IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO.

In the matter between :

MINISTER OF HEALTH	First Appellant
MEC FOR HEALTH, EASTERN CAPE	Second Appellant
MEC FOR HEALTH, FREE STATE	Third Appellant
MEC FOR HEALTH, GAUTENG	Fourth Appellant
MEC FOR HEALTH, KWAZULU-NATAL	Fifth Appellant
MEC FOR HEALTH, MPUMALANGA	Sixth Appellant
MEC FOR HEALTH, NORTHERN CAPE	Seventh Appellant
MEC FOR HEALTH, NORTHERN PROVINCE	Eighth Appellant
MED FOR HEALTH, NORTH-WEST	Ninth Appellant

and

TREATMENT ACTION CAMPAIGN	First Respondent
DR HAROON SALOOJEES	Second Respondent
CHILDREN'S RIGHTS CENTRE	Third Respondent

In re :

MEC FOR HEALTH, KWA-ZULU NATAL KWA-ZULU NATAL.	Appellant

and

THE GOVERNMENT OF KWA-ZULU NATAL	Respondent

HEADS OF ARGUMENT OF THE PREMIER OF THE GOVERNMENT OF THE PROVINCE OF KWA-ZULU NATAL

INTRODUCTION

1. In the main application brought in the Court below the fifth respondent in those proceedings, and the fifth appellant before this Court, was cited as the MEC for Health, KwaZulu-Natal representing the Government of the Province of KwaZulu-Natal . The MEC for Health, KwaZulu-Natal opposed the relief sought by the applicants in the Court below.

2. His Lordship Mr Justice Botha handed down a judgment granting relief to the applicants (the respondents before this Court). The respondents in the proceedings in the Court below filed an application for leave to appeal to this Court. The applicants filed an application for leave to execute the order granted by His Lordship Mr Justice Botha.

3. Both the application for leave to appeal and the application for leave to execute were set down for hearing before His Lordship Mr Justice Botha on 1 March 2002.

4. The Premier of the Province of KwaZulu-Natal ("The Premier") deposed to an affidavit that was filed in the Court below. The affidavit

set out the position of the Government of the Province of KwaZulu-Natal in respect of the application for leave to execute and the application for leave to appeal. In respect of the application for leave to appeal, the Premier abided the decision of the Court below. In respect of the application for leave to execute, the Premier supported the application, with certain qualifications, and set out the basis upon which the Government of the Province of KwaZulu-Natal considered the urgent and immediate administration of Nevirapine to be a moral and practical necessity, and indicated the extent of the capacity available to the Province to administer Nevirapine.

5. In his affidavit, the Premier averred that he represented the executive authority of the Province, and made the affidavit on behalf of the Government of the Province of KwaZulu-Natal, of which the MEC for Health, KwaZulu-Natal forms part.

Premier's affidavit paras 1 and 2.

6. In essence, the Premier sought to have recognised his authority to represent the Government of the Province of KwaZulu-Natal in the main proceedings, in respect of which an application for leave to appeal was pending, and in the application for leave to execute. Alternatively, and in so far as may have been necessary, the Premier sought leave to intervene in the proceedings on behalf of the Government of the Province of KwaZulu-Natal.

7. The respondents in the Court below opposed this intervention of the Premier on behalf of the Government of the Province of KwaZulu-Natal.

8. His Lordship, Mr Justice Botha, ruled that the Premier, as the person in whom the Executive authority of the Province vested in terms of Section 125(1) of the Constitution of the Republic of South Africa, ("The Constitution"), had the right to assert his authority and to represent the Province ("The ruling"). Furthermore, the learned Judge ruled that the Premier's decision to intervene was not a decision requiring writing as contemplated in Section 140(1) of the Constitution.

Judgment of Botha J in respect of the application for leave to appeal and leave to execute

Record page 10

9. The ruling was not confined to the status of the Premier as the authorised representative of the Government of the Province of KwaZulu-Natal in respect of the application for leave to execute, but was, in effect, the substitution of the Premier for the MEC for Health as the fifth respondent in the main application. This point was expressly raised by Botha J in the MEC for Health's application for leave to appeal on 16 April 2002, and the learned Judge clarified the effect of the ruling. Botha J stated:

" I did not allow the Premier for KwaZulu-Natal to intervene merely for the purposes of the application for leave to appeal and the application for leave to execute"

Judgement of Botha J of 16 April 2002, Record pg 30.

