IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA
HELD AT GABORONE

In the matters between:

[redacted]

THE ATTORNEY GENERAL	**1st APPELLANT**
THE PERMANENT SECRETARY MINISTRY OF HEALTH	**2nd APPELLANT**
THE PERMANENT SECRETARY MINISTRY OF JUSTICE, DEFENCE AND SECURITY	**3rd APPELLANT**
THE PRESIDENT OF THE REPUBLIC OF BOTSWANA	**4th APPELLANT**

and

DICKSON TAPELA	**1st RESPONDENT**
MBUSO PIYE	**2nd RESPONDENT**
BOTSWANA NETWORK ON ETHICS, LAW AND HIV/AIDS	**3rd RESPONDENT**

AND

ATTORNEY GENERAL OF BOTSWANA	**1st APPELLANT**
COMMISSIONER OF PRISONS	**2nd APPELLANT**
PERMANENT SECRETARY, MINISTRY OF HEALTH	**3rd APPELLANT**

and

GIFT BRENDAN MWALE **RESPONDENT**

HEADS OF ARGUMENT

BE PLEASED TO TAKE NOTICE that the Appellants file Heads of Argument upon which reliance shall be placed at the hearing of this Application.

14/07 2015 18:28 3819283 RANTAO KEBABANANG #0020 P.005/029

BE PLEASED TO TAKE NOTICE FURTHER that following the unopposed Consolidation, of similar matters, Application, an Order was granted by the Court on the 30th June 2015, and as a result, the Appellants file hereunder combined Heads of Argument in relation to both matters of the Dickson Tapela and Gift Mwale.

TABLE OF CONTENTS

14/07 2015 18:28 3818283 RANTAO KEVADANANE #0020 P.008/029

1. INTRODUCTION

1.1 The Applicant had approached Court seeking the following relief *ipsissima verba:*

'TAKE NOTICE, on a date to be arranged with the Registrar of this Honourable Court, the above-named Applicants intend to make application to this Court for an order in the following terms:

1.1.1 Reviewing, setting aside and declaring invalid the decision of the second respondent (or anyone acting under his authority), to refuse to provide the second and third applicants with access to and/or to enroll them on Highly Active Anti-Retroviral Treatment (HAART).

1.1.2 Declaring that the refusal to provide HAART to the second and third applicants is unlawful and violates their constitutional rights, including:

1.1.2.1 The right to life guaranteed by section 4;

1.1.2.2 The right not to be subjected to inhumane and degrading treatment guaranteed by section 7; and

1.1.2.3 The right to non-discrimination guaranteed by section 3 and 15.

1.1.3 Declaring that the refusal to provide HAART to the second and third applicants is in breach the National Policy on HIV and AIDS ("the Policy"), and is unlawful.

1.1.4 Declaring that the refusal to provide HAART to the second and third applicants is in breach of the duty, owed by the respondents to the second and third applicants and to similarly situated HIV-positive foreign inmates, to provide basic health care services to prisoners.

14/07 2015 16:28 3818283 RANTAO KEBABANANG #0020 P.007/028

1.1.5 To the extent necessary, declaring that Presidential Directive number Cab 5 (b)/2004 is unconstitutional, unlawful and invalid to the extent that it denies of HIV-positive foreign inmates access to and/or enrolment on HAART.

1.1.6 To the extent necessary, declaring the policy of denying HIV-positive foreign inmates access to HAART to be unlawful and unconstitutional.

1.1.7 Ordering the second and third respondents forthwith to provide the second and third applicants with HAART.

1.1.8 Ordering the second and third respondents forthwith to provide HAART to all prisoners who are HIV-positive and who are not citizens of Botswana.

1.1.9 Ordering such respondents as oppose this application to pay the costs hereof.

1.1.10 Granting the applicants further or alternative relief.'

1.2 Sequel to service on it of the originating process, a default judgment that was entered against the Appellants (Respondents in the main case) and an application to rescind that Order, the Appellants filed her opposing papers.

