IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA **SECHELE J.**

HELD AT GABORONE **CASE NO:MAHGB – 000057-2014**

In the matter between:

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

and

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

HIGH COURT OF BOTSWANA
CIVIL REGISTRY
GABORONE
27 MAY 2014
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DATED AT GABORONE THIS 27th **DAY OF** MAY **2014.**

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GABORONE

AND TO: THE ATTORNEY GENERAL
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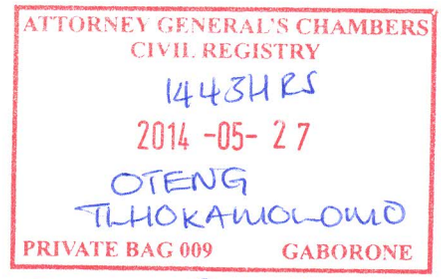

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INTRODUCTION

1. The issue at the heart of this application is the health and well-being of foreign prisoners incarcerated in prisons in Botswana. It concerns the refusal to provide life-saving medication to prisoners on the sole basis that they are foreigners.

2. The first and second applicants, Mr Tapela and Mr Piye, are foreign prisoners serving sentences in Gaborone Central Prison.[1] Both of them were diagnosed with HIV while in prison in Botswana.

3. HIV is a retro-virus that compromises the immune system of infected persons.[2] It uses the cells of an infected person to reproduce, and HIV then spreads throughout the body, infecting other cells – particularly CD4 cells, which perform a critical role in the co-ordination of the immune system.[3] If HIV is left untreated, the infection progresses and the immune system deteriorates, rendering the body more susceptible to opportunistic infections (OIs).[4] The manifestation of OIs is what is clinically described as AIDS (Acquired Immune Deficiency Syndrome).[5] AIDS is a fatal condition marked by a series of OIs that lead, in time, to the deterioration of the immune system and premature death.[6]

4. There is no known cure for HIV and AIDS. Combinations of anti-retroviral medications (ARVs) are, however, clinically proven in their effect to supress the

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[1] FA p 23 para 7-8; AA p 719 para 11.
[2] Expert affidavit, p 266 para 15.
[3] Expert affidavit, p 266 para 15.
[4] Expert affidavit, p 266 para 16; BONELA affidavit, p 595 para 13.
[5] Expert affidavit, p 267 para 19.
[6] Expert affidavit, p 266 para 16.

replication of HIV, and thus to improve life expectancy.[7] The use of these medications, known as Highly Active Anti-Retroviral Therapy ("HAART"), substantially reduces the incidence of OIs and result in significant reductions in morbidity and mortality rates of HIV-positive persons.[8] Without access to HAART, HIV inevitably progresses to AIDS and causes death.[9]

5. A CD4 count is generally used, both internationally[10] and in Botswana,[11] to determine when an HIV-positive person should start on HAART. In Botswana, HAART must be given to all adults and adolescents with a CD4 count of less than 350 cells/ul.[12]

6. Mr Tapela last had his CD4 count tested in August 2012. It was 74 cells/ul.[13] Mr Piye last had his CD4 count tested in August 2009, and it measured 243 cells/ul.[14] Both of them are thus required, under Botswana's Treatment Guidelines, to be enrolled on HAART at the State's expense.[15]

7. However, in or around early 2011, both Messrs Tapela and Piye were refused state-subsidised treatment, purportedly because paragraph 3 of Presidential Directive number Cab 5(b) of 2004 ("the Presidential Directive) provides for the "*provision of free treatment to non-citizen prisoners suffering from ailments*

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[7] Expert affidavit, p 268 para 23.
[8] Expert affidavit, p 268 para 23; BONELA affidavit, p 269 para 28; p 270 paras 31-35.
[9] Expert affidavit, p 271 para 40.
[10] Expert affidavit, p 270 para 36.
[11] Treatment guidelines, p 62.
[12] Treatment guidelines, p 70 para 4.1.
[13] FA, p 28 para 29.
[14] Piye affidavit, p 628 para 12.
[15] Treatment guidelines, p 66 para 3.3.2.

other than AIDS".[16] This has been interpreted to mean that foreign prisoners are entitled to be treated for all infections and ailments (including OIs) at government's expense, but will not be provided with ARVs.[17]

