF THE ORDER OF 20 JUNE 2006 (AS AMENDED)

Delivered on 25 July 2006

PILLAY J

There are two applications before me to be heard simultaneously. For the sake of convenience the parties will be referred to as cited in the main application as the Applicants and the Respondents.

The one is an application by the Respondents for leave to appeal to the Full Bench of the Natal Provincial Division or the Supreme Court of Appeal against the whole of my judgment of the 22nd of June 2006 as subsequently amended in terms of Rule 42(1)(b) of the Uniform Rules of the High Court on the 30th June 2006.

It needs to be mentioned that I had, when delivering judgment on the merits on the 22nd of June 2006, granted the Respondents leave to appeal to the Full Bench of this division against my refusal to recuse myself pursuant to an application to that effect made by the Respondents during the course of the hearing on the 31st of May 2006. My reasons for refusing to recuse myself and granting leave to appeal were delivered with the judgment on the merits on the 22nd of June 2006.

The application for leave to appeal against the whole of the judgment on the merits is opposed by the Applicants.

The second application is one in terms of Rule 49(11) of the Uniform Rules of Court in which the Applicants seek an order that the order of the Court of the 22nd of June 2006 (as amended) be implemented pending the final determination of the appeal. This application is also being opposed.

In dealing firstly with the application for leave to appeal, the fact that I had already granted leave to appeal on the recusal application does bear some weight on the eventual decision in the present application – more especially from the viewpoint, about which there can be no disagreement, that the matter be brought to a speedy conclusion and further that it is desirable that piece-meal adjudication of the appeal process should, as far as possible, be avoided.

The grounds of appeal as a whole are somewhat lengthy. Having said that, the Respondents' attack on the conclusions reached by the Court or its findings on law are neither extensive nor novel. However, the Respondents' challenge on the Court's factual findings are wide ranging contending firstly, that at the time the matter came before the Court the Respondents were complying with their constitutional obligations; secondly, that at the time when the Court was seized with the matter all the Applicants were enrolled on the anti-retroviral program and that there were no restrictions. Finally, that I had misdirected myself by completely ignoring or taking inadequate consideration of what had been done by the Respondents by the time I was seized with the matter. The last submission loses complete sight of what I had said in my judgment at paragraph 23 about SISHUBA's single reference to anything being done before the 28th of Cotober 2005. The Applicants contend broadly that there are no prospects that another Court could come to a different conclusion on the merits of the matter. They further contend that the lengthy appeal process will render the order meaningless.

I am fully aware of the prejudice to the health and life of the Applicants if the usual effect of the appeal process results in the suspension of the order. In my judgment on the merits, at para 33 on page 41, I say the following:

> *I must however express the hope that whatever plan the Respondents come up with, if there is any disagreement, good sense will prevail and a settlement reach through negotiation in the interest of those affected prisoners whose vulnerability cannot be denied. Any protracted litigation can only be counter-productive and harmful to those in whose interest this application was launched.*"

I still hold that view.

Having carefully considered the grounds on which application for leave to appeal is sought and the lengthy argument advanced by counsel, I come to the conclusion that there are reasonable prospects of success on appeal and that leave to appeal on the merits against the whole of the judgment should be granted. The matter is also unarguably one of some importance. Having said that, it does not appear to me that the issues of law and/or fact are of such complexity or novel that they require the attention of the Supreme Court of Appeal. I must however correct the conclusion drawn by the Respondents that I had not given any thought to the rule in ***PLASCON EVANS***. The Respondents raised in argument only one dispute of fact relating to whether the Applicants were on the "Wellness Programme" or not. The matter is dealt with at para 22

of the judgment where I say that there is no genuine dispute of fact on this score. The Respondents' conclusion that I had not given any consideration to the rule, is with respect, ill-founded. Furthermore no application was forthcoming from either party for referral of the matter to oral evidence.

The decision for me on the second application for an order that the order of the 22nd of June 2006 as amended by the further order in terms of Rule 42(1)(b) of the Uniform Rules of Court made mero motu on the 30th of June 2006 be implemented pending the outcome of the appeal, is a relatively simple one.