1.3 On the 11th April 2014 the Appellants filed their defence through Dr. Khumo Seipone pleaded, *viz*:

1.3.1 'The decision to refuse the Applicants with provision of ARV (HAART) does not conflict with the National Policy on HIV/AIDS (the Policy) or does (sic) is it incompatible with the states duty of care towards the said applicants. It is also not unconstitutional as alleged and the same shall be demonstrated herein. The Presidential Directive is also not unconstitutional as alleged by the Applicants.

14/07 2015 16:28 3918263 RANTAO KEBABAMANG #0020 P.008/029

1.3.2 Foreign Prisoners are to be treated in accordance with the Prisons Act and are entitled to medical care subject to availability, practicability, financially and reasonableness. The right to medical treatment is not absolute in so far as treatment of all natures is concerned.

1.3.3 The Policy speaks about access to health services to all persons in Botswana. It does not mention anything about treatment, the nature of such treatment nor does it mention any obligation on the government to provide such, least of all HAART as the provision of same is not viewed simplistically.

1.3.4 The Policy goes further to qualify under what circumstances the provision of access to the said health services is to be undertaken; "that notwithstanding, the Government may confer preferential treatment on its citizens."

1.3.5 Clause 6.3.4 of the Policy itself goes further to define persons who are eligible for anti-retroviral treatment as being "citizens of Botswana who meet criteria established by the Government." (underlined for emphasis).

1.3.6 The Constitution further allows for discrimination in certain circumstances of which the current matter falls or is subject.

1.3.7 The decision by the Government does not violate the Prisons Act as alleged by the applicants, the provision of treatment is not absolute but is subject to the consideration of other criteria. The decision taken by the nurse in refusing to grant the applicants treatment is also rendered lawful by virtue of the Presidential Directive No 5 of 2004.

1.3.8 The Constitution provides for discrimination in certain circumstances more specially as it relates to non-citizens and

14/07 2015 18:29 3819283 RANTAO KEBABANANE #0020 P.008/028

people languishing behind bars such as the applicants. Not every person in Botswana can be afforded ARV Treatment and this also includes natural citizens.'

1.4 On the 25th April 2014 the Respondents/Applicants filed their reply to state effectively that they stand by their contentions that the refusal to provide HAART to HIV positive foreign prisoners, as well as the Presidential Directive on which they are purportedly based, are unlawful and breach of ss 3, 4, 7 and 15 of the Constitution of Botswana.

1.5 The parties appeared before Court for Argument, following which, the Court on the 22nd August 2014 and 17th June 2015 gave judgment in the Respondents'/Applicants' favour, ordering the Government of Botswana (the Government) to provide HIV positive foreign inmates with free ARVs.

1.6 The Government then noted this appeal, in being dissatisfied with the orders given against it.

2. ISSUES FOR DETERMINATION BY COURT

From the pleadings before Court, essentially what the Court is required to determine can be crystalised as follows:

2.1 Whether the Court *a quo* was correct in holding that the Government of Botswana's exclusion of non-citizen inmates from the provision of ARVs is unconstitutional *vis-a-vis* sections 3, 4, 7 and 15 of the Constitution of Botswana;

2.2 Whether the Presidential Directive is *ultra vires* the Constitution; and

2.3 Whether the Court *a quo* was correct in compelling the provision of ARVs by the Government.

14/07 2015 16:28 3919263 RANTAO KEBABANANG #0020 P.010/029

3. SUBMISSIONS AND THE LAW

3.1 Constitutionality of the Presidential Directive

3.1.1 It is crucial for present purposes to state how this matter has come before Court. The 1st Respondent states that following his partner informing him of her HIV positive status, he proceeded to check his, whereat he was informed that he is HIV positive.

3.1.2 This Respondent states that when he sought medical assistance at Extension 15 Clinic, Gaborone, he was advised that because he is not a citizen of Botswana he was not eligible to have his CD4 count and viral load assessed through which he could learn whether he was a qualified candidate to be enrolled into the HAART programme.

3.1.3 He then through the 3rd Respondent, some three (3) years post his diagnosis, went for his viral load and CD4 count tests, following which, he further states, he fell squarely within the legibility bracket under the Treatment Guidelines and was subsequently entitled for enrolment for the HAART programme, in terms of the Policy.

