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CASE NOTES

Minister of Health and Others v. Treatment Action Campaign and Others (2002)[1]

Introduction

Clearly, one of the greatest challenges that faces sub-Saharan Africa is the AIDS[2] pandemic. The Human Immuno-Deficiency Virus (HIV), which causes AIDS, continues to spread at an alarming rate.[3] In South Africa the statistics relating to the AIDS disease are staggering.[4] With the greatest impact on the young and economically active population, it is estimated that without firm action, it will be an epidemic of catastrophic proportions, which will break up the foundations of socio-economic life. Against this background, the need for combative measures and strategies to deal with the problem is not in doubt. Civil society groups have taken an active interest in this issue and some, like Treatment Action Campaign (TAC), have conducted campaigns for access to quality health services. Recently, the Constitutional Court of South Africa was faced with an important case involving AIDS, pitting civil society groups on one side and the government of South Africa on the other. At the centre of the dispute was the South African government's response and policy towards combating the spread of the disease through mother-to-child transmission at birth.

TAC was launched on 10 December, 1998 and aims, *inter alia*, to campaign for the development and implementation of comprehensive national treatment programme for people living with HIV/AIDS.[5] It also aims to promote prevention of HIV infection to children born of HIV-infected mothers. Anti-retroviral drugs help people to live longer and lead a healthier existence. They have been found to be particularly useful to combat transmission of HIV from mother to child at birth. TAC was the principal applicant in this case, although other organizations and members of civil society groups were involved [hereafter "the Applicants"]. The government of South Africa has been embroiled in disputes over, *inter alia*, the safety and efficacy of the drugs. There has been confusion and accusations of lack of political will on the part of the government.[6] This apparently negative attitude has seen a relative delay in the implementation of programmes to provide anti-retroviral drugs to prevent mother-to-child HIV transmission. Organizations in civil society have challenged this lax approach by the government in light of the unfolding disaster.

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[1] 2002 (5) SA721 (CC). Also at http://www.concourt.gov.za/courtrecords/2002/tac3cr.shtml

[2] Acquired Immuno-Deficiency Syndrome.

[3] According to the UNDP there are 40 million living with HIV and 95% of them are in developing countries. Of the new infections in 2001 68% were in sub-Saharan Africa: http://www.undp.org/hiv/publications/index.htm

[4] Indications are that 4.7 million (one in nine) South Africans are HIV-positive. See www.doh.gov.za/docs/reports/2000/hivreport.html (last visited 23 October, 2002).

[5] http://www.tac.org.za

[6] J. Shapiro, "A mixed message from government" at http://www.sundaytimes.co.za/2002/02/insight/2ap.gif

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The case was heard within this context of the SA government's notorious attitude and negative public image towards the AIDS pandemic. The legal dispute raised several important issues with implications for socio-economic rights, civil society and public interest litigation, judicial decision-making on policy matters and the role of the court in a constitutional democracy.

Facts

The dispute primarily arose over the government policy in relation to the provision of *Nevirapine* (NVP) in public health institutions to combat mother-to-child HIV transmission at birth. Some pharmaceutical companies had offered the drug to South Africa at no cost for the first five years. The Applicants requested government to allow the use of NVP in public health institutions. The government rejected that request on the grounds that there were doubts over the safety and efficacy of NVP in reducing mother-to-child HIV transmission and there were concerns over the government's operational capacity to carry out and sustain the treatment regime. Instead, it decided to subject the treatment regime to research and tests by restricting the use of NVP to two sites for each province. There were no time limits as to when the drug would be made available on a wider scale. This meant that the drug would only be available to a small section of the population using the public sector, leaving the majority to wait for a potentially protracted period until the release and approval of satisfactory results of the pilot projects. The Applicants challenged the policy.

The government's concern over safety was notwithstanding the fact that the drug had already been registered by the Medicine Control Council, a specialist body charged with the responsibility to test and certify the safety of drugs in the country. It had also approved of the suitability of the drug for combating mother-to-child HIV transmission. Additionally, the government policy of restricting the drug was only limited to the public health sector because it was not prohibited in the private health sector. In effect this meant that those with the financial means to access private health services were permitted to use the drug.