10. The effect of the ruling is common cause between the parties to this appeal. Thus the question at issue in this appeal is whether the Premier or the MEC for Health represent the Government of KwaZulu-Natal in the main appeal before this Court.

11. That the applicants for leave to execute subsequently withdrew that application as against the Government of KwaZulu-Natal did not render the ruling moot, because the ruling decided who may represent the 5th Appellant in the main appeal before this Court.

12. The MEC for Health KwaZulu-Natal applied for a certificate in terms of Rule 18 so as to seek leave to appeal directly to this Court. A positive certificate was granted by His Lordship Mr Justice Botha.

13. Accordingly this matter now comes before this Court. The following matter falls to be determined by this Court: whether the Premier enjoys the authority to represent the Government of the Province of KwaZulu-Natal for the purposes of the proceedings before the Court below, and now on appeal in this Court. In the event that this issue is answered in favour of the Premier, then the position of the Government of the

Province of KwaZulu-Natal in respect of the main appeal now before this Court is set out.

PRELIMINARY ISSUES

14. The Chief Justice has indicated to the parties that argument should be addressed to the following preliminary issues. First, as to the applicability of Chapter 3 of the Constitution. Second, as to whether this appeal is moot. I address these issues in turn.

15. In **Premier, Western Cape v President of the Republic of South Africa 1999 (3) SA 657 (CC) at paras [49-62]**, this Court considered the provisions of Chapter 3 of the Constitution.

16. At **para [54]** Chaskalson P said the following :

> *"The Provisions of Chapter 3 of the Constitution are designed to ensure that in fields of common endeavour the different spheres of Government co-operate with each other to secure the implementation of legislation in which they all have a common interest. The co-operation called for goes so far as to require that every reasonable effort be made to settle disputes before accord is approached to do so."*

17. Central to the principle of co-operative government is that obligations of co-operation should be observed between spheres of government. Chapter 3 is intended to secure the manner in which one sphere of government relates to another so as to foster the values of co-

operation between spheres of government and avoid disputes that may be settled without recourse to the Courts.

18. Section 41(3) requires that dispute resolution procedures be followed "in an inter-governmental dispute".

19. The dispute between the Premier and the MEC for Health of KwaZulu-Natal is not an inter-governmental dispute. It is an intra-governmental dispute in that it concerns a dispute between members of the same government as to who may lawfully represent that government. It is submitted that the dispute between the Premier and the MEC for Health, KwaZulu-Natal is thus not a dispute contemplated by Section 41(3) of the Constitution, and accordingly there is no requirement that dispute resolution procedures should have been followed before this matter came to Court.

20. The dispute between the Premier and the MEC for Health, KwaZulu-Natal is, in any event, a dispute that arises as a result of litigation initiated by applicants in the Court below, citing the Government of the Province of KwaZulu-Natal as a respondent. The dispute is thus collateral to a lis not initiated by either the Premier or the MEC for Health, KwaZulu-Natal. A collateral dispute of this kind does not fall within the meaning of Section 41(3) of the Constitution.

21. Nor, it is submitted, is the dispute between the Premier and the MEC for Health, KwaZulu-Natal of academic interest only. As indicated above, the ruling sought from Botha J in the Court below was of application in respect of the main proceedings, and not simply the application for leave to execute.

22. The outcome of the main appeal is of direct interest to the Government of the Province of KwaZulu-Natal for the decision of this Court will determine the constitutional obligations the Government of the Province of KwaZulu-Natal to provide health care services in the Province in respect of the distribution and administration of Nevirapine.

23. If this Court should decide the appeal as between the MEC for Health, KwaZulu-Natal and the Premier in favour of the MEC for Health, KwaZulu-Natal, then the position of the Government of the Province of KwaZulu-Natal in respect of the main appeal is to pursue the appeal. If a decision is made in favour of the Premier, then the position of the Government is to abide the outcome of the main appeal on the basis that the case of the other appellants is not well-founded.

24. Consequently, it is submitted, that the appeal between the MEC for Health, KwaZulu-Natal and the Premier is not moot.

WHO LAWFULLY REPRESENTS THE GOVERNMENT OF THE PROVINCE OF KWAZULU-NATAL ?

25. In the main application before the Court below, the MEC for Health, KwaZulu-Natal was cited as the fifth respondent.

26. In terms of Section 2 of the State Liability Act 20 of 1957, in proceedings against the State, the Minister of a Department, or the member of the Executive Council of a Province, is cited as a nominal respondent. The MEC for Health, KwaZulu-Natal was is cited in name only, as the representative of the Government of the Province of KwaZulu-Natal.

