Van Biljon and Others v *Minister of Correctional Services and Others*
1997 (4) SA 441 (C) (SAHC 1997 C)

The Department of Correctional Services failed to prove that it could not afford to provide antiretroviral medication to the applicants, who were HIV positive prisoners. The Cape High Court (South Africa) concluded that the provision of such therapy was part of the prisoners' constitutional right to adequate medical treatment.

Excerpts

…

Facts

[1] The four applicants are inmates of the Pollsmoor Prison on the outskirts of Cape Town. The first and second respondents are, respectively, the Minister and the Commissioner of Correctional Services. The third respondent is the Commander of Pollsmoor Prison and the fourth respondent is the Minister of Health and Welfare of the Province of the Western Cape.

[2] Applicants all suffer from Human Immunodeficiency Viral infection or, as it has become commonly known, they have been diagnosed as HIV positive. According to their amended notice of motion they, inter alia, seek declaratory orders in the following terms:

…

4. Declaring that the right to adequate medical treatment of the applicants and the prisoners infected with HIV, who have reached the symptomatic stage of the disease and whose CD4 counts are less than 500/ml, entitles them to have prescribed and to receive at State expense appropriate anti-viral medication, including but not limited to AZT, ddl, 3tC or ddC individually or in combination.'

…

Applicable law

[5] The matter squarely raises some of the problems related to HIV and AIDS in prisons which have attracted international research and debate.

[6] To at least one of the questions raised in this matter, the Constitution of the Republic of South Africa ('the Constitution') provides a clear and final answer, more particularly in s 35(2) thereof which provides that:

'(2) Everyone who is detained, including every sentenced prisoner, has the right -

…

(e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at State expense, of adequate accommodation, nutrition, reading material and medical treatment.'

Application of law to facts

…

[8] The only real dispute between the parties, therefore, revolves around the issues that arise from the declarator sought in para 4 of the notice of motion, namely whether applicants and other HIV infected prisoners - who have reached the symptomatic stage of the disease and whose CD4 counts are less than 500/ml - are entitled to receive the anti-viral treatment mentioned in that paragraph, at State expense.

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[23] From the answering affidavits filed on behalf of respondents, it is apparent that the increasing number of HIV infected prisoners has led to investigations and

reports by several working groups. On the basis of these reports, the Department of Correctional Services has formulated management strategy documents for the handling of prisoners who are HIV positive. From these management strategy documents which are annexed to respondents' papers, it appears, however, that they are predominantly concerned with the prevention of prison officials and other prisoners contracting AIDS, rather than with the medical treatment of HIV prisoners.
[25] From the affidavit of Dr Wood, it appears that the policy of provincial hospitals regarding the prescription of anti-viral drugs at State expense is, firstly, that only AZT monotherapy is provided; secondly, that the only HIV patients who can be considered for AZT treatment are essentially those with a CD4 count of less than 200 and whose condition - as I understand the policy - has developed to full-blown AIDS; and, thirdly, that in order to qualify for AZT treatment at State expense, the patient must still have a CD4 count of more than 50/ml.
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[31] As stated at the outset, the issue between the parties is whether applicants and other HIV prisoners, who have reached the symptomatic stage of the disease and whose CD4 counts are less than 500/ml, are entitled to have prescribed to them and to receive at State expense the anti-viral therapy described in para 4 of the notice of motion. As appears from the aforegoing, the determination of this issue requires an answer to two separate questions. The first question is whether applicants and other HIV prisoners who fall within the stated category are entitled to have such anti-viral therapy prescribed for them on medical grounds. The second question is whether applicants and other prisoners who are entitled to have anti-viral therapy prescribed for them on medical grounds are entitled to receive such therapy at State expense.
[33] The question whether applicants and other HIV patients who fall within the stated category are entitled to a prescription of a particular combination of anti-viral drugs on medical grounds is a medical question. The answer to this question by applicants' medical experts is that the anti-viral medication contended for by applicants should be prescribed for all prisoners who have reached the symptomatic stage of the HIV virus and whose CD4 counts are less than 500/ml. This view appears to find general support internationally. Dr Wood's answer to the question is, however, somewhat different. In his opinion, there are patients who fall into the stated category for whom the said anti-viral drugs should not be prescribed. As was decided by the American Supreme Court, 'the Court is not empowered to delve into the intricacies of modern medicine'. Mr Seligson's answer to Dr Wood, namely that he stands alone against an overwhelming majority, involves a head count which I am not prepared to undertake.
[34] Moreover, a declarator in the terms sought by applicants would, in my view, dictate to medical doctors when they must prescribe anti-viral treatment. Mr Seligson submitted that the order sought by applicants would leave the medical practitioner with a discretion as to what anti-viral medication he deems appropriate. That may be so. The fact remains, however, that it would compel the doctor to prescribe some form of anti-viral medication. For reasons that are, in my view, obvious, it is not the function of this Court to make an order of that nature.
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[38] This brings me to the question whether first and second applicants are entitled to be provided - at State expense - with the anti-viral therapy which has been prescribed for them on medical grounds. For the sake of convenience, I will henceforth refer to first and second applicants as 'applicants'.
[39] With regard to this question, Mr Scholtz referred to two decisions by American Courts that failure by the prison authorities to provide HIV positive prisoners with AZT does not amount to an infringement of the prisoners' constitutional rights. Having regard to the reasons for these judgments, it is, however, apparent that the