3.1.4 It is the 1st Respondent's case that his attempts to so enroll for same were proved futile when, in early 2011 he was advised by a nurse at a government hospital that because he was a foreign inmate, he was not eligible for government-provided HAART because there is Presidential Directive that provides that the HAART programme is applicable to non-citizen prisoners, only to the extent of provision of free treatment of ailments other than AIDS.

3.1.5 Resultantly, as it appears from the record, the Respondents claim that to the extent that the Appellants contend that there is a State Policy refusing to provide foreign HIV-positive inmates with access to HAART, or that they are precluded from doing so by the provisions of Presidential Directive number Cab 5 (b)/2004 ('the Presidential

14/07 2015 18:28 3818283 RANTAO KEBABANANG #0020 P.011/028

Directive'), the said Policy and or the Presidential Directive are unconstitutional and invalid as the Directive cannot be interpreted to override the provisions of the HIV/AIDS Policy.

3.1.6 In view of the above, it becomes imperative to embark on an analysis on the interpretation of the HIV/AIDS Policy and the said Directive as applicable to this matter.

3.1.7 The Directive states, at paragraph 3, as thus,

> *'Provision of free treatment to non-citizen prisoners suffering from ailments other than AIDS...'.*

3.1.8 Whilst the relevant portions of the HIV/AIDS Policy state that,

> *'This policy arises from and reflects the current socio-economic and legal situation in which the national response to HIV and AIDS is being undertaken. It takes cognizance of the fact that due to age, gender, socio-economic status, sexual orientation or disability, some Batswana are more vulnerable to the devastating effects of HIV and AIDS than others. Thus while the current situation can often constrain the ability to address certain important issues more comprehensively and effectively, this policy makes a clarion call for new and vigorous dialogue that would alter the situation and ease operational constraints.'*
>
> *'Currently, there is no specific legislative support for HIV and AIDS, and to ensure that the provisions contained herein relate to some established context, the National Policy is guided by the cultural values and historic principles that helped to establish and develop this country...'.*

3.1.9 It is without dispute that the Respondents' contention is that the Presidential Directive is *ultra vires* the said HIV/AIDS Policy. When one

14/07 2015 18:30 3919283 RANTAO KEVABAMANG #0020 P.012/029

however gives due regard to the Policy in question one can safely assert that it gives leeway to the relevant public authority to make such limitations as necessary when providing health care in Botswana, where it is rational and important to do so, as long as the limitations are within the bounds of the law. Put differently, we aver that the Policy in itself allows for limitations of individual rights in circumstances that it is vital and in the public interest to impose same.

3.1.10 On the contrary, it goes without saying that to say or declare the Presidential Directive unlawful and invalid ought to, cogently speaking, be offensive of a law, of sorts. The Respondent in this regard state that the offended laws are their Constitutional rights as enunciated at Sections 3, 4, 7 and 15, discussed below.

3.1.11 On the contrary to that opinion, we submit that there is only one (1) logical conclusion that is apparent from the extensive scrutiny of the Directive, as read with the HIV/AIDS Policy.

3.1.12 This is, because the Policy endows on the relevant public officer or authority to put such limitations to individual rights as is in the circumstances allowable. So if the Policy is in itself the source of a power, a Policy which legality is undisputed by the parties, a Policy which makes reference and consequently derives its legality from the Constitution, a Policy which forms the core argument of the Respondents' case, then in the exercise of his powers the 4th Appellant cannot be said to have authored an unlawful or invalid document because the act was so done within legal parameters.

3.1.13 In his valued consideration the Judge *a quo* in *Dickson Tapela & Another v The Attorney General & 2 Others* MAHGB-000057-14, states that, following an extensive perusal of the Expert Affidavit filed of record,

14/07 2015 18:30 3919263 RANTAO KERABANANG #0020 P.013/028

'27 Taken to its logical conclusion therefore, the Savingram excludes from the provision of free treatment, non-citizen inmates whose condition has deterioration to the clinical stage known as AIDS. An HIV positive person is not suffering from AIDS merely by being HIV positive. The 1st and 2nd applicants albeit HIV positive and having reached the CD4 cell count threshold for HAART enrolment do not suffer from AIDS. Their papers only allude to them being HIV positive and being due for enrolment on HAART. They are prone to opportunistic infections which the respondents continue to treat. My interpretation of the directive, or rather the Savingram from the 2nd Respondent is that the applicants and other non-citizen inmates who are HIV positive are not excluded from free medical treatment and which treatment includes HAART.'

