

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

CASE NO: 21182/2001

In the matter between :-

TREATMENT ACTION CAMPAIGN
DR HAROON SALOOJEE
CHILDREN'S RIGHTS CENTRE

1st Applicant
2nd Applicant
3rd Applicant

and

MINISTER OF HEALTH
MEC FOR HEALTH, EASTERN CAPE
MEC FOR HEALTH, FREE STATE
MEC FOR HEALTH, GAUTENG
MEC FOR HEALTH, KWAZULU-NATAL
MEC FOR HEALTH, MPUMALANGA
MEC FOR HEALTH, NORTHERN CAPE
MEC FOR HEALTH, NORTHERN PROVINCE
MEC FOR HEALTH, NORTH WEST PROVINCE
MEC FOR HEALTH, WESTERN CAPE

1st Respondent
2nd Respondent
3rd Respondent
4th Respondent
5th Respondent
6th Respondent
7th Respondent
8th Respondent
9th Respondent
10th Respondent

APPLICANTS' HEADS OF ARGUMENT ON LEAVE TO APPEAL AND APPLICATION TO EXECUTE

1 INTRODUCTION: OVERVIEW OF APPLICANTS' ARGUMENT

Application for a Certificate and Leave to Appeal

- 1.1 The applicants accept that the respondents have adopted an appropriate procedure in applying for a certificate in terms of Rule 18 of the Rules of the Constitutional Court and leave to appeal in the alternative to the Supreme Court of Appeal.
- 1.2 With regard to the application for a certificate in terms of Rule 18 of the Rules of the Constitutional Court, the standpoint of the applicants is the following:

- 1.2.1 The constitutional matter is one of substance on which a ruling by the Constitutional Court is desirable.
- 1.2.2 The evidence in the proceedings is sufficient to enable the Constitutional Court to deal with and dispose of the matter without having to refer the matter back to the High Court for the adducing of further evidence. However, it would be of assistance to the Constitutional Court to have before it the minutes of the Minmec meeting which gave rise to the MTCT programme.
- 1.2.3 There is no reasonable prospect that the Constitutional Court will reverse or materially alter the judgment.
- 1.3 With regard to the application for leave to appeal to the Supreme Court of Appeal, as an alternative to a direct appeal to the Constitutional Court, the standpoint of the applicants is as follows:
 - 1.3.1 The matter is of substantial importance to both parties;
 - 1.3.2 There are no reasonable prospects of success on appeal.
- 1.4 With regard to the prospects of success on appeal, the respondents have filed grounds of appeal in which they identify some 34 separate aspects in which they allege that this Court erred in fact or in law. It is clear that the respondents have adopted a 'shot gun' approach without any apparent attempt at discernment. It is not clear whether the respondents will indeed persist in advancing each ground of appeal. The applicants deal with each ground of appeal in separate submissions filed simultaneously herewith. By way of overview, however, it is submitted that:
 - 1.4.1 The respondents frequently misstate either findings by this Court or evidence and arguments presented by the applicants.
 - 1.4.2 The respondents misconceive the nature of the constitutional challenge. The orders made by this Court do not in any respect entail the making of a policy choice by the Court or the implementation of a policy choice. On the contrary, at issue is a policy determined and implemented by the respondents. The Court was called upon to determine whether that policy was consistent with the Constitution. Such a jurisdiction flows from the clear wording of the Constitution.
 - 1.4.3 Orders 1 and 2 do not require the respondents to do what they are not already able to do. In particular they do not:
 - 1.4.3.1 oblige the respondents to provide Nevirapine where this is not medically indicated.
 - 1.4.3.2 compel the respondents to provide testing or counselling where this is not available.
 - 1.4.4 The order is not ambiguous and does not cause uncertainty.
 - 1.4.5 The order does not oblige any of the respondents to provide Nevirapine where it is impossible for them to do so.
 - 1.4.6 On the facts of the case, the order would not result in any other treatments and services being compromised.

Application for Leave to Execute

- 1.5 The application for leave to execute applies only to orders 1 and 2. In this regard, there is no dispute that Nevirapine can and in fact will save lives. Accordingly, the prejudice in not allowing leave to execute turns literally on matters of life or death.
- 1.6 The respondents have not advanced any compelling facts which would displace the obvious duty of this Court to take steps to preserve life.
- 1.7 The respondents cannot escape the reality that in effect orders 1 and 2 are already being executed in KwaZulu-Natal and Gauteng. The disparity in the availability of life saving medication is therefore profound.
- 1.8 If, as the respondents contend, they are committed to a comprehensive MTCT programme, execution of orders 1 and 2 does nothing more than give effect to that commitment.
- 1.9 The applicable legal principles will be dealt with below.

2 THE APPLICATION FOR A CERTIFICATE AND LEAVE TO APPEAL

Procedure

- 2.1 The procedure adopted by the respondents in applying both for a certificate and leave to appeal in the alternative is appropriate. In *Mkangeli and Others v Joubert and Others* 2001 (2) SA 1191 (CC) the Constitutional Court endorsed such an approach. Chaskalson P, on behalf of a unanimous court observed at paras 6 - 7:

[6] Litigants wishing to take advantage of these provisions face a problem. Unless they also apply for leave to appeal to the Supreme Court of Appeal or to the Full Bench of the High Court, when they apply for a certificate in terms of Rule 18, an application for leave to appeal to such courts may be out of time, if leave to appeal directly to the Constitutional Court is refused. To deal with this it has become the practice for litigants to apply for leave to appeal to the Supreme Court of Appeal or to the Full Bench at the same time as they apply for a certificate in terms of Rule 18. If the High Court considers that leave to appeal should be granted it may then grant leave subject to the condition that leave is granted only if this Court refuses the application to appeal directly to it.