The matter initially came before the High Court in Pretoria in August 2001. The court handed the judgment in favour of the Applicants. Botha, J., ruled that the policy of restricting the use of NVP to selected sites was unreasonable and ordered the government to make it available on a wider scale. He also found that the government had breached section 27 of the Constitution of South Africa, which guarantees access to health care and that the government had not provided a comprehensive programme to deal with the problem. He ordered the government to provide a comprehensive national mother-to-child HIV transmission roll-out plan by 31 March, 2002. The government appealed to the Constitutional Court, thus freezing the execution of the High Court order. The Applicants made a successful application for interim relief in March 2002 to enforce the judgment pending the appeal. The government then made an unsuccessful interim application to the Constitutional Court to stay the High Court order pending the determination of the appeal. In view of the urgency of the matter, it was given priority and set down for hearing by the Constitutional Court. On 5 July, 2002, the Constitutional Court handed down its judgment.

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Issues

The Constitutional Court identified two main issues for determination:

(i) Whether, by following its policy of restricting the provision of NVP to two sites per province, the government was meeting its constitutional obligations to enable individuals, particularly newly born children, to have access to health care as guaranteed under sections 27 and 28 of the Constitution and,

(ii) Whether the government was constitutionally obliged to provide a comprehensive policy for combating mother-to-child HIV transmission and if so, whether it could be ordered to do so forthwith.

The government had argued that by making the order to change its policy, the High Court had, contrary to the principle of Separation of Powers, made policy for the State, which is its exclusive domain.

Decision

On the first issue, the court decided that the prevailing government policy was flawed and violated its obligations to provide access to health for all citizens. The court ordered the government to abandon that policy and ensure that NVP was available beyond the two sites for each province. On the second issue, the court found that the government has a constitutional obligation to provide a comprehensive policy to combat mother-to-child HIV transmission and it had failed to meet that obligation. Allowing the government some room to manoeuvre, the court ordered the government to formulate a programme to meet this obligation. Although the court formulated a fresh order to meet the circumstances, it essentially upheld the judgment of the Pretoria High Court, meaning that TAC and others were successful.

Commentary

In resolving the two main issues, the court had to deal with several important aspects in the realms of democratic governance and socio-economic rights. The issues related to the enforcement of socio-economic rights and the court's approach to matters affecting government policy. The measurement of the adequacy of government policy in terms of the constitution as well as the State's responsibility for the rights of children are issues on which the court had to make important decisions and pronouncements.

Socio-economic rights

The CC deals with the issue of enforcement of socio-economic rights enshrined in the Bill of Rights of the SA Constitution. In particular the court had to deal with the individual's access to health care services under section 27 and the rights of children under section 28 whose parents can ill afford to provide such access. The court placed the issues within the international context by referring the country's obligations in terms of the International Covenant on Economic Social and Cultural Rights.[7] In two previous cases the CC had tackled the same

[7] "International Covenant on Economic, Social and Cultural Rights, 1966", reprinted in (1967) 6 *ILM* 360.

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issue, so this case extends the positive and active stance that the court seems to have taken in relation to matters affecting socio-economic rights.[8]

Significantly, the court reiterated that the State is under a constitutional obligation to meet the positive duties imposed by the constitution. In light of its previous decisions, the justiciability of socio-economic rights is already a settled point and this case only served to cement that position. For so long it has appeared as if civil and political rights enjoy greater protection and more attention than socio-economic rights to the extent that the latter, which are also referred to as "second generation rights" have the appearance of being "softer". Indeed in other countries socio-economic rights are not enshrined in the Bills of Rights.[9] This case reinforces the position that violation of socio-economic rights is as grave as violation of civil and political rights, and States can be made to account for their conduct. Victims can be assured that when they take action against the government when it fails to advance their socio-economic rights, they will receive serious judicial attention. The court can be seen as a bulwark not only to prevent the state from abusing its power but also ordering the court to take positive action to advance the rights of citizens. To the extent that it deals positively with socio-economic rights, the case enriches the growing jurisprudence on the enforcement of socio-economic rights. Governments will have to take heed and ensure that they provide access for the enjoyment of the rights.