3.1.14 Effectively speaking, the Judge *a quo* held that because the Savingram that makes changes to the Presidential Directive, effectively the Presidential Directive, makes no mention of the word 'HIV' and because the Respondents, according to their papers, are HIV positive then the Directive does not apply to them.

3.1.15 This holding is incorrect.

3.1.16 In his own words, Medical Doctor Willem Daniel Francois Venter, the Medical Expert herein, states,

15 'HIV proliferates by invading cells in the blood and other tissue. Since HIV is a retrovirus, it can convert its own genetic material into a form that is similar to the genetic material of the host cell. These newly infected cells start becoming factories for HIV production, and HIV then spreads throughout the body, infecting other cells, particularly what are called the CD4+ cells. The CD4+ cells play a critical role

14/07 2015 18:30 3818283 RANTAO KERABANANG #0020 P.014/029

in the co-ordination of a person's immune system. Therefore in order to measure the deterioration of the immune system over time, a CD4 count is done.

16 *If untreated, infection with HIV ultimately results in a condition known as Acquired Immune Deficiency Syndrome (AIDS). This is an invariably fatal condition that is marked by the development of a largely predictable set of opportunistic illnesses that lead over time to a deterioration of the immune function and premature death of PLHIV.'*

3.1.17 By the Expert's own evidence that the Court has placed heavy reliance on, we can deduce that HIV and AIDS are part and parcel of each other, as AIDS is untreated HIV, and when it is so untreated and has manifested into AIDS then opportunistic infections (OIs) attack and affect the immune system, hence the sequence of events is in this order: HIV – AIDS – OIs, and not HIV – OIs – AIDS as the Court suggests.

3.1.18 For the Honourable Court to have said that the Respondents are entitled to the provision of ARVs because by their very HIV positive status their systems are attacked by OIs is an incorrect position of the Respondents' position, as articulated by the Expert.

3.1.19 What seems to be, and actually as a matter of fact is correct, is that because one cannot divorce HIV and AIDS from one another, then the wording of the Presidential Directive is inclusive of 'HIV'.

3.1.20 By the Court's interpretation, the Judge seems to agree that the said Directive is applicable to the Respondents because in their very nature OIs are only contracted resultant of an AIDS manifestation.

3.1.21 As such, the sound inference consequent to the evidence before the Court and the circumstances of the case in its entirety, is that in the

14/07 2015 18:30 3818263 RANTAO KEPABANANG #0020 P.015/029

exercise of His powers, the 4th Appellant, the President of Botswana, in line with the terms of the Policy and the Constitution of this Republic, issued a Directive limiting the provision of ARVs to non-citizen inmates, and hence the holding by the Court *a quo* that the Appellants are indirectly extending the limits of punishment by withholding certain services to which inmates are lawfully entitled on account of their status as 'convicted non-citizen inmates', is incorrect, with respect.

3.1.22 The constitutionally supported limitation is an exercise of power that is far removed from punishing non-citizen inmates any further than they already are. We therefore submit that the Presidential Directive *in casu* is lawful and valid and plead with this Honourable Court to hold as such.

3.2 Legal Framework on Section 15 (as read with Sections 3, 4, 7)

3.2.1 To begin with, the above-mentioned Policy recognises fundamental rights of all individuals as set out in Chapter II of the Constitution, and which the Presidential Directive derives its legality, and states at Clause 7.1, that,

> *'Every person in Botswana shall not be discriminated against in terms of access to health services. That notwithstanding, the Government may confer preferential treatment to its citizens.'*

3.2.2 The crux of the matter therefore is to consider whether section 15 of the Constitution allows for discrimination on grounds of nationality.