[7] If the High Court refuses leave to appeal in such matters, a litigant who wishes to keep its options open regarding an appeal may have to petition the Chief Justice for leave to appeal before a decision is given by this Court on the application for leave to appeal directly to it. That is what happened in this case. It is a practical course to follow. This Court may refuse leave to appeal directly to it, not because the appeal lacks prospects of success, but because it considers the matter to be one which ought properly to be dealt with by the Supreme Court of Appeal before it is called on to consider hearing the matter. Where that is the case, an order refusing leave to appeal directly to this Court does not preclude the litigants from approaching this Court again for leave to appeal after the Supreme Court of Appeal has disposed of the matter either by way of a judgment, or by refusing the petition for leave to appeal. Should that happen, this Court will consider the application on its merits in the light of the decision of the Supreme Court of Appeal.'

- 2.2 An application for a certificate in terms of Rule 18 of the Constitutional Court rules differs fundamentally from an application for leave to appeal. In the case of the former, the Court does not grant leave to appeal at all. The actual grant of leave to appeal is left to the Constitutional Court. In the case of the latter, however, leave to appeal is in fact granted.

- 2.3 The Constitutional Court has indicated that an application for a certificate in terms of Rule 18 is no mere formality. In *Mistry v Interim National Medical and Dental Council of South Africa and Others* 1998 (4) SA 1127 (CC) Chaskalson P observed at para 7:

'[7] The purpose of the certificate is to assist this Court in the decision that it has to make as to whether or not leave to appeal should be granted. Where the relevant constitutional issues have been fully traversed in the judgment in respect of which the certificate is given, there may be no need for a detailed judgment on the certificate. But where the application for a certificate raises issues which have not been fully canvassed in the judgment, or where the reasoning in the judgment is subjected to challenge which calls for comment, the judgment on the certificate may have to be more comprehensive. Ultimately, what is necessary is that the judge or judges in the High Court to whom the application is made should consider the issues ... and give reasons for the findings made.'

This judgment was made in terms of Rule 18 of the Rules promulgated under section 100(1) of the interim Constitution. That rule, however, is substantially the same as the present rule.

Cf. *Minister of Home Affairs and Others v Dawood and Ano* 2000 (1) SA 1074 (C) at 1082 G - 1083 F

The Requirements of Rule 18

- 2.4 As indicated above, the applicants accept that the constitutional matter is one of substance on which a ruling by the Constitutional Court is desirable. Accordingly, the applicants do not oppose a positive certificate in terms of Rule 18(6)(a)(i).
- 2.5 The applicants also accept that the evidence in the proceedings is sufficient to enable the Constitutional Court to deal with and dispense of the matter without having to refer the case back to the High Court for further evidence. In this regard, however, the applicants submit that it would be appropriate for the Minmec Minute to form part of the Record.
- 2.6 At the hearing of the main application, the applicants were confronted with an argument that a ruling on the admissibility of the Minmec minute was essential to enable the matter to proceed. The standpoint adopted by the respondents was that in the absence of such a ruling the main application was not ripe for hearing. Confronted with this dilemma and given the manifest urgency of the matter, the applicants chose not to proceed with the application. The standpoint of the applicants nevertheless remains that the Minmec Minute is relevant and ought to form part of the Record before the Constitutional Court. To that end, it is submitted that this Court ought to indicate that while the evidence in the proceedings is sufficient to enable the Constitutional Court to deal with and dispose of the matter, the Record is nevertheless incomplete without the Minmec Minute.
- 2.7 Since the respondents dispute the admissibility of the Minmec Minute, and have yet to acknowledge its authenticity, the applicants propose to make a substantive application to the Constitutional Court (in the event of leave being granted) for the Minmec Minute to form part of the Record.
- 2.8 In the light of the above, and subject only to the proviso concerning the desirability of the Minmec Minute forming part of the Record, the applicants accept that a positive certificate may be issued for purposes of Rule 18(6)(a)(ii).

- 2.9 The applicants do not accept that there is a reasonable prospect that the Constitutional Court will reverse or materially alter the judgment of this Court. This is addressed in the separate submissions filed simultaneously herewith. Accordingly, it is submitted that a negative certificate be furnished in terms of Rule 18(6)(a)(iii).
- 2.10 Finally, in terms of Rule 18(6)(b) the certificate is required to indicate whether 'in the opinion of the Court concerned, it is in the interests of justice for the appeal to be brought directly to the Constitutional Court'. The applicants accept that in the event of the Constitutional Court granting leave to appeal, it is indeed in the interests of justice for the appeal to be brought directly to the Constitutional Court.

Leave to Appeal to the Supreme Court of Appeal

- 2.11 In any application for leave to appeal there are a variety of considerations which the Court granting leave must take into account. In *Haine v Podlashuc and Nicolson* 1933 AD 104 Wessels CJ handed in a memorandum in which he stated at 11 - 113:

'In granting leave the predominant consideration ought to be whether the matter is of substantial importance to one or both of the parties concerned.'