The court reaffirmed the point made in the previous cases that the measurement of whether the government laws or policies meet constitutional obligations is reasonableness. In this particular case the court rightly found that the restriction of access to NVP was not reasonable. The court found that the measure excluded a significant population that required the service. It also disadvantaged the poor when those with financial wealth were able to access the treatment free of the policy. Furthermore, it was unreasonable for the government to insist on the doubts about safety when they were already providing access to people at selected sites. If it were unsafe, the government could not possibly be using people at those sites as guinea pigs for experiments on the safety or otherwise of the drug. The inflexibility and rigidity of the policy made the policy unreasonable.

Right to health and state responsibility for the rights of children

In this case the court was primarily concerned with the provision of access to heath care services. The court's attention was focused on children's rights, especially in circumstances where their parents are incapable of providing for them. The court made important pronouncements indicating that the state has responsibility to provide health care services for children whose parents are indigent. Although the obligation towards children is primarily placed on the parents, where parental care is lacking the state must take responsibility. The court emphasized the urgency of the need to protect children in this case. It stated that: "Their rights are 'most in peril' as a result of the policy that has

[8] *Soobramoney* v. *Minister of Health, KwaZulu*-Natal, 1998 (1) SA765 (CC), *Government of the Republic of South Africa and Others* v. *Grootboom and Others*, 2001 (1) SA 46 (CC).

[9] For example, African countries such as Zimbabwe (1979) and Kenya (1963) do not include socio-economic rights. The new constitutions of the 1990s such as Namibia (1990) and South Africa (1996) however include these rights.

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been adopted and are most affected by the rigid and inflexible policy that excludes them from having access to Nevaripine."

The affirmation of and focus on the rights of children whose welfare was at the centre of this dispute was an important stance that enhances the jurisprudence on children's rights. It also showed a commitment to provide for the welfare of the poor and to ensure that rich and poor alike have access to the basic socio-economic rights. This is an important position given that the affluent individuals who could access the private health sector were able to do so without the constraints of government policy. The government policy had direct negative and possibly discriminatory implications on the poor people without means to access those private facilities. This judgment enhances the importance of the rights of children who are otherwise incapable of representing themselves. It also shows the court's capacity to help the cause of the poor in society to access socio-economic rights and that the government, using the public purse, has a responsibility to meet their demands. It would be absurd and unfair to perpetuate the legacy of apartheid, when the rich and powerful were able to access facilities and socio-economic rights and the rest of the population was not in a position to do so by reason of their indigence.

Judicial approach to matters affecting government policy

The court also had to tackle the important issue of how to approach matters that have implications on government policy-making. In many cases courts are called upon to judge whether legislation is consistent with the Constitution. However in this case the court was specifically concerned with government policy. To what extent should a court's order affect government policy? The government raised the point that, consistent with the doctrine of separation of powers, the court must not make mandatory orders obligating the state to follow certain policies. They argued that the court has no powers to make policy, otherwise it will be venturing into the domain of the executive. As such the state argued that the court could only make a declaratory order. That is why it appealed against the order of the High Court, which it saw as an unacceptable judicial exercise in policy-making.

However, the Court rejected this argument, pointing out that regardless of the need to respect and uphold the doctrine of separation of powers, the court still had the power to pass judgment on government policy and to make mandatory orders where appropriate. The index with which to measure whether policy complied with the Constitutional requirements is reasonableness. As indicated above the court found that the policy of restricting NVP to selected sites in each province and barring the majority of the population from access to the treatment was not reasonable. It also found that the government did not have an acceptable comprehensive policy to combat mother-to-child HIV transmission.

The court's pronouncements on matters of policy and the issuing of mandatory orders may raise eyebrows among those who believe that the courts must be restrained when it comes to matters that are strictly within the executive terrain. Indeed it would be difficult for the South African government to ignore the policy judgments without attracting accusations of subversion of the judiciary's independence. This may have been a simpler case, but where sensitivity attaches to government policy in other spheres it might lead to clashes between the

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judiciary and the executive. However to the extent that policy, like legislation, has an impact on citizens, it must be called into question, and the court did well to take an active stance to safeguard the rights of children born to HIV-infected parents. Policies impact on people's socio-economic rights and ought to be checked when they violate the fundamental freedoms. While the approach might lead to potential clashes between the executive and the judiciary, it enhances the case for the enforcement of socio-economic rights.