3.2.3 First, Section 3 of the same Constitution states in verbatim as thus,

14/07 2015 18:31 3918263 RANTAO KEBABAMANG #0020 P.018/028

'Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely-

(a) life, liberty, security of the person and the protection of the law;

(b) freedom of conscience, of expression and of assembly and association; and

(c) protection for the privacy of his or her home and other property and from deprivation of property without compensation,

the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.'

3.2.4 It is also provided by Section 15 of the Constitution as follows,

'(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the

14/07 2015 18:31 3818283 RANTAO KEBABANANG #0020 P.017/028

performance of the functions of any public office or any public authority.

(3)In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) of this section shall not apply to any law so far as that law makes provision-

(a) for the appropriation of public revenues or other public funds;

(b) with respect to persons who are not citizens of Botswana;

(c) ...

(d) ...; or

(e) ...'.

3.2.5 This Honourable Court pronounced in the case of *Ramantele v Mmusi and Others* CACGB 104-12 that,

> *'Section 3 is the substantive umbrella section which entrenches the inherance of the set out fundamental rights on each individual or person...but of course, subject to the rights and freedoms of others or public interest.'*

3.2.6Clearly it is settled law that the derogations of Section 15 (4) (b) can be invoked when they are rational and justifiable either as being intended to ensure that the rights and freedoms of any individuals do not prejudice the rights and freedoms of others or as being in the public interest.

14/07 2015 18:31 3918283 RANTAO KEBAGAMANG #0020 P.018/028

3.2.7 It follows therefore that Section 15 (4) (b) will only justify a limitation of the right to equality where such limitation is intended to protect the public interest or to safeguard the rights and freedoms of others.

3.2.8 We submit that from the onset the Judge *a* quo erred as he states at paragraph 22 of his judgment that *the crisp issue* that arises for determination is whether or not the exclusion is reasonably justifiable in a democratic society and or in the public interest. This holding by the Court is incorrect. (our emphasis)

3.2.9 This is because Sections 3, 4, 7 and 15 of the Constitution, do not make any reference to 'reasonably justifiable in a democratic society'.

3.2.10 A distinction to the above appears at Section 12 of the Constitution, Section 12, unlike Sections 3,4,7 and 15 makes explicit reference to 'reasonable justifiable in a democratic society'.

3.2.11 The legislature did not qualify that the application of Sections 3, 4, 7 and 15 must be a reasonably justifiable and for the Court to import extra meaning to these provisions is improper and incorrect.

3.2.13 Our main contention why the Government of Botswana should not be compelled to provide non-citizens with ARVs is because the non-provision of same is in the public interest in that the Appellants cannot afford it.

3.2.14 Even according to the Policy, the Government does not provide ARVs to all Batswana, the Government has, in line of the funds available, set out a threshold within which to provide citizens with ARVs.

14/07 2015 18:32 3918283 RANTAO KEYABANANE #0020 P.018/028

3.2.15 The logical conclusion of setting out a threshold by the Government is that only a certain number of citizens can be financially supported, hence, it goes without saying that to demand a provision of ARVs to non-citizens is to stretch the meaning of public interest beyond unintended bounds and limits and undermine Government capabilities, or lack thereof.

3.2.16 It is because of the Government's lack of resources to fully realise the Constitutional right as intended by the section 3 provision that the derogations of section 15 ought to be implored in this matter. A Court cannot compel the Government to provide ARVs when on the face of it we have limited resources.

3.2.17 Another area of error that the Court adopted was its failure or neglect to interpret Section 15 (4) (b) instead what the Court did was to make reference to international treaties which did not deal with discrimination.

3.2.18 Noteworthy is that the distinction between differential treatment as opposed to discrimination is that not every differential treatment amounts to discrimination. As already alluded to above, the jurisprudence on discrimination suggests that the law or the conduct complained of which promotes discrimination must have a legitimate purpose and should bear a rational connection between the differentiation and the purpose. The right to equality does not prohibit discrimination but unfair discrimination. Also See *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC); 1997 (3) SA 1012

3.3 <u>Appellants' Duty to provide ARV treatment to foreign inmates</u>

3.3.1 At common law, prisoners are entitled to all fundamental rights that accrue to free persons; they retail the basic rights that are not taken away by their legal position and incarceration.