8. Both Mr Tapela and Mr Piye arranged for their enrolment on HAART to be paid for initially by family[18] and, when their families could no longer afford to assist, by a public interest organisation.[19] They are not certain, however, that they will continue to be so subsidised and their future access to treatment is uncertain.[20] If they stop treatment, they may become immune to first-line HAART and, if they do not go back onto treatment, they will die.[21]

9. On 9 August 2013, the Revised Botswana National Policy on HIV and AIDS ("the HIV/AIDS Policy") was published. It provides, inter alia, for universal access to HIV and AIDS treatment.[22] In the light of the adoption of that Policy, the first and second applicants again applied for enrolment on HAART.[23] No response from the respondents has been recorded. It follows that their requests have been rejected.[24]

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16 Presidential directive, FA3 p 249.
17 FA, p 26 para 19-20; AA p 720 para 13.
18 FA p 28 para 31; Piye affidavit, p 628-29 para 13.
19 FA p 28 para 32; Piye affidavit, p 629 para 14.
20 FA p 28 para 32; Piye affidavit, p 629 para 14.
21 FA p 28 para 32; Piye affidavit, p 629 para 14.
22 Policy, FA2, p 244 para 6.1.
23 FA p 30 para 36; AA p 721 para 18.
24 FA p 30 para 37; AA p 721 para 18.

10. In this application, the applicants challenge the decision to refuse to enrol Messrs Tapela and Piye (and similarly situated foreign prisoners) on HAART, as well as the discriminatory policy underpinning that refusal, on the basis that:

10.1. It is not authorised by law;

10.2. The Presidential Directive is ultra vires and unenforceable; and

10.3. The refusal of HAART is unconstitutional because it unjustifiably limits the rights of foreign prisoners to life, the protection against inhuman and degrading punishment, and to equality.

11. We will deal with each of these grounds of challenge in turn. We will then deal with the technical defences advanced by the respondents.

THE DECISION AND THE POLICY ARE UNLAWFUL

12. We submit that the decions and/or policy to refuse foreign prisoners (including Mr Tapela and Mr Piye) HAART for HIV and AIDS are unlawful, for the following reasons.

13. At common law, the State has a clear duty to protect and safeguard the health and bodily integrity of prisoners under its charge. That is because their ability to make their own decisions and to carry them out has been neutralised by their

incarceration.[25] The principle has most recently been affirmed by the South African Constitutional Court in the following terms:

> *"A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments. One is s 12(1) of the [Act], which obliges the prison authorities to provide, within its available resources, adequate health care services, based on the principles of primary care, in order to allow every inmate [of a prison] to lead a healthy life. The obligation is also inherent in the right given to all prisoners by s 35(2)(e) of the Constitution to conditions of detention that are consistent with human dignity."*[26]

14. We submit that similar considerations apply in Botswana. As in South Africa, Botswana's Prisons Act 28 of 1961 requires prisoners to be provided with adequate healthcare services. Section 56 of the Prisons Act compels the second respondent, the Permanent Secretary to the Minister for Health, to appoint a medical officer responsible for the health of prisoners. Such officer must report on the health and treatment needs of the prisoners under his care, and must "*take or cause to be taken such action (including the forcible feeding, inoculation, vaccination and any other treatment of the prisoner whether of the like nature or otherwise) as he considers necessary to safeguard or restore the health of the prisoner or to prevent the spread of disease*".[27]

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[25] *Mtati v Minister of Justice* 1958 (1) SA 221 (AD) at 22; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 40A. For the approach in English law, see for example *Ellis v Home Office* [1953] a All ER 149 at 154; *Egerton v The Home Office* [1978] Crm LR 494; *Kirkham v Greater Manchester Police* [1990] 2 QB 283.

[26] *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) at para 17, Nkabinde J (for the majority) quoting the Supreme Court of Appeal's finding with approval.

[27] Section 57(1) of the Prisons Act.

15. It is thus clear that the State has an obligation to safeguard prisoners' health and to provide them with such treatment and care as they may require. Contrary to the respondents' claim,[28] nothing in the Prisons Act limits or restricts the State's duty to provide medical care.

16. In relation to HIV and AIDS, the State's obligations are bolstered by the terms of the Treatment Guidelines and the HIV/ AIDS Policy.