Also illustrating the primacy of the fact that South Africa is a constitutional democracy, the court pointed out that the power to make mandatory orders against the state is provided for in the Constitution. The Constitution gives the court powers to make "appropriate orders" where necessary without limiting it to issuing declaratory orders only. Therefore, according to the court, even if it was an intrusion into the zone of the executive, it was because the Constitution allowed it. The court stated that its "primary duty" is owed to the Constitution and the law, which ought to be applied impartially and "without fear, favour or prejudice".[10] It also noted that it had power to exercise supervisory jurisdiction "to ensure that the order is implemented" and commented on the need to ensure that effective relief is granted. The court also noted support from jurisprudence of courts in other jurisdictions such as UK, USA, India and Germany. It reflects the court's commitment to uphold the supremacy of the Constitution and to make decisions even if the executive does not want them. On a general platform this may be interpreted as a reflection of the independence of the judiciary and is also consistent with the Rule of Law.

The insistence on granting a mandatory order against the government may also reflect the court's desire to ensure that especially poor people get effective relief. Declaratory orders often leave much room to the executive and it can manoeuvre without necessarily complying, as the court would have intended. Nonetheless the court's approach breeds potential for an uneasy relationship between the courts and the executive. This is a problem that has affected many post-colonial African States where the creation of a strong executive was often at odds with the courts. For example, in Zimbabwe, the executive has carried out a sustained attack on the judiciary because it perceives it to be a hindrance to its policy and strategies.[11]

Nonetheless, perhaps realizing the potential clashes with the government and attempting to temper the force of its mandatory order, in formulating the terms of the order, the court allowed some room for the executive to make adaptations as long they are consistent with the Constitution.[12] The court may have realized that it could not totally dictate policy to the executive and in the concluding paragraph of the order, it leaves some room for the government to manoeuvre. It also stated that the "Government must retain the right to adapt the policy, consistent with its constitutional obligations, should it consider it appropriate to do so"[13] and that "Court orders concerning policy choices made by the executive

[10] S. 165(2) of the Constitution.

[11] The government has been at odds with the judiciary over the land redistribution exercise. In recent years at least seven judges of the High and Supreme Courts have resigned or left the bench in circumstances borne of an uneasy relationship with the executive.

[12] Paragraph 4 of the final order reads, "The orders made in paragraph 3 do not preclude the 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". http://www.concourt.gov.za/courtrecords/2002/tac3cr.shtml at 79.

[13] At paragraph 114 of the judgment. Ibid. at 68.

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should therefore not be formulated in ways that preclude the executive from making such legitimate choices".[14]

While noting the flexibility of policies, the court repeated that the policies must be consistent with the Constitution and the law. The court also reversed the order of the High Court, which had required the government to submit the revised government policy so that the court could satisfy itself that the new policy was consistent with the Constitution. By doing that the court was probably giving deference to the government and stating that there was no reason to believe that it could refuse to respect and execute the court's order. Having hit the government hard on its policy and explicitly demonstrated its powers to grant any orders including exercising supervisory jurisdiction, the court was probably attempting to reassure the government that it was not being confrontational but was merely making a judgment as the Constitution commands. The court was showing the government that it trusts its commitment to the democratic traditions and would not at this stage need any force to be called upon to accept the orders of the court.

Socio-historical context in decision-making

The court also brought in an important dimension by expressly taking into account the socio-historical context within which the problem was situated. In newly independent states, where the colonial and in this case the apartheid system caused gross inequalities in privileges and access to resources, there is need to redress the living conditions of the formerly undermined classes. A consideration of the socio-historical context is therefore an important part of decision-making. The court followed two previous decisions in which it had made similar pronouncements.[15] Courts do not operate as abstract entities and decisions must be made with due consideration of social realities. In addressing socio-economic rights, post-colonial societies have to balance several interests rooted in the past and present. By taking the socio-historical context into account, the court comes closer to issues on the ground and becomes an important player that is not removed from the realities within the social set up.