27. Thus, when the MEC for Health, KwaZulu-Natal was cited in the proceedings, the true party before the Court was the Government of the Province of KwaZulu-Natal.

28. The question as to who may lawfully represent the Government of KwaZulu-Natal is determined by reference to the provisions of the Constitution, and in particular Sections 125, 127, 132, 133 and 140.

29. In **Premier Western Cape v President of the Republic of South Africa 1999 (3) SA 657 (CC) at para 92,** this Court gave a general description of the executive responsibility of provincial government. As the matter was put : provincial government remains in the hands of the Premier and Executive Council, the Executive Council is appointed

by the Premier and functions are assigned to the Executive Council by the Premier.

30. The Executive authority of the Province vests in the Premier of that Province **(Section 125(1)).** The Premier exercises the executive authority of a Province, together with the other members of the Executive Council. **(Section 125 (2).** The Premier is elected by the provincial legislature **(Section 128**). The Premier of a Province appoints the members of the Executive Council, and assigns their powers and functions, and may dismiss them. **(Section 132(2)).** The Executive Council of the Province consists of the Premier, as Head of the Executive Council, and no fewer than five and no more than ten members appointed by the Premier from among the members of the provincial legislature. **(Section 132(1)).**

31. These provisions of the Constitution answer two different questions. First, how is the executive authority of a Province constituted? Second, how is that authority exercised?

32. The Executive authority of a Province is constituted, first by the election of the Premier, and then by the appointment of members of the Executive Council by the Premier. The executive authority of a Province is exercised by the Premier together with the other members of the Executive Council.

33. Section 127 (1) of the Constitution grants to the Premier of a Province the powers and functions entrusted to that office by the Constitution and any legislation. Thus in answering the question whether the Premier has the power to represent the executive authority of the Province of KwaZulu-Natal, it is necessary to look in the first place at the relevant provisions of the Constitution.

34. It is submitted that by reason of the fact that the Premier is the head of the executive authority of the Province, and that the executive authority of a Province vests in the Premier, the Premier has the authority to represent the executive authority of a Province. The power to represent the executive authority of a Province forms part of the executive authority of a Province and this authority vests in the Premier.

35. Just as office bearers of juristic persons may be clothed with powers of representation by the Charters, Constitutions or Rules of such juristic persons, (See **LAWSA vol 1 Agency and Representation para 113)** so too it is submitted that, upon a proper reading of Section 125, the effect of vesting the executive authority of a Province in the Premier is to authorise the Premier to represent that authority.

36. Portion of the executive authority of a province is the power to represent that province. Once the Constitution vests authority in a particular office, it clothes that office with all the powers necessary to

the exercise of executive authority. How the Premier exercises that power of representation is constrained by the requirement that the Premier does so together with the executive members of the Executive Council (Section 125(2)). Thus the Premier could not represent the executive authority in a manner inconsistent with the collective responsibility of each member of the Executive Council to the binding decisions of the Executive Council. If the Premier does not agree a binding decision of the Executive Council, then the Premier is empowered to dismiss members of the Executive Council who serve at his pleasure of the Premier.

37. Accordingly, it is submitted that the Premier represents the Government of the Province of KwaZulu-Natal since the executive authority of the Province is vested in the Premier and absent any assignment of such authority, executive authority includes the authority to represent the executive.

38. The decisions adopted by the Executive Council may limit the basis upon which such representation takes place.

39. That however is not the issue before this Court. The Premier has deposed to an affidavit on behalf of the Government of Province of KwaZulu-Natal setting out the position of that Government in respect of issues germaine to the main appeal before this Court. There is no challenge made by the MEC for Health, KwaZulu-Natal that the

Premier in his affidavit has gone beyond the scope of the Executive Council's policies in representing the Government of the Province of KwaZulu-Natal. Rather, the MEC for Health, KwaZulu-Natal contends that he properly represents the executive authority of the Province.

40. That is not so. The MEC for Health, KwaZulu-Natal is a member of the Executive Council. His views and position on the issues relevant to the main appeal before this Court do not determine what may be said on behalf of the Government of the Province of KwaZulu-Natal. On the contrary, the policies and position of the Government of the Province of KwaZulu-Natal are determined by the Executive Council, of which the MEC for Health forms part, and by which he is bound.