It is trite that at common law, the noting of an appeal automatically suspends the judgment or order appealed against. It is equally trite that the onus is on the Applicant who wishes to execute on a judgment or order to show why the judgment or order should be implemented or carried into execution pending the outcome of the appeal. (see ***SOUTH CAPE CORPORATION v ENGINEERING MANAGEMENT SERVICES 1977 (3) SA 534 (AD); UNITED REFLECTIVE CONVERTERS PTY LTD V LEVINE 1988 (4) SA 460 (WLD)***).

The judgment appealed against is not one sounding in money or eviction as one commonly encounters. A number of cases dealing with execution pending the outcome of an appeal relate in the main to such judgments. However, it is quite clear that the relief claimed under Rule 49(11) is available to an Applicant not only for the purposes of implementing a judgment by levy under a writ of execution, but by execution in any other manner appropriate to the judgment appealed from. See headnote to the ***SOUTH CAPE CORPORATION*** case *supra* at page 534 G-H)

In considering an application under Rule 49(11), ERASMUS in "***Superior Court Practice***" at B1 – 370A referring to decided cases, says the following:

> *"The Court to which application for leave to appeal 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. In the exercise of its discretion the court should determine what is just and equitable in all the circumstances, and in doing so, should have regard, inter alia, to the following factors. - - -*"

To paraphrase the factors referred to by ERASMUS, in the context of the citation of the parties in this case, will be:

(a) The potentiality of irreparable harm being sustained by the Respondents if leave to execute were to be granted and to the Applicants if leave were to be refused.

(b) The prospects of success on appeal.

(c) Where there is potential of irreparable harm or prejudice to both Applicants and Respondents, the balance of hardship or inconvenience, as the case may be.

I take the view that the prejudice to the Respondents, if any, pales into insignificance when compared to the potential for prejudice to the Applicants and other similarly situated prisoners. For the Applicants it is a matter of life and death. For the Respondents it involves no more than the conduct of an exercise and thereafter setting out in affidavit form how it intends to carry out its obligation in terms of its Operational Plan and Guidelines, which the Respondents have consistently maintained they are already complying. With the resources at their disposal, it would be a matter of relative ease for them to comply with the order. Even if the Respondents were to eventually succeed on appeal, I am in agreement with the submission by counsel for the Applicants that complying with the order would constitute more of an inconvenience than real prejudice. The question of irreparable harm to the Respondents does not even, in my estimation, arise. On the Respondents' own version as pointed out in my judgment, an officer in the service of the Third Respondent describes the position at WESTVILLE CORRECTIONAL CENTRE as one of "seriousness" and " - - - a matter of life and/or death".

The balance of convenience, in this case or more appropriately the balance of hardship, (see ***CITY OF CAPE TOWN v RUDOLPH 2004 (4) SA 39*** (in relation to eviction under PIE at 65 G – H) clearly favours the Applicants and it is simply no skin off the Respondents' noses to comply with the order pending the outcome of the appeal. The Respondents have been aware of the terms of the order for more than a month. Judging from statements to the media, (if correctly reported, some of which are of serious concern and say to say, in my view contemptuous, and defamatory) the Respondents have obviously already given the implication of the order much thought.

The principal basis upon which the Respondents oppose the application to implement, firstly, is that the Court was wrong in making the order; that it is ambiguous and uncertain and that in any event they have always been doing what they are now being ordered to do. It is submitted therefore that it is quite unnecessary to grant the implementation order. The Respondents further contend that none of the restrictions have been identified by the Court which consequently renders paragraph 1 of the order meaningless and *a fortiori* the rest of the order. This is with respect, patently incorrect. To illustrate by way of example, the judgment makes clear reference to the irrationality of the plan to access the one accredited site namely KING EDWARD VIII Hospital. Further, the judgment also at paragraph 26 refers to other accredited sites which have not been accessed. Significantly, SISHUBA in her answering affidavits makes no reference, even in dealing with each of the Applicants, of any effort made by her department to access any of the other accredited sites referred to in the judgment. Only the R K KHAN Hospital appears to have been used rather sparingly. Mr MOERANE, even when invited to do so, did not address the Court on both the Respondents' failure to access the other accredited sites, as well as the Court's findings on the irrationality and unworkability of the Respondents' plan for the prisoners to be seen at KING EDWARD VIII Hospital. I do not propose to deal any further with the answering affidavit, as much of what is said therein is irrelevant to the application and should in part any way, form the substance of the reply by way of the affidavit contemplated in paragraph 3 of the order.