See also: *African Guarantee and Indemnity Co. Ltd v Van Schalkwyk and Others* 1956 (1) SA 326 (A) at 328 D - 329 A

- 2.12 The applicants accept that the present matter is of substantial importance to both parties and, if this is to be regarded as the predominant consideration in an application for leave to appeal, then such leave would be justified. In so stating, however, the applicants do not wish to be understood as in any way conceding that there are reasonable prospects of a successful appeal.

3 THE APPLICATION FOR LEAVE TO EXECUTE

References to the papers in the application for leave to execute will contain the reference 'execution', in order to distinguish them from references to the papers in the main application.

The Test

- 3.1 It is now settled that an application for leave to execute is determined according to the yardstick of justice and equity. In the leading decision of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) Corbett JA (as he then was) put the matter thus at 545 C - G:

'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 Ano*, supra 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:

- (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, eg, to gain time or harass the other party; and
- (4) Where there is the possibility of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

The Potential Loss of Life

3.2 It is common cause that:

- 3.2.1 Nevirapine is already prescribed in the pilot sites. If it was prescribed in only another 15% of the cases in which the mother is HIV positive, this would mean that it was administered to an additional 10 500 of the 70 000 cases per year in which the babies would otherwise be infected.
- 3.2.2 If this prevented mother-to-child transmission in only one-third of those cases, that would mean that some 3500 children - or almost ten children every day - would be prevented from becoming HIV positive and from a virtually certain death.
- 3.2.3 On the most conservative estimates based on the figures used by the respondents' own experts, every day in which the implementation of orders 1 and 2 is delayed results in the unnecessary infection and death of ten children.

Execution Founding Affidavit: pp 7-8 paras 13 - 15

Execution Answering Affidavit: p 45 para 18

3.3 We have been unable to find any case in which a Court has been called upon to consider the concept of irreparable prejudice in the context of the lives of children. This is scarcely surprising. The respondents cannot avoid the reality that their opposition to this application to execute will result in the loss of life. They do so despite their ostensible claim that they 'do not take the view that Nevirapine should not be provided outside the present research and training sites' and that they are 'fully committed to preventing and reducing MTCT of the HIV'.

Execution Answering Affidavit: p 38 para 5

Moreover, Ntsaluba states that the respondents 'have always maintained that they intend to roll out the programme of making Nevirapine available at all public health facilities, but that the rate and timing of the roll out will depend on the lessons learnt from the research and training sites and on the availability of the material, human and financial resources available to them.'

Execution Answering Affidavit: pp 49-50 para 27

3.4 This Court is enjoined to consider the potentiality of irreparable harm or prejudice being sustained if leave to execute be granted or refused as the case may be. In a case such as the present, where the admitted facts are that the denial of leave to execute can result in the significant loss of life, the prejudice and harm contemplated is self-evidently utterly irreparable.

- 3.5 There is a further category of irreparable prejudice which will be incapable of being remedied. It is the devastating impact upon mothers who are denied medication which has the potential for saving the lives of their children. Moreover, this prejudice occurs in a context in which the mothers themselves are already suffering from an incurable ailment. In a real sense, therefore, the prejudice to mothers is likewise irreparable.
- 3.6 We submit that there are aspects of the respondent's stance which are simply irreconcilable with any opposition for leave to execute.
- 3.6.1 In the present application, the respondents claim that they 'do not take the view that Nevirapine should not be provided outside the present research and training sites' and that they are 'fully committed to preventing and reducing MTCT of the HIV.'

Execution Answering Affidavit: p 38 para 5

Moreover, the respondents take the view that they 'have always maintained that they intend to roll out the programme of making Nevirapine available at all public health facilities' subject to lessons learnt and the availability of resources.

Execution Answering Affidavit: pp 49-50 para 27

- 3.6.2 In the main application, although there were contradictory statements (now seemingly clarified), the respondents stated that their aim was 'to make the treatment with Nevirapine available to the general population gradually.'

Answering Affidavit: Ntsaluba, p 713 para 116.3

- 3.6.3 The respondents also stated, in the main application, that there may be variations in the respondents' approach 'depending on the availability of resources, the extent of the problem in each province and as new information comes to hand concerning the medicine itself and the operational issues that arise in its administration to prevent or reduce the risk of MTCT of the HIV.'

Answering Affidavit: Ntsaluba, p 732 para 146.3

- 3.7 In announcing their intention to appeal the Minister proclaimed pursuit of a 'double course of action'. On the one hand, the respondents apparently felt they could not allow the Court's judgment to remain unchallenged. 'On the other, we are determined that an appeal against the judgment must not stand in the way of developing a dynamic and well-articulated MTCT prevention programme.' The Minister stated further :

'We would like to emphasise that this appeal is not an attempt to obstruct the development of the MTCT programme. Rather it is aimed at clarifying a constitutional and jurisdictional matter which - if left vague - could throw executive policy-making into disarray and create confusion about the principle of the separation of powers which is the cornerstone of our democracy.' (emphasis added)

Execution Founding Affidavit: p 14 para 47

Execution Answering Affidavit: p 58 para 40

Minister's Statement, Annexure 'AN3": pp 66-67

3.8 It is clear that the Minister's statement does not address why leave to execute should be opposed. The respondents do not dispute this but contend that the full basis and reasons for the appeal are canvassed in the application for leave to appeal.