14/07 2015 16:32 3918283 RANTAO KERABAHANE #0020 P.020/028

3.3.2The legal questions that arise therefore are – (I) whether foreign inmates are constitutionally entitled to ARV treatment at Government's expense; (II) what degree of medical care is owed to foreign inmates; and (III) further whether the denial of ARV treatment by the Government amounts to a breach by the Government's duty of health care towards foreign inmates.

3.3.3 It should be stated from the onset that the Constitution of Botswana does not have a specific provision on the right to health. The right to health, although an important right, is not a statutory right, neither is it a constitutional right. The right to health is read into the Constitution through other provisions, for example the right to life as provided for at Section 4, whilst the right to medical treatment of inmates flows from the Prisons Act, which states in more generic terms that the Government is to provide medical care to people whom it has incarcerated. (our emphasis)

3.3.4 One then asks to what extent do we read Constitutional rights into a Policy that is not legislated, although Parliamentary approved?

3.3.5 There is without , a duty on Government to provide to those whom it is incarcerating with medical treatment. The state of affairs as it presently stands in Botswana is that the Respondents are provided with free medical care meted out at Government expenses. Respondents' are given every medical treatment for any ailment that they might be suffering from, except the specific provision of ARV treatment. It is submitted that through these treatments foreign inmates are afforded the right to health and ultimately preserve the right to life. And that the Government to this end has discharged, and continues to discharge, its obligation towards the said inmates.

3.3.6 HAART is a special dispensation by the Botswana Government to provide its citizens with free ARV treatment. This is influenced by

14/07 2015 18:32 3918283 RANTAO KEBABANANG #0020 P.021/028

the National Policy on HIV/AIDS, discussed at length, throughout this document. The Policy introduces certain exemptions under which a person becomes legible to be enrolled in the ARV Treatment. Not all Batswana infected with the HIV virus are legible for enrollment on ARV treatment and no foreigner is legible from benefiting from any free medical treatment at the expense of the Government, to the extent that it is permissible, in terms of the same Policy.

3.3.7 In answering the question of what standard or degree of medical care is owed to foreign inmates, we submit that the standard of medical care is to provide adequate medical treatment. (our emphasis)

3.3.8 We submit that adequate does not mean absolute and what constitutes adequate medical treatment for prisoners should be determined according to that which obtains from the Government's duty and financial well-being to execute its mandate in that regard. (underlined for emphasis)

3.3.9 What is adequate is further determined by budgetary constraints and the availability of resources, see *Rv Cambridge Health Authority* 1995 2 ALLER 129 CA. In determining what is adequate the critical question is whether the Government can afford to provide such medication or treatment.

3.3.10 It is submitted that in the circumstances, Government provides medical intervention to foreigners to all of their ailments, except HIV/AIDS and that is because that is what is affordable to the Government, except ARVs, and as thus it is adequate.

3.3.11It is therefore submitted that, Respondents alleged that it is incompatible with the State's duty of care to incarcerated prisoners, and its constitutional obligations to exclude them from

14/07 2015 18:32 3818263 RANTAO KEBABANANG #0020 P.022/028

the provisions of ARVs, we submit that the Appellants do as a matter of fact execute their mandate in that regard.

3.4 Approach to Constitutional Analysis

3.4.1 It is common cause that the Applicants (as they then appeared approached the High Court seeking to review and set aside the decision of the Respondents to refuse to enroll them, and to provide them with access to, Highly Active Anti-Retroviral Treatment (HAART), claiming that they are entitled to the provision of same under the Botswana National Policy on HIV and AIDS (the Policy) as adopted by Parliament.

3.4.2 The learned Judges in both cases erred and misdirected themselves in holding that failure of the government to provide foreign inmates with the HAART treatment is a violation of their Constitutional right as entrenched by sections 3, 4, 7 and 15.

