

# ACCESS TO TREATMENT LITIGATION

The Attorney General v Tapela &  
Others, Botswana Court of Appeal,  
26/08/15

Tshiamo Rantao

# BRIEF FACTS

- ▣ We represented two Zimbabwean (foreign) inmates and Botswana Network on Ethics, Law & HIV/AIDS.
- ▣ The two foreign inmates had been convicted of armed robbery in 2007 and were sentenced to long terms of imprisonment.
- ▣ Each were diagnosed as being HIV-positive.

# BRIEF FACTS Ctd

- ▣ When they sought to have their viral loads assessed with a view to accessing treatment, they were informed that as foreign prisoners they were not eligible to be assessed.
- ▣ Their health deteriorated.

# BRIEF FACT Ctd

- ▣ Government refused to provide them with Highly Active Anti-Retroviral Treatment (“HAART”).
- ▣ They, together with BONELA, challenged the refusal to provide them with HAART.

# REASON FOR REFUSAL

- ▣ Government, in refusing to provide them with HAART, relied on a savingram from the ministry.
- ▣ It claimed that there was a presidential directive which provided that there shall be “*provision of free treatment to non-citizen suffering from ailments other than AIDS.*”

# COURT FINDINGS

- ▣ Finding in favour of the applicants, the following decisions were made by the court:
  - a) The decision to withhold free medical treatment from non-citizen prisoners with AIDS conveyed, in the savingram, was set aside;
  - a) There shall be full compliance with the Prisons Act and the Regulations by the provision to the applicants and to other foreign prisoners of free testing, assessment and treatment with ARVs and HAART where appropriate.

# COURT FINDINGS Ctd

- ▣ Costs awarded in favour of the foreign inmates and BONELA.

# GENESIS OF THE LITIGATION

- ▣ The two foreign inmates were initially assisted by their family members for medication.
- ▣ The money ran out, and the Prison Fellowship came in to assist with medication.
- ▣ At the time the case was filed, the Christian Fellowship's assistance was due to expire and the prisoners feared for their lives.

# THE GENESIS Ctd

- ▣ At all times, BONELA assisted them through its legal aid programme.
- ▣ It and SALC connected them with us, the attorneys, to commence legal proceedings.

# SELECTION OF APPLICANTS

- ▣ The first and second applicants were the two foreign prisoners. BONELA was the third applicant.
- ▣ The strategy, which worked well, was not to use the prisoners alone. It was to use a human rights organisation as well so as to improve jurisprudence on public interest litigation (“PIL”) by organisations such as BONELA.

# SELECTION OF LITIGANTS Ctd

- ▣ Surprisingly, there was no challenge to BONELA's *locus standi*.
- ▣ There was no challenge to the order sought on behalf of all deserving foreign inmates.
- ▣ The order was granted in favour of all foreign inmates who were not before court.
- ▣ Great victory for PIL.

# ENFORCEMENT CHALLENGES

- ▣ The Court of Appeal (“the CoA”) is the highest court in Botswana, followed by the High Court.
- ▣ The noting of an appeal from the High Court to the CoA does not stay the operation of the High Court judgment. You have to apply for and be granted a stay.
- ▣ Government noted an appeal against the High Court judgment which was in favour of foreign inmates.

# ENFORCEMENT CHALLENGES Ctd

- ▣ It did not apply for stay.
- ▣ However, we discovered, a couple of months, after the High Court judgment, that it was not complying.
- ▣ We applied on urgency for enforcement and contempt, but the court dismissed us on the basis only of urgency, holding that we ought to be have been aware long time ago of Government's failure to comply.

# ENFORCEMENT CHALLENGES Ctd

- ▣ We were not happy because we could not have been aware of non-compliance since the two foreign inmates had by then long been released.
- ▣ Government counter-applied for stay but was also dismissed.
- ▣ However, there was no order for enforcement despite the High Court Order.

# ENFORCEMENT CHALLENGES Ctd

- ▣ Fortunately, CoA's decision was ultimately delivered and it was in favour of foreign inmates.

# ENFORCEMENT CHALLENGES AFTER THE CoA

- ▣ Both BONELA and SALC are trying to monitor compliance by Government.
  - ▣ It's difficult because the two foreign inmates have long been released.
  - ▣ Information which is yet to be verified is that Government is not complying.
  - ▣ The team has just agreed to have BONELA engage the relevant Ministry so that it can monitor compliance.
  - ▣ Should we have evidence of non-compliance, we shall approach the CoA for contempt proceedings with a view to enforcing the orders.
- ▣ THANK YOU!!!