Execution Founding Affidavit: pp 14-15 para 48
Execution Answering Affidavit: pp 58-59 para 41

3.9 In an article written by the Minister and published in The Sunday Times, she stated, in relation to the decision to appeal, the following:

'We decided to go the route of appeal not because we are against protecting babies from HIV, but because we believe the judgment in wrong in a number of respects and too risky to stand unchallenged.' (emphasis added)

She concluded her article as follows:

'Whatever the appeal process brings we offer the assurance that it will not introduce a state of paralysis into the programme to prevent HIV infection of babies' (emphasis added)

3.10 The Minister's article does not advance any reasons for opposing the application for leave to execute. Again, the respondents advance the merely technical reply that the reasons for the appeal are to be found in the application for leave to appeal.
Execution Founding Affidavit: p 15 paras 50-51
Sunday Times Article, Annexure 'J', p 33

Execution Answering Affidavit: pp 59-60 para 43

3.11 From the foregoing, it is clear that:

3.11.1 The respondents do not suggest that Nevirapine should be available at the pilot sites only;

3.11.2 Nevirapine may be made available outside the pilot sites depending on the availability of resources;

3.11.3 The respondents have 'always maintained' that it is their intention to make Nevirapine available at all public health facilities' subject to lessons learnt and availability of resources.

3.11.4 The noting of the appeal is not intended to 'introduce a state of paralyses'.

All of these considerations militate strongly in favour of leave to execute and are inconsistent with the respondent's opposition.

3.12 Preventing doctors from doing their constitutional and ethical duties is untenable and also in conflict with the respondent's policy. Indeed, the minutes of the MTCT National Steering Committee meeting held on 13 December 2000 (Respondents' Answering Affidavit, p 1403) reflect the following:

'There was acknowledgement of the need for policy provision regarding the access of Nevirapine. National and provincial departments need to look urgently at the issue, especially because it has potential ethical and political implications.'

Execution Replying Affidavit: pp 127-128 para 5

3.13 In the main application we addressed the ethical dilemmas created by the respondent's policy. It is these dilemmas which inform the relief granted in orders 1 and 2.

3.13.1 Ntsaluba was simply unable to refute the dilemma articulated by Dr Saloojee:

'As a paediatrician, I care for the ever-increasing numbers of sick children with HIV/AIDS on a daily basis. Paediatricians in South Africa have to deal with dying children at hospitals and clinics around the country. I, and my colleagues, have to inform parents of their infant's positive HIV status knowing that the risk of HIV infection may have been greatly reduced if the parents had been counselled and mothers offered anti-retroviral therapy such as Zidovudine (AZT) or Nevirapine (NVP), in the final stages of the pregnancy, and also if their infants had received the same drugs as prophylaxis after birth.'

Founding Affidavit: Saloojee, p 526 para 14

Answering Affidavit: Ntsaluba, p 822 para 296

3.13.2 Ntsaluba chose, in the main application (and in this application) to avert his eyes to the true horror of the dilemmas confronting health professionals by seeking refuge, wrongly it is submitted, in the hearsay rule. Saloojee refers to an article which he specifically adopts as representing his own views. He states:

'The difficulties that confront us in our work are accurately described in an article by a pediatrician that appeared in the Mail and Guardian newspaper on 5 July 2001.'

It is clear, therefore, that the article is not hearsay but was advanced as reflecting Saloojee's own views. That article states, inter alia:

'For many years it has been our daily bread to care for sick children most of whom we could cure. But now we ordinary, unexceptional people are facing something extraordinary and exceptional; something that challenges the foundations on which our professional lives are built.

We have seen it coming but we did not know that it would have the power to remould our practice and our relationship with the children, to challenge the essence of our humanity (up to now we thought we had enough humanity in us to do our jobs), even our sense of self. This extraordinary and unprecedented challenge is brought about by what HIV is doing to children. (That HIV causes AIDS is not something we argue about - we see the evidence daily).

AIDS comes upon most children like the poetic 'wolf on the fold'. It seizes them in a fast-forward caricature of the adult disease. Years are telescoped into months, months into weeks. The final deadly expression of the immune deficiency is often also its first manifestation. Sometimes parents hardly have time to take in the scent of the plague before their child is gone and they are left to face their own mortality.

These shocks are now our daily fare. Like the steady reverberations from a pile-driver, they rattle the pillars on which, up to now, we have built our professional lives.'

Founding Affidavit: Saloojee, Annexure 'HS6", p 576

3.13.3 The consequence of the respondents' policy is unethical in itself but, more importantly, it compels health professionals to act unconstitutionally and unethically. Saloojee reflects the inevitable ethical and constitutional dilemma which flows from the respondents' policy:

'As doctors who place the health of our patients first, we would act against our constitutional right to freedom of conscience and against our ethical duty of clinical independence if we were to deny women the right to use anti-retroviral therapy to prevent mother-to-child transmission of HIV. The current policy that restricts provision of anti-retroviral therapy to pregnant women to 'pilot' and 'research' sites deny women this right and undermines the doctor-patient relationship.'