17. Clause 4.1 of the Treatment Guidelines provides that:

> *"for all adults and adolescents (regardless of pregnancy status), either one of the following conditions require ART initiation:*
> - *WHO clinical stage 3 or 4, or*
> - *Any CD4 count* ≤ 350 cells μ/L"[29]

18. The Treatment Guidelines thus recognise that the initiation of HAART is a medical necessity once a person's CD4 count drops below a certain level, and mandates its initiation for anyone with a CD4 count of less than 350. This is consistent with the evidence of Dr Venter, an HIV expert, who states that HAART dramatically improves the life expectancy of HIV-positive people with low CD4 counts.[30] Dr Venter's evidence is entirely undisputed.

19. The Guidelines must be read with the HIV/AIDS Policy, which sets out "*the general principles by which management of the national response to HIV and AIDS in Botswana is to be guided*".[31] It is the most recent, and prevailing,

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[28] AA p 720 para 14.
[29] Treatment guidelines, FA1 p 70 para 4.1. Emphasis added.
[30] Expert affidavit, pp 269-270 paras 28-36.
[31] Policy, FA2, p 238 para 1.8.

statement of how HIV and AIDS must be treated in Botswana. It pertinently provides:

19.1. First, that all procedures, parameters and services will be rendered, to the extent possible, to all residents of Botswana based on accepted criteria and costs.[32] As prisoners of the State, Mr Tapela and Mr Piye must be treated as residents. We submit that the accepted criteria in relation to HAART are those set out in the Treatment Guidelines.

19.2. Second, paragraph 6.1 of the Policy provides for "*universal access to comprehensive HIV and AIDS treatment, care and support services*".[33] Although paragraph 6.3 provides that ARVs will be administered to citizens,[34] that clause cannot serve to preclude foreign prisoners from receiving HAART. That is because, as we have explained above, the State bears a special duty of care to those incarcerated, and must take adequate measures to safeguard their health. In the absence of an express exclusion, we submit that the State is obliged to provide HAART to <u>all</u> prisoners, whether foreign or Batswana.

19.3. Third, paragraph 7.1. of the Policy "*recognises the fundamental rights of all individuals as set out in Chapter II of the Constitution, including*

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[32] Policy, FA2 p 237 para 1.5.
[33] Policy, FA2 p 244 para 6.1. Emphasis added.
[34] Policy, FA2 p 244 para 6.3; p 245 para 6.3.4.

the right not to be discriminated against."[35] Importantly, clause 7.1.4 provides:

> *"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."*[36]

Once again, that clause cannot be interpreted to mean that foreign prisoners are excluded from receiving HAART at State expense during their imprisonment. Because of their incarceration, such prisoners have limited access to healthcare services and are dependent on the State for the provision of medical care. They cannot work to earn the necessary funds for enrolment on ARVs during their incarceration and, as is the case for Mr Tapela and Mr Piye,[37] will consequently effectively be prevented from receiving the treatment that they require. Put differently, refusing to fund the provision of HAART to HIV-positive foreign prisoners does not amount to preferential treatment of citizens; rather, it constitutes a substantive denial of medical care to a category of prisoners based only on their nationality. That is plainly not an exclusion that the Policy anticipates or permits.

19.4. To the contrary, the Policy provides that vulnerable persons will receive enhanced protection and care. "*Vulnerability*" is defined, in the Glossary of Terms, as:

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[35] Policy, FA2 p 246 para 7.1.
[36] Policy, FA2 p 247 para 7.1.4.
[37] See FA p 28 para 30; Piye affidavit, p 628 para 13. These allegations are not denied: AA p 720 para 15.

> "*Openness to negative consequences as a result of AIDS and refers to the likelihood of suffering harm from the effects of sickness and death due to AIDS. It can be applied to individuals, or to groups of people such as household, organisations, or societies. Vulnerability is made worse by poverty, fragmented social and family structures, and gender inequality.*"

19.5. We submit that prisoners are vulnerable persons within the meaning of that definition.[38]

19.6. Finally, one of the objectives of the Policy is to prevent the spread of HIV[39] and to prevent new infections.[40] To that end, it undertakes to "*ensure access to prevention information, techniques and services to all persons.*"[41] Enrolment on HAART significantly lowers an HIV-positive person's viral load and thus reduces the risk of their transmitting the virus to others.[42] Seen in this light, the provision of HAART to HIV-positive foreign prisoners is a measure that assists in preventing the spread of HIV.