41. It is accordingly submitted that the Premier lawfully represents the executive authority of the Province, and an MEC may not seek to usurp such position by asserting a separate and overriding power to represent the executive authority of the Province simply because the subject matter of the main appeal falls within the portfolio of the MEC for Health.

42. While the Premier, in terms of Section 132(2), may assign powers and functions to a member of the Executive Council, there is nothing on the record that indicates that the Premier has assigned specific powers to the MEC for Health, KwaZulu-Natal, to represent the Government of the Province of KwaZulu-Natal in litigation in these proceedings. In

any event, any assignment of this kind is plainly revocable, and the Premier, in asserting his authority to represent the Government of Province of KwaZulu-Natal is in a position himself to act on behalf of the Province by thereby revoking any power assigned to the MEC for Health, KwaZulu-Natal. .

Administrator Cape v Associated Buildings Ltd 1957 (2) SA 317 (A) at 323 H.

43. Nor can the MEC for Health, KwaZulu-Natal maintain a position as an independent litigant as against the Premier. The MEC for Health, KwaZulu-Natal serves at the pleasure of the Premier. This indicates an administrative hierarchy in which the Premier holds the superior office. Where the Premiers asserts his authority to represent the Government of the Province of KwaZulu-Natal, then the MEC for Health, must yield. For the MEC for Health cannot act as an independent litigant against his superior within the same administrative hierarchy.

Suid-Afrikaanse Verpleegstersraad v Minister van Gesondheid 1961 (4) SA 715(T)

and more generally

Naidoo v Johannesburg City Council 1979 (4) SA 893 (W).

44. A further issue is raised by the MEC for Health, KwaZulu-Natal in the appeal before this Court. The MEC for Health, KwaZulu-Natal submits that the Premier could not intervene in the proceedings in the

Court below so as to represent the Government of the Province of KwaZulu-Natal because the Premier failed to comply with the requirements of Section 140(1) of the Constitution.

45. Section 140(1) requires that a decision by the Premier of a province must be in writing if it is taken in terms of legislation or has legal consequences.

46. The intervention by the Premier to represent the Government of the Province of KwaZulu-Natal is not a decision of the kind contemplated by Section 140(1). Section 140(1) should be read together with Section 127 of the Constitution. Where the Premier exercises a power entrusted to that office by any legislation, then a decision so taken must be in writing. So too, if the Premier exercises a power set out in Section 127(2) then such a decision, having legal consequences, is also to be made in writing. Decisions of this kind directly affect the rights and interests of persons, and hence the rule of law requires that such decisions be in writing so their content may be clear and capable of publication.

47. Representing the Government of the Province of KwaZulu-Natal in litigation is not a decision of this kind. The power of a Premier to represent the Province flows from the Constitution, as submitted above, and any person that has an interest in the litigation may participate in the proceedings in the ordinary way. The Premier in

these proceedings is not engaged in acts of law-making or administrative decision-making, but is rather protecting the interests of the Government of Province of KwaZulu-Natal in pending litigation.

48. Accordingly, the Premier in asserting his authority to represent the Government of the Province of KwaZulu-Natal is not required to comply with the formalities of Section 140(1). But in any event, the Premier has done so. The affidavit filed in the Court below is plainly in writing and reflects the decision taken by the Premier to state the position of the Government of the Province of KwaZulu-Natal. Accordingly, even if such intervention is a decision within the meaning of Section 14)(1), the formalities have been complied with.

49. There is no requirement that the affidavit filed by the Premier must be countersigned by the MEC for Health, KwaZulu-Natal. As I have submitted above, who may represent the Government of the Province of KwaZulu-Natal is not a matter requiring consensual decision-making by the Premier and the MEC for Health KwaZulu-Natal. Rather, the Premier enjoys the authority to represent the Government of the Province of KwaZulu-Natal in the proceedings, and there is no assignment of this function that is proven before this Court. Any such assignment, in any event may be recalled by the Premier, in which event there is no requirement that Section 140(2) need be complied with.

50. Accordingly, the formal grounds of appeal based upon Section 140 are without merit.

SUBMISSIONS IN THE MAIN APPEAL

51. The Premier, on behalf of the Government of the Province of KwaZulu-Natal, does not support the Appellants' case before this Court, and abides the decision of this Court in respect of the main appeal.