conclusion arrived at in these two cases is of very limited assistance for at least two reasons. The first reason is that both cases involved the treatment of HIV prisoners in 1989. At that time it was found that the plaintiff-prisoners were asserting a right to an experimental and novel form of treatment. In the present case, the medical consensus is that the anti-viral therapy prescribed for applicants can no longer be regarded as experimental. On the contrary, it is internationally recognised as 'state of the art' treatment for HIV patients in applicants' condition.

[40] The second reason why these two American cases are of limited assistance is that they were dictated by the 'deliberate indifference test' which was adopted by the United States Supreme Court in *Estelle* v *Gamble* in giving effect to the Eighth Amendment prohibition against cruel and unusual punishment. According to this test, a failure by prison authorities to provide medical treatment will only amount to cruel and unusual punishment - as envisaged by the Eighth Amendment - if the prison authorities are shown to have been deliberately indifferent to the prisoners' medical needs. In short - unlike our Constitution - the American Constitution does not contain a provision in terms whereof a prisoner's right to adequate medical treatment is specifically entrenched. This obvious difference must also be borne in mind in considering other decisions of the American Courts, including those in which it was held that federal and state governments have a constitutional obligation to provide 'minimally adequate' medical care or 'reasonable medical assistance' to those whom they are punishing by incarceration.

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[42] At common law it has been held repeatedly that prisoners retain all basic rights not temporarily taken away or necessarily inconsistent with being prisoners. As long ago as 1912, Innes J dealt as follows with a contention on behalf of the prison authorities that a prisoner may only claim such rights as the prison regulations confer:

'(T)he directly opposite view is surely the correct one. They were entitled to all their personal rights and personal dignity not temporarily taken away by law, or necessarily inconsistent with the circumstances in which they had been placed.'

This principle was restated by Corbett JA in *Goldberg and Others* v *Minister of Prisons and Others* when he explained that, although there are infringements which incarceration necessarily makes on a prisoner's rights, 'there is a substantial residuum of basic rights which he cannot be denied'.

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[49] In principle, I agree with Mr Seligson's submission that lack of funds cannot be an answer to a prisoner's constitutional claim to adequate medical treatment. Therefore, once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment. I do not, however, agree with the proposition that financial conditions or budgetary constraints are irrelevant in the present context. What is 'adequate medical treatment' cannot be determined in vacuo. In determining what is 'adequate', regard must be had to, inter alia, what the State can afford. If the prison authorities should, therefore, make out a case that as a result of budgetary constraints they cannot afford a particular form of medical treatment or that the provision of such medical treatment would place an unwarranted burden on the State, the Court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as 'sufficient' or 'adequate medical treatment'. After all, as was pointed out by Mr Scholtz, s 35(2)(e) of the Constitution does not provide for 'optimal medical treatment' or 'the best available medical treatment', but only for 'adequate medical treatment'.