Founding Affidavit: Saloojee, p 531 - 532 para 31

In answer, Ntsaluba misses the point. He argues that 'it is a pity' that Saloojee sees the policy as undermining the doctor-patient relationship and proclaims that it has never been the 'intention' of the respondents to do so. He contends that the 'intention was to enhance that relationship by ensuring effective administration of Nevirapine to reduce MTCT of the HIV'. In so responding, he avoids the thrust of the complaint, namely, that the undermining of the relationship flows from the restriction imposed by the respondents confining prescription of Nevirapine to designated sites.

Answering Affidavit: Ntsaluba, p 836 para 309.2

The Changed Position in Kwa-Zulu-Natal

3.14 On 21 January 2002, the Premier of KwaZulu-Natal made an announcement which stated, inter alia that:

3.14.1 A 'principled position' had been adopted that 'the government of this province is under obligation to supply anti-retroviral drugs to pregnant mothers who are HIV-positive'.

3.14.2 The Premier commends 'the courageous decision of the doctors who have committed themselves to supply the anti-retroviral drugs to pregnant mothers at Empangeni, Bethesda and other hospitals in those parts of KwaZulu-Natal which are ravaged by the scourge of HIV and AIDS'.

3.14.3 The Premier stated further: 'It is encouraging that the said doctors have faithfully followed the requirements of the Hippocratic Oath as well as section 11 of Chapter 2 of the Bill of Rights of the South African Constitution. Every subject has a right to life. In pursuance of that, section 27 clearly spells out that every person has the right to have access to health care services including reproductive health care. Constitutionally no one may be refused emergency medical treatment. The administration of Nevirapine is an emergency measure in a life threatening situation to the baby. The mother is already afflicted by an incurable disease.'

3.14.4 The Premier concluded: 'While it is accepted that the drug Nevirapine does cause complications, it is the pregnant mother's prerogative to save her child from contracting the AIDS virus. A mother who is already afflicted by an incurable disease should not have to contend with a hopeless situation of having her unborn child facing the same affliction if it can be prevented.'

Execution Founding Affidavit: p 12, para 34
Statement, Annexure 'E', pp 24 - 25

3.15 In answer, the views of the Premier are simply noted. The sole response is that the affidavit in the main application 'provided a proper and detailed explanation of the position adopted by the

KwaZulu-Natal Provincial Health Department of Health.' This simply misses the point. The present is an application for leave to execute and the question is whether there is any substantive defence to such execution. In stark terms, KwaZulu-Natal has adopted a stance diametrically opposed to that advanced by the respondents in the main application.

- 3.16 The statement of the Premier indicates that doctors who prescribe Nevirapine are acting in accordance with their ethical duties under the Hippocratic Oath and in accordance with the requirements of the Constitution. Hence, the contention is advanced that leave to execute asks for no more than that the medical practitioners be able to act in this manner.

Execution Founding Affidavit, p 13, paras 38-39

The answer to this is illogical. The respondents contend that doctors employed by the respondents 'are bound to act in accordance with the policy developed by the respondents.' They state further that 'doctors who disregard this policy may end up causing more harm than good'.

Execution Answering Affidavit: pp 54-55 para 34

But, the simple truth, is that the province of KwaZulu-Natal has adopted its own policy which entails an expansion of the MTCT programme and hence leave to execute orders 1 and 2 would be entirely consistent with that policy.

- 3.17 On 23 January 2002 the fifth respondent issued a statement that the province was not yet ready to roll out Nevirapine on a comprehensive basis. He announced a phased approach which, in effect, amounts to precisely the kind of reasonable plan consistent with the requirements of section 27 of the Constitution and which envisages a complete roll out:

'The proposal that we will table is that of a phased approach consisting of three phases, in which the current study is the first phase. Here the questions that were being asked include analysing data, recruitment and identifying personnel to take the process forward seeking funding.

The second phase will be the provision of this service at all major hospitals in every district, in total 27 of them. This we believe will bring access of this service to the majority of the people of our province while at the same time ensuring that the programme is not interrupted and remains sustainable. We are targeting that all these must have commenced by August. This is extremely massive work which will include recruitment of counsellors, training and has got significant financial implications. Experience of the current site has indicated that the teething problems may also take a long time to correct. Those hospitals that require less capacity and support will necessarily start much earlier. They will be given additional support. The remaining hospitals will only be given attention by March 2003. Once again we want to emphasise that this is an indication of the work that is on-going by the Department of Health. The problem with HIV/AIDS remains a serious concern for government both nationally and provincially. Everything will be done to tackle the serious challenge particularly as it affects the babies. These hospitals will be given six months to work out whatever teething problems and settle in the programme before phasing the second phase, March 2003.

The third phase to complete the roll out of the programme incorporating all institutions in the province and their feeder clinics will also be approached in the same manner.'

Execution Founding Affidavit: p 13, paras 41-42

Execution Answering Affidavit: pp 56-57 para 36

Statement, Annexure 'AN1", pp 63-4

3.18 Significantly, and unlike the unsubstantiated and gratuitous attack on Dr Grant by Ntsaluba in the main application, the fifth respondent did not contradict the Premier's statement that doctors who had prescribed Nevirapine to their patients, such as those at Bethesda, had acted courageously in doing so. It is not disputed that this was a reference to Dr Grant and his colleagues.