3.4.3 At the heart of this matter lies the proper construction of sections 3, 4, 7 as read with Section 15 of the Constitution and section 56(1) of the Prisons Act. In construing these sections the court has to first apply the usual rule of statutory interpretation, which is to give the clause its normal meaning as dictated by the words used, the grammar and the syntax.

3.4.4 Then, since this is a constitutional provision, the Court has to breathe life into the sections by applying, where the wording so allows, the now time-honoured special rules of constitutional construction. These are that expressions granting or defining individual rights and freedoms are to be broadly and generously construed, keeping pace with the times, so as best to realise the full promise of the fundamental rights provisions of the

14/07 2015 16:33 3919263 RANTAO KEPAGANANG #0020 P.023/028

Constitution, whereas, expressions tending to limit fundamental rights, on the other hand, are to be narrowly construed.

3.4.5 Further, constitutional provisions are not to be considered in isolation, but are to be interpreted in the light of all other relevant provisions of the Constitution so as best to achieve the great purposes of the instrument. See, for example, *Petrus & Another v The State* (1984) BLR 14 CA (full bench) at pages 34 et seq; *Attorney General v Dow* (1992) BLR 119 CA (full bench) at 131 and 132.

3.4.6 When a question arises as to whether a law or a policy is constitutional or not, after the contents of the law has been ascertained, the court must consider whether no proper construction which is consistent with the Constitution can be given to that law or policy, for each law or policy is presumed to be consistent with the supreme law of the land unless otherwise shown. It is only when no such construction can be given that the law/ policy can be declared to be in violation of the Constitution.

3.4.7 The learned judges in both cases, transitorily dealt with the provisions of section 15 (4) (b), notwithstanding that this Constitutional derogation is the soul of the Appellants' defence. The learned judge in the case of *Geofrey Khwarae v Bontle Kealkitse* MAHGB-000291-14, held that the enunciated principles of equality, being formal equality and substantive equality, accommodate the derogation from the principles of equality or disparity of treatment to ensure equality of outcome. This is acknowledged by the Court at paragraph 124 when the judge notes:

> *'...and that a difference in treatment is not necessarily discriminatory if it is based on reasonable and objective criteria.'*

14/07 2015 16:33 3919283 RANTAO KERABANANG #0020 P.024/029

3.4.8 At paragraph 127 of the same judgment the Judge finds that the applicant/respondent is being unfairly discriminated. And that such discrimination is unfair because it serves no legitimate purpose and bears no rational connection between the differentiation and the purpose.

3.4.9 In imploring the above principles in this matter, we submit that the Judges *a quo* misdirected themselves in coming to these conclusions and failed to apply the precepts of equality as discussed in the *Khwarae* case, supra, in that; (i) the requirement of formal equality dictates sameness of treatment for individuals similarly circumstanced, and (ii) that substantive equality is prepared to tolerate disparity in treatment to achieve this goal.

3.4.10 The Judges failed to apply the facts of the case before them to the foregoing principles, instead, what the Judges seem to conveniently disregard is that the respondents are foreign prisoners, not just prisoners, and that even some Batswana prisoners, who do not fall within the provision criteria, are similarly discriminated against.

3.4.11 In all fairness and purposes, and in achieving the intent and purpose of the Policy, Government exclusion of foreign inmates from the HAART programme, satisfies the requirement of substantive equality.

3.4.12 It is submitted that it is rational to not provide foreign inmates with HAART treatment as it is justifiable in a democratic society and it is in the public interest. It is submitted further that the difference in treatment is not unconstitutional as it based on a reasonable and objective criteria and covered by the section 15 (4) (b).

3.4.13 The disregard by the learned judges of section 15 (4) (b) defeated the whole purpose of construing the constitution in its totality to

14/07 2015 18:33 3919283 RANTAO KEBABANANG #0020 P.025/029

achieve the greater purpose of the instrument, contrary settled law in our Republic.

3.4.14 Another rule of constitutional construction is that interpretation of the provisions of the constitution more particularly with regards to the fundamental rights, the courts have to regard the liberal democratic values and where necessary (my emphasis) look to the aid of international instruments and conventions on human rights to which Botswana has subscribed. See *Petrus*, above. The Interpretation Act, section 24 and 26 also refers to consideration of relevant International treaties, conventions and agreements in statutory interpretation.