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[52] With reference to, inter alia, accommodation, nutrition and medical care, the Constitution itself draws a distinction between prisoners and people outside prison. In terms of s 35(2)(e), prisoners have a fundamental right to adequate accommodation, nutrition and medical care, and Mr Scholtz submitted that, as far as medical care is concerned, this is a distinction without any real difference. What is guaranteed to prisoners, he argued, is 'adequate medical care' and not 'optimal medical care' or 'the best available medical care'. What is good enough for people outside prison, Mr Scholtz submitted, must be good enough for prisoners. According to Mr Scholtz's argument, such medical treatment as is afforded outside prison must, therefore, per se be regarded as 'adequate medical care'. I do not believe that this submission can be accepted as a principle of general application. What is true for medical treatment must also be true, for example, for accommodation. Acceptance of the principle contended for by Mr Scholtz would, therefore, mean that the State is not obliged - in terms of s 35(2)(e) - to provide better accommodation for prisoners than that which is provided for people outside. It is an unfortunate fact of life, however, that there are many people in this country whose accommodation cannot be described as adequate by any standard. What is provided for people outside can therefore be no absolute standard for what is adequate for prisoners.
[53] With reference to the position at common law, Mr Scholtz submitted that if the same standard of care and treatment is provided for prisoners attending State institutions, they would be retaining the residuum of rights which survive incarceration. I do not believe that this is so. Unlike persons who are free, prisoners have no access to other resources to assist them in gaining access to medical treatment. It is true that some HIV positive prisoners will, upon release, be dependent on the State for medical treatment. On the other hand, there are prisoners, like first applicant, who may well be able, upon their release, to earn an income which will enable them to afford anti-viral treatment or who will receive charitable assistance from their employers. As far as the latter category of prisoners is concerned, an inroad would be made upon their personal liberties if they were to be refused access to anti-viral treatment. Since such inroad cannot be described as a necessary consequence of incarceration, I do not believe that the refusal to provide these prisoners with anti-viral medication is consistent with the principles of our common law. In saying that I obviously do not intend to suggest that the standard of medical treatment for any particular prisoner should be determined by what he could afford outside prison. What I am saying, is that the standard of medical treatment for prisoners in general cannot be determined by the lowest common denominator of the poorest prisoner on the basis that he could afford no better treatment outside.
[54] As far as HIV prisoners are concerned, there is another factor which should, in my view, be borne in mind, namely that they are more exposed to opportunistic viruses than HIV sufferers who are not in prison. It is applicants' case that tuberculosis and pneumonia are prevalent in prison. Although respondents deny the prevalence of these particular opportunistic infections, they do admit that the overcrowded conditions in which prisoners are accommodated exacerbates the vulnerability of HIV prisoners to opportunistic infections. Even if it is, therefore, accepted as a general principle that prisoners are entitled to no better medical treatment than that which is provided by the State for patients outside, this principle can, in my view, not apply to HIV infected prisoners. Since the State is keeping these prisoners in conditions where they are more vulnerable to opportunistic infections than HIV patients outside, the adequate medical treatment with which the State must provide them must be treatment which is better able to improve the immune systems than that which the State provides for HIV patients

outside.
…
[57] With regard to possible financial constraints, there is the further consideration of a cost-saving raised by applicants' experts to which respondents have, in my view, not given a conclusive answer. As appears from the aforegoing, it is contended by applicants' experts, on the basis of international research, that the administration of anti-viral therapy at an early stage is cost-effective in that the treating of opportunistic infections is significantly reduced. It is true that respondents' medical expert, Dr Wood, does not agree with the results of the international research. It is also true, as was submitted by Mr Scholtz, that this dispute between medical experts cannot be determined on motion papers. It does, however, stand to reason that the postponement of the costly treatment for opportunistic infections must result in some cost-saving, even if such saving does not exceed the cost of prophylactic anti-viral treatment, as appears to be suggested by the results of international research. From respondents' papers, it appears that they have disregarded the possibility of any cost-saving through anti-viral treatment.
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[60] Applicants have, therefore, established, in my view, that anti-viral therapy is at present the only prophylactic. The benefits of this treatment - in the form of extended life expectancy and enhanced quality of life - are such that this treatment must be provided for the unfortunate sufferers of HIV infection if at all affordable. As I have already stated, respondents have failed to make out a case that the Department of Correctional Services cannot afford to provide HIV I infected prisoners in the stated category with the combination anti-viral therapy claimed by applicants. In these circumstances, I believe that the medical treatment claimed by applicants must be regarded as no more than the 'adequate medical treatment' to which they are entitled in terms of s 35(2)(e) of the Constitution. It follows that the failure to provide applicants with this treatment amounts to an infringement of applicants' constitutional rights.

Remedy
[61] … What I therefore propose to order is that first and second applicants be provided with such anti-viral therapy as had already been prescribed for them on medical grounds and only for as long as this treatment is so prescribed.
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