The court recognized that the demands on the government can be heavy. Indeed the government policy on provision of NVP was partly based on the fact that it wanted to assess the operational efficacy of the treatment regime. In recognition of the difficulties however, the SA Constitution states that socio-economic rights must be available to citizens but only on a "progressive" basis. The court affirmed that while the state has a duty to provide access to these rights, it must be done within the state's available resources. It took into account the historical problems in South Africa that make it a difficult task for the government to be able to satisfy the people's needs in the immediate term. The court noted that the state is only required to act reasonably to ensure that there is adequate provision of access to socio-economic rights guaranteed by the Constitution on a progressive basis.

In the context of SA history, where facilities and privileges were limited by racial demarcations, this decision goes a long way to advance and safeguard the rights the poor people whose situation is a result of the apartheid era. It did not

[14] At paragraph 114. Ibid.
[15] See n. 8 above.

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make sense for the government to worry about safety when the same drug was available to fee-paying patients in the private sector. Indeed it smacked of a discriminatory attitude towards the poor majority who rely on the public health sector. Since the public health sector is funded by the taxpayers, the courts decision goes some way to improve general accountability for the poor in society. If the government has to commit more funds to the public health sector, that is fair because it improves the welfare of the poor and addresses the problems arising from the past injustices. Courts of law, like other institutions have a special role in the transformation of society from the chains of colonial legacies. By taking an active approach towards advancement of socio-economic rights of poor and disadvantaged the court took a positive approach. Where government policy was seemingly perpetuating, albeit indirectly, the injustices against the poor the courts stepped in to advance citizens' rights and thus correct an otherwise misguided and ruinous policy.

Public interest litigation

The case was a brainchild of TAC and other civil society organizations concerned with the rights of citizens to health care and social welfare. The major beneficiaries were the poor and indigent people of South Africa otherwise unable to make representations due to lack of means and knowledge and disadvantaged by government policy on provision of anti-retrovirals. This was a clear case of using litigation and law generally as a means to advance the human rights agenda. That it was successful was significant but more importantly this was a high profile case which brought the government policy towards AIDS prevention to the centre of public debate. The impact of the litigation is most evident in the responses to the High Court ruling. Three major provinces, Western Cape, Gauteng and KwaZulu-Natal, responded with statements and measures that showed major transformation in the attitudes of officials at the ground level.[16] As Berger shows, the litigation strategy also raised awareness in the media, among health practitioners and other players in the field. The government also began to initiate the pilot programme in the provinces, although the applicants also challenged this on the grounds that the policy was too restrictive. Many others in similar circumstances will have learnt some lessons from this case that public interest litigation can play an important role in the campaign for human rights.

Conclusion

In a nutshell, this case is an important milestone in the jurisprudence on the advancement and protection of socio-economic rights. Socio-economic rights are justiciable and courts have a vital role in ensuring that they are enforced. In particular, it improves the position of the rights of citizens in an age when access to health care is becoming more difficult because of the high expense of drugs and treatment. Government policy, like legislation, can have an impact on people's rights and must be checked by the courts of law to ensure that it is consistent with the constitutional requirements. However, the downside is that

[16] J.M. Berger, "Litigation strategies to gain access to treatment for HIV/AIDS: The case of South Africas Treatment Action Campaign", 20 *WILJ* 595 at http://www.westlaw.com (last visited on 20 October, 2002).

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it creates possibilities of clashes between the executive and judicial arms of the state. This means that in making orders, while attempting to safeguard the rights of citizens, the court must try to strike the right chord so that it does not cause confrontation with the executive. The case also highlights the supremacy of the Constitution and the court's commitment to protect it even in the face of executive opposition. The recognition that in making decisions, the court must take into account the socio-historical context is significant as it illustrates that judicial decision-making is not an exercise that is carried out in the abstract but a process that must take into account the prevailing realities on the ground. It goes a long way to informing the jurisprudence on the enforcement of socio-economic rights and also contributes to the fight against the AIDS pandemic which poses a terrible menace to the majority of the world population.

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