Execution Founding Affidavit: p 14 para 43

Execution Answering Affidavit: pp 56-57 para 36

3.19 The Premier of KwaZulu-Natal subsequently reiterated his standpoint forcefully. He stated, inter alia:

'I reiterate for the whole world to understand clearly, that I stand resolutely by the announcement I made on Monday that we as the government of KwaZulu-Natal will supply Nevirapine to HIV-positive pregnant mothers of this province.

This is a principled stand which I have taken out of deep concern for the plight of unborn generations who are condemned to death even before they see the light of day, for sins not their own. No leader worth his salt would turn a blind eye to the suffering our children go through. This is a moral position to which every leader who professes dedication to the welfare of our country should commit himself.

If there are any problems as the provincial Minister of Health is reported to have said, they must be urgently brought to cabinet so that we deal with them swiftly and effectively. But we cannot parade problems as an excuse to abdicate our fundamental responsibility to the people of this province. Saving lives is what we as government are called upon to do. As Premier I would not like to be relegated to the dustbin of time for failure to act decisively and promptly to alleviate a desperate situation.' (emphasis added)

Execution Founding Affidavit: p 14 para 46

Statement: Annexure 'H', pp 30 - 31

3.20 On 31 January 2002 the Cabinet of KwaZulu-Natal passed the following resolution:

'The Cabinet having received a comprehensive report on the progress made in the research sites on the use of Nevirapine in the prevention of the mother-to-child transmission of the HIV resolved as follows:

1 To support the implementation plan for the roll out of the use of Nevirapine for the prevention of mother-to-child transmission of the virus throughout KwaZulu-Natal as presented by the Department of Health; with the proviso that the plan is expedited in those institutions which are ready.

2 That the Central Procurement Committee and the Department of Public Service and Administration be approached to facilitate and expedite the tender process and recruitment procedures which will make it possible for the programme to prevent mother-to-child transmission of HIV to be fully implemented.

3 That the programme to prevent mother-to-child transmission is granted high priority by cabinet and accordingly the budget of the Department of Health as well as that of the province as a whole must reflect this reality.

4 That the roll out must be seen in the broader context of the fight against HIV/AIDS in general.

5 Further, that regular reports be presented to cabinet to monitor progress.'

Execution Answering Affidavit: pp 57-58 para 38.2

Statement: Annexure 'AN2", p 65

3.21 It is quite clear that what the province of KwaZulu-Natal has undertaken to do is consistent with orders 1 and 2.

The Position in Gauteng

3.22 It is also clear that the position in Gauteng is one which does not confine the availability of Nevirapine to two pilot sites. Already in the answering affidavit, Gauteng had announced a significant expansion of the programme. On 18 February 2002, however, the Premier of Gauteng announced that his government 'will ensure that all public hospitals and our large community health centres provide Nevirapine for the prevention of mother-to-child transmission.'

1.1

Execution Replying Affidavit: p 140 paras 59-60

There is thus no proper basis for opposition to execute orders 1 and 2 in Gauteng.

3.23 The respondents' opposition is irreconcilable with the stance now adopted by three of the nine provinces, namely:

3.23.1 The Western Cape;

3.23.2 KwaZulu-Natal;

3.23.3 Gauteng.

3.24 In those three provinces, the execution not simply of prayers 1 and 2 but of the entire relief is in the process of being implemented.

The Defence of the Diversion of Resources

3.25 The respondents contend that the effect of the application for leave to execute is 'forcing' the respondents to 'prioritise one treatment over other treatments' and that this means that 'the treatment of the pregnant HIV-positive women will be at the expense of other patients'.

1.1

Execution Answering Affidavit: p46 para 19.2
p 42 para 13.5

3.26 The argument is spurious for the following reasons:

3.26.1 First, it deliberately misconstrues the import of prayers 1 and 2. Neither prayer forces doctors at non-designated sites to dispense Nevirapine. On the contrary, such prescription arises only where medically indicated which includes that testing and counselling have been carried out.. In other

words, execution only arises where the necessary support structures exist. Absent such structures, prescription would not be medically indicated.

- 3.26.2 Second, it is quite clear on the papers that there are indeed other sites where there is the expertise and capacity to dispense Nevirapine. This was the evidence of, inter alia, Dr Grant in KwaZulu-Natal and Professor Cooper in Gauteng. The latter's evidence is particularly telling. When the Johannesburg Hospital became designated as a site from 1 October 2001, Professor Cooper was able to continue doing what he had previously been doing but without the allocation of any additional resources.
- 3.26.3 Third, the defence flies in the face of the initiatives now taken by KwaZulu-Natal and Gauteng. In these provinces execution is already taking place.
- 3.26.4 Fourth, the respondents couch their defence in the most vague and general of terms. It is merely advanced at the level of assertion but without any supporting evidence whatsoever. Moreover, it is conspicuous that the respondents do not allege that the execution of orders 1 and 2 will result in the deaths of other patients from whom resources are ostensibly diverted. This is no mere oversight. The critical issue in the present application for leave to execute manifestly requires the weighing of the lives of children born to HIV- positive mothers against anything else.
- 3.26.5 Fifth, the claim of diversion of resources entails an intellectual sleight of hand. It postulates a situation where doctors are called upon to choose between patients. This is not correct. Mothers are entitled, as of right, to give birth at State hospitals. Medical practitioners are not confronted with the choice between delivering babies, on the one hand, and other medical procedures (dispensing Nevirapine) on the other.
- 3.26.6 Sixth, if, as the respondents now contend, they do not take the view that Nevirapine should not be provided outside the present research and training sites and that they are fully committed to preventing and reducing MTCT of the HIV, then their objection to the execution of orders 1 and 2 can only be one of timing. Execution of the orders pending appeal would enable the respondents to give effect to their stated commitment that Nevirapine can be provided outside the present research and training sites. Indeed, the respondents now state that 'the programme of providing Nevirapine to pregnant women who utilise the public health facilities will be rolled out to facilities outside the present research and training sites as and when the necessary resources become available'

Execution Answering Affidavit, p 45 para 18.1

The execution of orders 1 and 2 go no further than this stated commitment.