52. The Premier, nevertheless, seeks to make certain limited submission in respect of :

52.1 the constitutional principles that arise in the case;

52.2 the capacity available within the Province of KwaZulu-Natal to distribute Nevirapine.

53. The outcome of this case is of particular importance to the Government of the Province of KwaZulu-Natal since it wishes to ensure that its policies, and those of other provincial governments and the national government, are co-ordinated within a clear framework of constitutional obligations.

54. The importance of co-ordination between the spheres of government was emphasised in:

Government of the RSA & others v Grootboom & others 2001 (1) SA 46 (CC) at para 68.

55. The Appellants in the main appeal contend that the Court below trespassed upon the separation of powers and usurped the policy-making functions of the Appellants, and failed thereby to show proper deference to the policies adopted by the Appellants.

56. In **SA Association of Personal Injury Lawyers v Heath & Others 2001 (1) SA 883 (CC) at para 25,** this Court again affirmed that the separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution. Under that separation, it is the duty of the Courts to ensure that the limits to the exercise of public power are not transgressed. (**at para 25)**.

57. The formation and implementation of policy by government does not escape constitutional scrutiny because policy is an exercise of public power, even though it is not ordinarily administrative action.

58. In **President of the RSA v South African Rugby Football Union 2000 (1) SA 1 at paras [147] and [148],** this Court found that a Commission of Enquiry is an adjunct to the policy formation responsibilities of the President, and the appointment of a Commission did not constitute administrative action. Nevertheless the exercise of

such powers , as the exercise of a public power, may not infringe any provision of the Bill of Rights and is constrained by the principle of legality.

59. Thus even though policy is not administrative action, the formation of a policy by government is nevertheless subject to judicial scrutiny because the policy may not infringe the Bill of Rights or trespass upon the principle of legality.

SARFU (supra) at para [143]

President of the Republic of South Africa and another v Hugo 1997 (4) SA 1 (CC) at paras [16-28].

60. Accordingly, the judicial review of government policy does not trespass upon the separation of powers because such review falls within the constitutionally legitimate sphere of judicial power: ensuring the limits of executive power.

61. It is thus clear that :

61.1 judicial scrutiny of the formation and implementation of policy does not trespass upon the separation of powers under the Constitution;

61.2 the formation and implementation of policy by government, in its different spheres, is subject to the principle of legality and the Bill of Rights.

62. These principles of Constitutional scrutiny are consistent with a recognition that the Courts should be slow to impose obligations upon government which will inhibit its ability to make and implement policy effectively. This Court has recognised the importance of the need to ensure the ability of the executive to act efficiently and promptly.

Premier, Mpumalanga v Association of State-Aided Schools 1999 (2) at para 41.

63. The issue that then arises is whether the policy of the Appellants, restricting the availability of Nevirapine in public hospitals to certain designated sites, complies with the Bill of Rights.

64. It is submitted that the policy infringes a number of fundamental rights.

65. Section 27 of the Constitution accords to everyone the right to have access to health care services, including reproductive health care. The State must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights.

66. In Re **Certification of the Constitution of the RSA 1996 (4) SA 744 (CC) at paras 77 and 78,** this Court rejected an objection that socio-economic rights are inconsistent with the separation of powers because they encroach upon the terrain of the executive, and in particular budgetary allocations. It was held that the distinction

between positive and negative rights, as claims upon resources, was far from clear-cut, and that these rights are at least, to some extent, justiciable.

67. The manner in which socio-economic right are justiciable under our Constitution was set out in **Government of the RSA and others v Grootboom 2001 (1) SA 46 (CC).**

68. Interpreting Section 26 of the Constitution, which is similar in structure to Section 27, this Court held:

68.1 that all the rights in the Bill of Rights are inter-related and mutually supporting (**at para 23)**;

68.2 that rights need to be interpreted and understood in their social and historical context (**para 25**)

68.3 the right delineated by Section 26(1) is closely related to the obligations of the State in Section 26(2), the implicit content of which is that the State shall desist from preventing or impairing the right recognised in Section 26(1) (**para 34**);

68.4 the State is required to devise a comprehensive and workable plan to meets its obligations, co-ordinated between the difference spheres of government (**paras 38-39**);

68.5 the measures taken must establish a coherent programme for the progressive realisation of the right (**para 41**);

68.6 the measures are not confined to legislation but require action on the part of the executive to achieve legislative measures (**para 42**);

68.7 in determining where the measures are reasonable, consideration must be given to the problems posed, the capacity to implement a programme, and the need to balance short, medium and long-term needs.(**para 43**);

68.8 reasonableness is to be determined in the context of the Bill of Rights as a whole (**para 44**);

68.9 the State must take steps progressively to meet the basic needs of all in society (**para 45**);

68.10 the State is not required to do more than is its available resources permit **(para 46**).