3.4.15 In his judgment, in the *Gift Mwale* case above, which makes reference to Justice Sechele's *Dickson Tapela* matter, Justice Dingake refers to a plethora of international instruments, none of which are binding in this Republic, and the Court stipulates, in its own words that,

> *32 'This Court is conscious that some jurists especially of the yesteryear, frown upon reliance on declarations or resolutions by United Nations and other regional bodies. Although, "Soft law", the term used to refer to the aforesaid declarations and resolutions, is not law, and therefore not binding, in international law it is accepted as affording important guidance.'*

3.4.16 It is our submission that these are of least assistance, they are only helpful only to show general trends and approaches worldwide to human rights to prisoners in general, but they are less relevant as to detail because the international treaties, conventions and agreements cited thereat arise from a different legal frameworks in which there is no derogation clauses as is the case with our Constitution. The court should be alive to these

14/07 2015 16:34 3918263 RANTAO KEBABANANG #0020 P.028/028

trends and note that it is not obliged to swim with the tide. Our courts should be guided in the final analysis by local laws and local conditions.

3.4.17 Of relevant assistance when reliance is placed on international treaties, conventions and agreements, in terms of the provisions of our Interpretation Act, at section 26 the construction or interpretation should best attain its object according to its true intent and spirit.

3.5 Conclusion

3.5.1 In summation, the Judges *a quo* erred and misdirected themselves in placing much reliance, guidance and persuasion on international treaties, conventions and agreements which are not in *para-materia* with the intent and spirit of our Constitution.

3.5.2 Despite its consciousness, it is apparent that in its conclusion, the Court *a quo* did not only seek for guidance on international law, it is what informed the Court's decision.

3.5.3 It is our considered view that the Court's finding is misplaced because to be aware of the status of 'soft law', or lack thereof and find in favour of a party on that basis, is erroneous.

3.6 The Effect of the Judgment

3.6.1 When one considers the present case in its entirety, one can safely deduce that the effect of the Judges *a quo* decisions is that – (i) the Government has been forced to provide ARVs to foreign inmates despite the contention that doing so is expensive and will cause financial prejudice to the Government; and (ii) with sensitivity and respect, the only way that a foreigner can get ARVs for free in our country is when s/he is a convict.

14/07 2015 18:34 3918283 RANTAO KEBABANANG #0020 P.027/028

3.6.2 What do the Judgments then mean? Where will Governments get the monies, in order to honour the Court's direction?

3.6.3 Noteworthy is that Sir Udo Udoma of the Supreme Court of Nigeria in *Rafiu Rabiu v. The State* (1981) 2 N.C.L.R 293 at p.326 where that learned judge said,

> *'the Supreme Law of the Land, that it is written, organic instrument meant to serve not only the present generation, but also several generations yet unborn... that the function of the Constitution is to establish a framework and principles of government, broad and general in terms, intended to apply to the varying conditions which the development of our several communities must involve, ours being a plural, dynamic society and therefore, more technical rules of interpretation of statutes are to some extent inadmissible in a way so as to defeat the principles of government enshrined in the Constitutions.'*

3.6.4 To emphasis, the Policy states, additionally that,

> *'...the Constitution of Botswana makes strong statements relative to the protection of individual privacy and property as well as shielding persons from, among others, discrimination and inhuman treatment by providing all with equal protection under the law. However, important limitations to individual rights in the context of the community good can be exercise, however, where there are specific considerations with regard to, amongst others defence, public safety, public order, public morality and public health.'* (our emphasis)

3.6.5 It is on the above that we plead that the Appeal succeeds.

14/07 2015 18:34 3918283 RANTAO KEBABANANG #0020 P.028/028

DATED AT GABORONE THIS 7th DAY OF JULY 2015.

FOR/ATTORNEY GENERAL

PER. Y. K. SHARP/K.K. MABOTE/N.K.T SHARP

14/07 2015 18:34 3819283 RANTAO KEBABAMANG #0020 P.028/028