- 3.27 The respondents make a significant concession. They admit that 'it is impossible to exactly quantify the hardship caused by the distortion in budgets and the disruption of other services if orders 1 and 2 were to be made effective'.

Execution Answering Affidavit: p 52 para 30

If the respondents are unable to 'quantify the hardship' then their opposition to the application for leave to execute must fail. This Court is required to consider the balance of hardship and irreparable harm. On the one side of the scale are the lives of children. On the other side of the scale are vague and ill-defined assertions which the respondents are unable to quantify.

The Defence of Inability to Execute Everywhere and Immediately

- 3.28 The respondents further distort the case made out by the applicants. They contend, repeatedly, that they would have 'the greatest difficulty in making Nevirapine available at every public health facility in the country'. (emphasis added)

Execution Answering Affidavit: p 48 para 23

It is no part of the applicants' case that the execution of orders 1 and 2 would require Nevirapine to be made available at every public health facility in the country.

- 3.29 The individual affidavits filed on behalf of the provinces display, in the main, an ominous similarity to the extent of even repeating typographical errors. A constant refrain in the provincial affidavits, with minor variations only, (which will be pointed out below) is that orders 1 and 2 cannot be 'immediately' executed.

Eastern Cape Execution Affidavit: p 91 para 5

Free State Execution Affidavit: p 94 para 5

Gauteng Execution Affidavit: p 99 para 6

KwaZulu-Natal Execution Affidavit: p 103 para 5

Mpumalanga Execution Affidavit: p 107 para 5

Northern Cape Execution Affidavit: p 111, para 5

Northern Province Execution Affidavit: p 115 para 5

North West Province Execution Affidavit: p 122 para 13

- 3.30 Not surprisingly, Gauteng and KwaZulu-Natal adopt a somewhat different stance in relation to the expansion of their programmes:

- 3.30.1 It is stated on behalf of Gauteng that the Department 'is busy rolling out the programme as fast as it possibly can'.

Gauteng Execution Affidavit: p 99 para 5

- 3.30.2 On behalf of KwaZulu-Natal it is stated that 'the department intends to roll out the programme as fast as resources permit'.

KwaZulu-Natal Execution Affidavit: p 103, para 6

- 3.31 The contention that orders 1 and 2 cannot be made 'immediately' executable is based upon a fundamental misconception of what those orders entail. The contention pre-supposes that doctors outside of the designated sites are required immediately to prescribe Nevirapine. This is manifestly not what was asked for nor what was ordered. Order 1 goes no further than enabling doctors to prescribe Nevirapine where medically indicated. The only thing that the respondents are directed to do is to distribute the drug and even in that case, the applicants offer alternative relief which will relieve the respondents of this obligation.

- 3.32 The respondents, therefore, have fundamentally misconceived the nature of the obligations imposed by orders 1 and 2.

The Defence of Imposing a Policy Choice and Ambiguity

- 3.33 The respondents contend that the execution of orders 1 and 2 would be 'tantamount to making a policy choice' for the respondents and that the orders are 'vague, ambiguous and uncertain'. The 'policy choice' argument also features pre-eminently in the Minister's public pronouncement as to why she is appealing.

Execution Answering Affidavit: pp 46-47 para 19.3
Annexure 'AN3": PP 66-7
Sunday Times Article: p 33

- 3.34 The contention that orders 1 and 2 amount to the imposition of a policy choice is a recurrent theme of the respondents. It is submitted that the contention is spurious. At issue in the present case is the constitutional validity of a policy designed and implemented by the respondents themselves. It is not without significance that the source document for that policy, namely the Minmec minute, has been deliberately withheld by the respondents. This Court was called upon to do no more than fulfil its constitutional mandate to test whether that policy is consistent with the Constitution. This is precisely what the Constitution mandates and it is precisely what the Constitutional Court did in the Grootboom case.
- 3.35 The defence of ambiguity is surprising. The undisputed evidence was that health professionals in the public sector are 'every bit as qualified and competent as their colleagues in the private sector to decide on a case-by-case basis whether the prescription of Nevirapine is in the interests of their patients.'

Founding Affidavit: Mthati: p 55 para 155
Answering Affidavit: Ntsaluba pp 717 - 718 para 120

- 3.36 Accordingly, the decision to dispense Nevirapine whether in the private sector or the public sector and whether at designated or non-designated sites entails the same exercise of professional judgment. It is the prescribing doctor who makes the appropriate judgment as to whether or not Nevirapine is medically indicated. There is manifestly no ambiguity in the order.