20. We therefore submit that the prevailing legislation and policy enactments require the State to provide all prisoners with access to ARVS.

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[38] See also *Lee* at para 17, where the South African Constitutional Court found that "*[p]risoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations.*"
[39] Policy, FA2 p 239 para 2.1.1
[40] Policy, FA2 p 241 para 4.1.
[41] Policy, FA2 p 241 para 4.1. Emphasis added.
[42] See BONELA affidavit, p 597 para 19.3.

21. There is no express legislative provision that allows for prisoners to be refused enrolment on State-funded HAART merely due to their nationality.[43] In the absence of such a clause, and in light of the legislative provisions above, we submit that all prisoners – whether citizens or foreigners – are legally entitled to be enrolled on HAART once their CD4 count drops below 350 cells/uL. Any refusal to enrol them is thus unlawful.

22. In those circumstances, the decision to refuse to enrol Messrs Tapela and Piye on HAART is unlawful, and should be set aside.

THE PRESIDENTIAL DIRECTIVE

23. The respondents contend that the refusal to grant Messrs Tapela and Piye (and other foreign prisoners in their position) treatment is lawful, because of the terms of the Presidential Directive.[44] In that regard, the applicants have put up, as annexure FA3, a notice from the second respondent recording that the Presidential Directive provides, in relevant part:

> *"Addressees are hereby informed that the following have been approved:*
> . . .
> *Provision of free treatment to non-citizen prisoners suffering from ailments other than AIDS".*[45]

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[43] The Presidential Directive is not a legislative provision. We deal with its significance below.
[44] AA p 721 para 20.
[45] Directive, FA3 p 249.

24. Annexure FA3 states that certain measures have been "*approved*" by Presidential Directive Cab 5(b) of 2004. But that approval appears to issue from the office of the Permanent Secretary to the Minister of Health (the second respondent) and is titled "*Proposed changes to Presidential Directive Cab 13(c) 2002*". It is therefore not clear that the Directive has been brought into effect and, if it has, whether the correct party passed such resolution. Despite being called on to produce a record of the decisions under challenge,[46] the respondents (who include the President) have not produced the Presidential Directive at all. Its existence and status is thus uncertain. In the remainder of these submissions, we assume (without admitting) that the Presidential Directive was issued by the President and is in force.

25. We submit that the Presidential Directive cannot be interpreted to exclude the provision of HAART to HIV-positive foreign prisoners. That is so for two reasons:

25.1. First, it must be interpreted to promote, rather than restrict, the fulfilment of constitutional rights.[47]

25.2. Second, it has been overtaken by the terms of the HIV/AIDS Policy, which was published after it.[48] In line with the principle *lex posterior*

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[46] See notice of motion, p 19.

[47] *Ramantele v Mmusi and Others* CACGB 104-12, 3 September 2013 (CAC) (*Mmusi*) at para 58.

[48] The Directive was issued on 26 March 2004, while the Policy was published on 9 August 2013.

derogat legi priori,[49] the provisions of the Policy must prevail. As we have addressed above, the Policy provides for universal access to ARVs.

26. If the Presidential Directive is to apply, it must therefore be interpreted to allow for the provision of HAART to non-citizen prisoners.

27. We submit, in any event, that the Presidential Directive is invalid because it is both *ultra vires* and unlawful.

The ultra vires challenge

28. It is trite that the exercise of public power is constrained by the scope of the empowering provision.[50] A decision that is taken beyond the scope of the empowering provision will be *ultra vires* and invalid, and can be set aside by a Court on review.[51]

29. The Court of Appeal has outlined the proper approach to assessing whether the exercise of a public power was authorised by the empowering provision:

> *"Where the ambit of an administrative authority's powers are challenged as being ultra vires the starting point appears to be first, to enquire whether the empowering statute, i.e. from whence the power is derived allows for a tacit or implied power. Secondly and more particularly important, to determine the*

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[49] Which is adopted in s 29(2) of the Interpretation Act 20 of 1984.
[50] *Murima and Another v Kweneng Land Board* 2002 (1) BLR 18 (HC).
[51] See, for example, *Good v the Attorney-General* (2) [2005] 2 BLR 337 (CA); *Botswana Association of Tribal Land Authorities v The Attorney-General* 2007 (3) BLR 93 (HC) at 99; *Patson v the Attorney-General* 2008 (2) BLR 66 (HC).

scope and purpose and to find out whether the powers entrusted upon the authority serve the scope and purpose of the legislation in question and thirdly whether the general principles of justice and legality have not been infringed by the authority on whom the power to make regulations has been entrusted."[52]

30. The starting point is thus to determine the source of the President's purported powers to prescribe what medical services the Government will provide and to whom.