It is quite evident, that the judgment has succeeded to a certain extent in eliciting some action from the Respondents in respect of the thirteen remaining Applicants. There is, however, a deafening silence of what is being done for the remaining similarly affected prisoners. I am at one with the submission made by Mr TRENGROVE that it is simply not enough to say that all the Applicants are on therapy – something more needs to be forthcoming in light of VENTER's undisputed evidence that the inmates are seriously ill and require urgent treatment. For example nothing has been forthcoming by way of comment from the Respondents on what the Regional Commissioner had to say about the number of deaths which have already occurred and that treatment must therefore be "fast tracked". The Regional Commissioner also makes reference to fifty HIV/AIDS sufferers who will require treatment urgently. Surely, he at least must be in a position to identify them. It therefore makes no sense for the Respondents to say that they are unidentifiable. One cannot, on the one hand hail the values of our Constitution which holds the right to life as sacrosanct and on the other, allow people to die in a situation when something can and should be done, certainly more diligently, to counter a

pandemic which has been described as an "incomprehensible calamity" and the "most important challenge facing South Africa since the birth of our new democracy." Mr TRENGROVE has pointed out to the alarming statistic, that on the Respondents' own version nine prisoners per month died of HIV/AIDS related illnesses since the beginning of 2005.

The Respondents place much store on what they say they are doing to comply with their constitutional obligations. I take the view, as I took in my judgment on the merits, that in a broad sense, certainly much more needs to be done.

In the context of this application to implement the order, it is worth once again noting what YACOOB J said in ***GOVERNMENT OF THE RSA v GROOTBOOM 2001 (2) SA 46 (CC)***:

> *"The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligation. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations*." (my emphasis)

It is also well to bear in mind what BOTHA J had to say in ***MINISTER OF HEALTH AND OTHERS v TAC AND OTHERS***, an unreported judgment under case number 21182/2001 (TPD) referred to me by Mr TRENGROVE. BOTHA J said the following – pertinent to the question of inconvenience and possible prejudice to the State is that case, also invoking an application under Rule 49(11) and very relevant to any inconvenience or prejudice the Respondents may suffer *in casu*:

> *"If the order is suspended and the appeal were to fail, it is manifest that it will result in the loss of lives that could have been saved. It would be odious to calculate the number of lives one could consider affordable in order to save the Respondents the sort of inconvenience they foreshadow. I find myself unable to formulate a motivation for tolerating preventable deaths for the sake of sparing the Respondents prejudice that cannot amount to much more than organisational inconvenience*."

Finally, reverting to the objection to my hearing this application, I find it somewhat curious that the Respondents have confidence in my objectivity relating to the application for leave to appeal, but not to my objectivity when hearing the application to implement the order. My position is no different from that refusing the application for my recusal. I remain unwavering in my belief that my objectivity is not in any way tainted by my daughter acting as the correspondent attorney for the AIDS LAW PROJECT. Significantly, no finding on the merits is challenged on the basis of any bias – only on misdirection. In any event, Rule 49(11), in the manner in which it is formulated, says in clear and unequivocal terms that the Court which granted the order is the Court which is entrusted with the decision to grant leave to execute on its order.

In the exercise of my discretion, based on what I consider to be just and equitable in all the circumstances, I am of the view that the application to implement the order should be granted. The Applicants have discharged the onus upon them to show that the order should be implemented pending the outcome of the appeal. In the circumstances I make the following orders, taking into account the need to extend the date in paragraph 3 of the order of the 22 June 2006 (as amended).

A. In relation to the application for leave to appeal:

1. The Respondents (the Applicants in the application for leave to appeal) are granted leave to appeal to the Full Bench of the Natal Provincial Division.

2. The costs of the application for leave to appeal is reserved for decision by the Court hearing the appeal.

B. In relation to the application for leave to implement the order in terms of Rule 49(11) of the Uniform Rules of the High Court:

1. The order of the Court of the 22nd of June 2006 (as amended) is to be implemented pending the outcomes of the appeal subject to the date in paragraph 3 of that order being amended to read the 14th of August 2006;

2. The costs of this application for implementation is reserved for decision by the Court hearing the appeal.

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