The Defence of Absence of Jurisdiction

- 3.37 Throughout the answering affidavits opposing the application to execute orders 1 and 2, the respondents contend that the orders cannot be executed by reason of the lack of jurisdiction to make the orders in the first place and that the orders are a nullity.

Execution Answering Affidavit, p 39 para 6.1.2

- 3.38 The claim of an absence of jurisdiction to make the orders in question flies in the face of the express wording of the Constitution and an unbroken line of authority emanating from the Constitutional Court. The relevant principles are set out in the main heads of argument, Part II. It is not appropriate to repeat those arguments. It suffices merely to highlight certain matters:
- 3.38.1 Section 7(2) of the Constitution requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights'.
- 3.38.2 The supremacy clause contained in section 2 proclaims the Constitution as the 'supreme law' and states that 'law or conduct inconsistent with it is invalid and the duties imposed by it must be performed'.
- 3.38.3 Section 27 of the Constitution imposes a positive obligation upon the State to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of the right of access to health care.
- 3.38.4 In terms of decisions by the Constitutional Court, the Constitution is committed to establishing and maintaining an efficient and equitable and ethical public administration which respects fundamental rights and is accountable to the broader public.

- 3.38.5 The Constitutional Court has stated that the exercise of all public power must comply with the Constitution.
- 3.38.6 The courts are vested with the widest remedial powers including the power, under section 38, to 'grant appropriate relief, including a declaration of rights'.
- 3.39 In the light of these principles and others elaborated upon in the main heads of argument, there is simply no basis for the contention that the making of orders 1 and 2 was beyond the jurisdiction of this Court. The matter may be tested very simply. Suppose the respondents adopted a policy of making Nevirapine available only to white women. It would manifestly be within the jurisdiction of the courts to declare that the policy was unconstitutional and further to declare that the provision of Nevirapine be made available without racial discrimination. This hypothetical example serves to illustrate that the power to test the validity of State policy against the precepts of the Constitution is clearly within the jurisdiction of the courts. The Constitutional Court exercised precisely such a jurisdiction in the Grootboom case.

The Alternative Relief

- 3.40 As an alternative to the execution of orders 1 and 2, the applicants seek an order declaring that doctors in the public health sector are entitled to make Nevirapine available to pregnant women and their babies if in the judgment of the attending medical officer, acting in consultation with the medical superintendent of the facility concerned, this is medically indicated, which shall at least include that the women concerned has been appropriately tested and counselled.
- 3.41 The purpose of this alternative form of relief is to meet an anticipated argument that the State cannot or would not make Nevirapine available. It deals with the situation with which Professor Cooper at the Johannesburg Hospital was confronted and Dr Grant at the Bethesda Hospital. In the case of the former, Nevirapine was donated. In the case of the latter, the doctors concerned purchased Nevirapine out of their own pockets.
- 3.42 The respondents contend that there is no jurisdiction to grant the alternative relief. As far as can be ascertained, the argument advanced by the respondents rests on two legs. First, if there is no jurisdiction to grant orders 1 and 2 in the first instance, there would likewise be no jurisdiction to grant an alternative. It appears that the respondents also contend, however, that the alternative prayer amounts to a variation of the court order and constitutes an admission that orders 1 and 2 are wrong and not implementable.

Execution Answering Affidavit: p 60 para 45

- 3.43 The question of jurisdiction to grant orders 1 and 2 has been dealt with above. With regard to the alternative, execution of orders of court is an incident of the inherent jurisdiction of the Supreme Court to control its own judgments.

South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd
1977 (3) SA 534 (A) at 545 C - D

- 3.44 The Constitution itself now puts the matter beyond doubt. Section 173 of the Constitution provides:

'Inherent Power

173 The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

3.45 There are many examples in which the Court has exercised its inherent jurisdiction. The yardstick by which such jurisdiction is exercised is justice and equity. Thus, for example, in *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and Others* 1986 (2) SA 663 (A) Kotze JA, in dealing with the power of a court to grant interim relief pending a review observed at 676 D:

'An inherent power of this kind is a salutary power which should be jealously preserved and even extended where exceptional circumstances are present and where, but for the exercise of such power, a litigant would be remediless, as is the case here.'

3.46 In *Nkweni v Bezuidenhout* 1927 CPD 130 it was stated:

'The rules of procedure of this court are devised for the purpose of administering justice and not of hampering it, and where the rules are deficient I shall go as far as I can in granting orders which would help to further the administration of justice. Of course, if one is absolutely prohibited by the rule one is bound to follow this rule, but if there is a construction which can assist the administration of justice I shall be disposed to adopt that construction.'

Cited with approval in:

Republikeinse Publikasies (Edms) Bpk v Afrikaanse Pers Publikasies (Edms) Bpk
1972 (1) SA 773 (A) at 783 B - C

In the same case the Appellate Division also cited with approval the following observation by Williamson J in *Brown Bros. Ltd v Doise* 1955 (1) SA 75 (W) at 77:

'In my view this is a case where the rules of court as framed do not provide for one particular set of circumstances which can arise, and I think that the Court has inherent power to read the rules applicable to the procedure of the Court in a manner which would enable practical justice to be administered and a matter to be handled along practical lines.'

3.47 In the light of the above principles, it is submitted that this Court clearly has jurisdiction to grant the alternative relief.

G J MARCUS S.C.

B MAJOLA

Chambers
Johannesburg
1 March 2002