31. We submit, with respect, that the President has no such power:

31.1. Neither the Prisons Act nor the Public Health Act authorise the President to issue directives concerning medical treatment (or the denial of it). To the extent that those statutes anticipate amplification of their provisions, that must be done by way of regulation.

31.2. Section 47(1) of the Constitution vests executive power in the President, and authorises him to exercise such vested powers subject to the provisions of the Constitution. But those executive powers cannot include a unilateral power to supplement or amend the provisions of validly enacted legislation. Indeed, to allow the President to do so would be fundamentally to undermine the constitutionally-

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[52] *Botswana Motor Vehicle Insurance v Marobela* 1999 (1) BLR 21 (CA) at 27.

ordained separation of powers, and the legislative powers conferred on Parliament in s 86 of the Constitution.[53]

32. We therefore submit that there is no empowering provision that underpins the President's (purported) decision to issue the Directive.

33. The applicants expressly took issue with the President's lack of authority to issue the Directive in the founding papers.[54] In response, the respondents merely asserted that the Directive was "*motivated by National Policy and national Interest*".[55] They did not, however, identify the source of the President's purported power to issue that directive. We submit that they could not do so because he does not, in law, possess such powers.

34. It follows that the Presidential Directive is *ultra vires*, at least to the extent that it precludes foreign prisoners from enrolling on HAART at the State's expense, during their incarceration. It should be set aside, and treated as invalid, on that basis.

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[53] The applicability of the doctrine of separation of powers has been recognised by the Botswana courts. See, for example, *Botswana Railway's Organization v Setsogo & Others* 1996 BLR 763 at 804B-C; *Peloewetse v The Permanent Secretary to the President and Others* 2000 (1) BLR 79. See also Dr Justice Dingake "Separation of Powers in Botswana", paper presented at the Southern African Chief Justices' Conference, 6-8 August 2009.

[54] FA p 33 para 41.1.

[55] AA p 722 para 25.

The unlawfulness challenge

35. Even assuming that the President had the power to issue the Directive (which is denied), we submit that he could not issue it in the face of, and contrary to, legislation expressly providing for the roll-out of ARVs to everyone – including HIV-positive foreign prisoners. That is because his executive powers do not permit him to contravene or circumvent, by fiat, the legislative provisions imposed by Parliament.

36. We have set out the statutory and policy enactments that provide for universal access to HAART by anyone whose CD4 count drops below 350 cells u/L. We do not repeat those submissions here. Suffice it to state that the prevailing legislative regime provides for all HIV-positive prisoners – whether foreigners or Batswana – to enrol on HAART when such treatment becomes appropriate. The Directive is unlawful and invalid to the extent that it contravenes that regime.

37. On this further basis, we submit that the Presidential Directive is invalid, and must be set aside, to the extent that it precludes foreign HIV-positive prisoners from accessing ARV treatment.

PRECLUDING HAART IS IRRATIONAL AND UNCONSTITUTIONAL

38. We submit that the HIV/AIDS Policy and/or the statutory regime and/or the Presidential Directive are unconstitutional and invalid, to the extent that they

deny HAART to foreign HIV-positive prisoners, for violating the right to life (entrenched in s 4(1) of the Constitution), the right not to be subjected to inhuman and degrading punishment (protected in s 7 of the Constitution), and the right to equality (entrenched in s 3 and 15 of the Constitution).