69. The authoritative interpretation of this Court in respect of Section 26 of the Constitution is of equal application to Section 27 of the Constitution. So understood, the State has a negative duty to desist from preventing or impairing the right of access to health care services. The State has a positive obligation to adopt measures, and not only legislative measures, that provide a coherent programme that is reasonable in that it progressively meets the basic health care requirements of all, and is implemented in a fashion that recognises those in greatest need, who may be assisted by the deployment of resources immediately available, and resources that become available over time.

70. The policy of the Appellants is to limit the availability of Nevirapine. This is done by way of designating limited sites in each Province where pregnant HIV positive mothers may have Nevirapine administered. Outside the designated sites, Nevirapine may not be prescribed even where the doctor treating a patient considers it to be medically indicated. Nevirapine is available throughout the private health sector without restriction and is available, free of charge, to patients in the public health sector who give birth at a designated site. (I shall refer to this as the "Appellants' policy").

71. The Appellants' policy infringes the right to have access to health care services. The Appellants' policy is not a reasonable measure, within available resources, to achieve the progressive realisation of the right of access to health care services. This is so for a number of reasons.

72. First, the claims of children to avoid fatal infection can hardly admit of any greater priority. The newborn child has no responsibility whatever for becoming infected with the HIV virus. So too, the newborn child has a special claim to enjoy the prospect of life without a preventable and fatal infection. While the lives of all are valued under the Constitution, the value of young lives claims special priority. The specific protection given to children in terms of Section 28(1) of the Constitution which, though primarily a claim to parental and family care,

(**Grootboom at para 76)** emphasises the special importance of children in the scheme of Constitutional values.

73. The Appellants' policy fails to meet the standard of reasonableness because it fails to accord proper priority to the claims of all children who risk infection by way of mother-to-child transmission. The Appellants' policy, rather, puts in place measures that advantage newly born children at designated sites, but fails to make any provision for the grave risks that attach to all children born to HIV positive mothers.

74. The Appellants' policy thus fails to use resources or provide a plan to meet the most urgent needs of all children at risk. The policy fails to be comprehensive in making available resources to all children who have a right to have access to health care services.

75. Unlike the position in **Soobramoney v Minister of Health, KwaZulu-Natal 1998 (1) SA 765(CC)** where the claim of a particular person to a particular kind of treatment was not consistent with the State's primary obligations, the claims of all children that risk infection do require that the State adopts measures, and prioritises resources, so as to provide a scheme within which all such children may participate, given only the uneven capacity in different areas of the country.

76. Second, the Appellants' policy is unreasonable and arbitrary because it requires that outside the designated sites, Nevirapine may not be

made available, notwithstanding the fact that the drug is available and the capacity exists to administer it under medical supervision. This constitutes the very harm identified in the **Grootboom** case, which is a violation of the negative obligation upon the State not to prevent or impair the right of access to health care services. Where the resources are available, the refusal to permit them to be used to save lives, in the face of a pandemic of disastrous proportions, is the clearest act of frustrating the right of access recognised in Section 27.

77. This is not a case in which resources given to one hospital take resources from another hospital under a rational scheme of hospital selection. The designation of a site does not carry with it the consequence that other sites do not have the capacity to administer Nevirapine, and consequently the Appellants' policy is an arbitrary refusal to allow resources, available for use, to be used to give access to urgently needed health care services.

78. What has been said in respect of the rights of the newborn child to have access to health care services, applies with similar force to the mothers of children that risk infection. For it is elementary that a mother wishes her child to avoid fatal infection that may follow from childbirth, and consequently the mother's right to have access to health care to ensure that her child is not infected is the corollary of the child's right not to be infected.

79. Accordingly, it is submitted that the Appellants' policy constitutes a violation of Section 27 of the Constitution.

80. The Appellants' policy also infringes the right to equality in Section 9.

81. Section 9(1) protects the right of equality before the law and the equal protection and benefit of the law. Section 9(3) prohibits unfair discrimination by the State.