39. In considering these constitutional principles, this Court is enjoined by three principles of interpretation:

39.1. First, constitutional rights must be afforded a broad and generous interpretation.[56] The Court of Appeal in *Ramantele v Mmusi and Others* held:

> *"[I]n interpreting the Constitution more particularly with regard to the fundamental rights the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regards to liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed."*[57]

39.2. Second, the opposite approach is to be applied in considering limitations of constitutional rights: it is a "*well known principle of construction that exceptions contained in constitutions are ordinarily to be given strict and narrow, rather than broad, constructions*".[58]

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[56] *Diau v Botswana Building Society* 2003 (2) BLR 409 (IC) at para 42.
[57] *Mmusi* at para 69.
[58] *Attorney-General v Dow* [1992] BLR 119 (CA) at 132A-B.

39.3. Third, the domestic law is to be interpreted in a manner that does not conflict with Botswana's international obligations. Amissah P analysed the relevant legal principles fully in *Dow*. We do not repeat the analysis here, but merely note that he concluded as follows:

> *"I am in agreement [with the judgment of Aguda JA in Petrus] that Botswana is a member of the community of Civilised States which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken."*[59]

40. Against that background, we assess each of the constitutional rights at issue

The right to life

41. Section 4(1) of the Constitution entrenches the right to life. It provides:

> "***Protection of right to life***
>
> *No person shall be deprived of his life intentionally save in execution of the sentence of a court in respect of an offence under the law in force in Botswana of which he has been convicted."*

42. We submit that the provision is violated by the refusal to provide HAART to HIV-positive foreign prisoners, thereby condemning them to certain and premature death.

43. Messrs Tapela and Piye will die if they do not receive HAART timeously.[60] Indeed, the Government's own Treatment Guidelines confirm that even "*short delays (less than a month) in initiating treatment are associated with increased*

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[59] *Dow* [1992] BLR 119 (CA) at 132A-B
[60] Expert affidavit, p 271 para 40.

mortality, especially for individuals with very low CD4 counts (less than 100 cells/ul)".[61]

44. They (and others in their situation) are, by virtue of their incarceration, not able to earn sufficient income to pay for their own treatment.[62] Their consequent inability to access HAART places them at a real risk of preventable, premature death,[63] and violates their right to life.

45. Regional and international law strongly supports a finding that the refusal to provide ARVs to detained prisoners constitutes a violation of the right to life:[64]

45.1. The Human Rights Committee, considering a communication made in terms of Article 6 of the International Covenant on Civil and Political Rights (ICCPR),[65] has stated that States, "*by arresting and detaining individuals [undertake] the responsibility to care for their life. . . . Lack of financial means cannot reduce this responsibility.*"[66] Botswana ratified the ICCPR on 8 September 2000 and is, we submit, bound by that principal.

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[61] Treatment Guidelines, FA1 p 65.
[62] See the South African case of *B and Others v Minister of Correctional Services and Others* 1997 (6) BCLR 789 (C).
[63] Expert affidavit, p 271 paras 38-40.
[64] Reference to Botswana's international and regional obligations can provide useful guidance on the nature and scope of existing constitutional rights: see *Dow* at 151.
[65] 16 December 1966, United Nations, U.N.T.S. 999, p. 171.
[66] *Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation*, Communication No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (2002).

45.2. The African Charter on Human and Peoples' Rights, ratified by Botswana on 17 July 1986, guarantees the right to life under article 16(2). In applying article 16(2), the Nigerian High Court held that the refusal to provide HIV/AIDS treatment to individuals detained in prison constitutes an infringement of article 16(2) of the African Charter.[67] We submit that the finding is equally applicable in Botswana.

46. In the circumstances, we submit that the decisions and/or policy and/or Directive violate s 4(1) of the Constitution.

The right not to be subjected to inhuman and degrading treatment

47. Section 7(1) of the Constitution protects all persons against cruel inhuman and degrading punishment. It states:

> *"**Protection from inhuman treatment***
> *(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."*

48. We submit that Botswana precedent strongly suggests that the failure to provide prisoners with necessary medical care constitutes a violation of the s 7 right:

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[67] African Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1982). See *Odafe and Others v Attorney General and Others* (2004) AHRLR 205 (NgHC 2004).

48.1. In *Mokoena v The State*,[68] the Court of Appeal confirmed (relying on an unreported case of Nganunu CJ)[69] that one of the factors relevant to determining whether a sentence was grossly disproportionate and thus violated s 7(1) of the Constitution, was the fact that the prisoner at issue was HIV-positive and would be unable to access appropriate treatment.