82. The right to equality has been given authoritative interpretation in a number of decisions of this Court.

Prinsloo v van der Linde 1997 (3) SA 1012 (CC)

Harksen v Lane NO and others 1998 (1) SA 300 (CC)

President of the Republic of South Africa v Hugo 1997 (4) SA(1) (CC)

Hoffmann v South African Airways 2001 (1) SA 1 (CC)

83. The Appellants' policy does not meet the threshold requirements of rationality, and consequently constitutes an infringement of Section 9(1). The designation of sites for the distribution of Nevirapine does not provide a rational scheme for securing the public good of access to live-saving medication. The designation of sites carries with it the sterilisation of capacity outside of these sites that may otherwise be utilised to secure this public good. In the face of a country-wide pandemic, this policy bears most harshly upon the poorest, who have

no means to secure private health care, a rational scheme of distributing Nevirapine must at least utilise all public capacity that exists and may be applied to the administration of Nevirapine where medically indicated.

84. In two related ways, the Appellants' policy does not meet the required constitutional standard of rationality. First, the designation of sites is not a deployment of scarce resources to maximise the provision of a public good. While government, in its various spheres, cannot be required to provide public goods going beyond what its public resources can yield, the irrationality of the Appellants' policy is that it renders yet more scarce a fundamental public good essential to the health and welfare of thousands of children by arbitrarily restricting the availability of Nevirapine to the designated sites.

85. The second way in which the Appellants' policy is irrational is that the designation of sites does not thereby release resources for the rendering of other public goods of equal or greater value.

86. The Appellants' policy consequently is not a defensible vision of the public good because it provides for arbitrary preferences between those who are able to utilise the designated sites and those who are not.

87. Consequently, the Appellants' policy is an infringement of Section 9(1).

88. The Appellants' policy is also an infringement of Section 9(3). The Appellants' policy discriminates against persons on the grounds of disability. Persons who are HIV positive and their children who run the risk of infection clearly suffer from a disability. The Appellants' policy arbitrarily precludes those who cannot access a designated site from securing Nevirapine, and in consequence unfairly discriminates against those who would spare their children the risk of infection. The Appellants' policy also discriminates against persons on the grounds in that persons who cannot afford private health care, and cannot procure access to the designated sites, will go untreated, with the significant risks that are then incurred in respect of mother-to-child transmission of HIV infection. Such infection has hugely damaging consequences for those infected, and the communities in which they live. The fundamental value of human dignity is plainly compromised. As a result there is an infringement of Section 9(3) of the Constitution.

THE POSITION IN THE PROVINCE OF KWA-ZULU NATAL

89. The Premier's affidavit filed in the Court below sets out the position in the Province of KwaZulu-Natal.

90. KwaZulu-Natal has the highest prevalence of HIV infection in the Republic and it is estimated that 35% of the population is HIV positive.

Premier's affidavit para 7

91. It is estimated that there were some 80,000 AIDS related deaths in the Province in 2001. In that same year, it is estimated that 40,000 children were infected with HIV by their mothers. Some 36% of women giving birth in the Province are HIV positive.

Annexure "A" to the Premier's affidavit page 4.

92. In the face of this pandemic, the Province of KwaZulu-Natal is in a position immediately to administer Nevirapine through its public health facilities. Nevirapine may be administered without delay on a province-wide basis.

Premier's affidavit paras 9 & 10

93. The health facilities already in place permit of the administration of Nevirapine to pregnant mothers during childbirth. This would be done on the advice of medical practitioners in attendance at public health care facilities.

Premier's affidavit para 11

94. There is a brst practice protocol for the administration of Nevirapine. Facilities do not exist throughout the province to meet a protocol of this kind. But the provincial government will roll out infrastructure and management capability so as to provide facilities that will progressively meet the protocol.

Premier's affidavit paras 12 and 14

95. Until better infrastructure is in place, public health facilities in the province are in a position to administer Nevirapine to women during childbirth upon the instruction of medical practitioners and administer Nevirapine to newborn babies within the 72 hour period. Nevirapine has been made freely available to the province for a period of 5 years.

Premier's affidavit para [16]

CONCLUSION

96. For the reasons set out above, the Premier prays that the appeal brought by the MEC for Health, KwaZulu-Natal against the Premier, be dismissed with costs. In respect of the main appeal, the Premier, on behalf of the Government of the Province of KwaZulu-Natal abides the outcome of that appeal.

David Unterhalter
Counsel for the Premier, KwaZulu-Natal

Chambers
22 April 2002

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