48.2. Similarly, in *Binda and Another v The State*,[70] the High Court found that the refusal to provide a foreign HIV-positive prisoner with access to ARVs might constitute inhuman treatment, and/or sufficient grounds for departing from the prescribed minimum sentence that had been imposed. On that basis, it granted leave to appeal against the sentence imposed. The Court held:

> *"In proscribing torture, unhuman or degrading treatment, the Constitution of Botswana lays down a moral standard which must be observed. The United Nation Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment include in the definition of 'torture' any act by which sever mental pain and suffering is intentionally inflicted on a person for the purpose of punishing him for an act he has committed. It does not include mental pain and suffering arising only from, inherent in or incidental to lawful sanctions. Inhuman treatment is treatment which is destitute of natural kindness or pity, brutal, unfeeling and cruel, see the definition of 'inhuman' in the Oxford English Dictionary. The intentional refusal of vital medical care can, in my view, be characterised as inhuman treatment. The applicant I believe suffers severe mental pain when he is denied ARV treatment when Batswana inmates receive it The denial of this treatment is not inherent in or incidental*

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[68] 2008 (1) BLR 151 (CA).
[69] *Moyo and Others v The State* (Crim App 12/06), unreported.
[70] 2010 (2) BLR 286 (HC).

discriminatory practice by the prison authorities.

49. Comparable foreign jurisdictions have similarly found that a denial of treatment may render punishment inhuman and degrading:

49.1. The European Court of Human Rights has held that the deportation of an AIDS sufferer from the United Kingdom (where he could access treatment) to St Kitts (where there was no effective medical or palliative treatment for his condition) constituted inhuman and degrading treatment in violation of article 3 of the European Convention of Human Rights.[71] That is because, as the Court later elucidated:

> *"As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."*[72]

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[71] *D v United Kingdom* (1997) 24 EHRR 423, particularly at paras 51-53.
[72] *Pretty v United Kingdom* (2002) 35 EHRR 1 at para 52. Emphasis added.

That finding must, we submit, apply with even more force in respect of prisoners who are wards of the State and who are unable to secure access to medical care on their own.

49.2. Similarly, the US Supreme Court has found that the failure to provide incarcerated prisoners with necessary medical treatment constituted cruel and unusual punishment in violation of the Eighth Amendment because:

> *"If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy. As a part of that basic obligation, the State and its agents have an affirmative duty to provide reasonable access to medical care, to provide competent, diligent medical personnel, and to ensure that prescribed care is in fact delivered. For denial of medical care is surely not part of the punishment which civilized nations may impose for crime."*[73]

50. We submit that similar considerations apply in this case. On the undisputed evidence, the refusal to provide HAART to HIV-positive foreign prisoners exposes them to an increased risk of contracting OIs, and to substantial prospects of a premature death.[74] It also results in intense (but preventable) physical suffering and indignity, and breaks the physical resistance of the person.[75] Mr Tapela and Mr Piye have both expressed fear about what the future holds, and anguish over their risk of premature death.[76]

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[73] *Estelle v Gamble* 429 US 97 (1976) at 116.
[74] Expert affidavit, pp 269-270 paras 27-34.
[75] FA pp 26-28 paras 22-28; expert affidavit, p 266 para 16; pp 268-271 paras 23-40; Piye affidavit, pp 627-628 paras 10-11.
[76] FA p 28 para 33; Piya affidavit, p 629 para 15.

51. We thus submit that the refusal to provide HAART occasions an infringement of section 7 of the Constitution contrary to moral standards and the sanctity of life.

Equality and Non-Discrimination

52. Finally, we submit that the failure to provide HAART to foreign prisoners living with HIV violates section 15 of the Constitution.

53. Section 15 of the Constitution pertinently provides:

> *"**Protection from discrimination on the grounds of race, etc.***
>
> *(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 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 or creed 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;*
>
> *. . . "*

54. Section 15 of the Constitution prohibits differentiation on the basis of place of origin, where the differential treatment places the affected person at a disadvantage.

55. In this case, Mr Tapela and Mr Piye are in the same position as other HIV-positive prisoners who need HAART. The only difference between them and those prisoners who receive HAART is that they are not citizens of Botswana. They are thus clearly discriminated against on the basis of their place of origin.

56. The respondents invoke s 15(4)(b) of the Constitution, which provides that discrimination may be permissible where it applies "*with respect to persons who are not citizens of Botswana*", to justify their conduct.

57. But we submit that s 15(4)(b) cannot justify the discrimination at issue in this case, for three reasons:

57.1. First, s 15(4)(b) is an internal limitation on the scope of the right and must therefore be restrictively applied.

57.2. Second, the application of s 15(4)(b) is constrained by the provisions of s 3 of the Constitution, which provides in relevant part:

> ***"Fundamental rights and freedoms of the individual***
>
> *Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is*

to say, the right, whatever his 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;

. . .

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."

57.3. The Court of Appeal has explained the relationship between section 3 and the other sections in Chapter II of the Constitution as follows:

> *"Section 3 is the substantive umbrella section which entrenches the inherence of the set out fundamental rights in each individual or person…but of course, subject to the rights and freedoms of others or public interest."*[77]

57.4. The Court of Appeal has also expressly confirmed that s 15(4)(b) can only be invoked where the public interest requirements of s 3 have been met:

> *"I therefore agree with the respondents that the derogations contained in section 15(4) of the Constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and*

[77] *Mmusi* above n 25.

freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest".[78]

57.5. It follows that s 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.

The denial of HAART is not in the public interest or intended to protect the rights of others

58. The State bears the onus of showing why a limitation is necessary in the public interest or to protect the rights and freedoms of others.

59. In the present case, The respondents have baldly asserted that the Government is not able to provide ARVs to all Batswana[79] and that its policy to refuse HAART to foreign prisoners is motivated by the national interest, which includes considerations of financial resources and expenses. They further state that aid is needed even to provide ARVs to Batswana citizens and that providing HAART to foreign prisoners would thus cause a perception that the Government was behaving irresponsibly towards its citizens.[80]

60. But they have advanced no evidence to support these bland averments and their allegations must, in those circumstances, be rejected. As the South African Supreme Court of Appeal has recently confirmed:

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[78] *Mmusi* at para 72. See also *Nchindo and Others v Attorney-General and Another*, 2010 (1) BLR 205 (CA) at 219A.
[79] AA p 721 para 22.
[80] AA p 722 para 25.

> *"A bare or unsubstantiated denial will only pass muster where there is no other option available to a respondent due to, for example, a lack of knowledge, and nothing more can be expected of the respondent. A bare denial, in circumstances where a disputing party must necessarily be conversant with the facts averred and is in a position to furnish an answer (or countervailing evidence) as to its truth or correctness, does not create a real and genuine dispute of fact. A proper answer to material averments under reply requires, at the minimum, a separate and unequivocal traversal of each and every such allegation which the party seeks to contest."*[81]

61. Such evidence is particularly important in constitutional litigation where Government respondents must satisfy a court that they lack the necessary resources fully to realise a constitutional right.

62. In the present case, the respondents rely on bald assertion, in an attempt to justify the wholesale deprivation of fundamental rights. That approach cannot suffice and should, we submit, be rejected.

63. The uncontroverted evidence put up by the applicants demonstrates that the refusal of HAART to HIV-positive foreign prisoners is inimical to both the rights and freedoms of others and the public interest.

64. Rather than protecting the rights of others, the refusal to provide HAART to HIV-positive foreign prisoners does the exact opposite: it places other prisoners at an increased risk of contracting HIV. That is because the viral load of HIV-positive people is higher when they are not on HAART than it is when they

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[81] *Municipality of Mossel Bay v the Evangelical Lutheran Church* [2013] ZASCA 64 at para 6, citing *Wightman t/a J W Construction v Headfour (Pty) Ltd 2008 (3) SA 371 (SCA)* at para 13 and *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA) at para 17. Internal citations omitted.

are.[82] In the closed environment of a prison, that means that HIV-positive prisoners who are not on HAART are far more likely to infect their co-prisoners.

65. Similarly, the refusal to provide HAART to HIV-positive foreign prisoners increases all inmates' chances of contracting infectious OIs, like tuberculosis ("TB"). Without access to HAART, HIV-positive persons are more prone to OIs. TB is the lead OI and it recurs in prisoners living with HIV who are not placed on HAART.[83] Due to overcrowding, bad ventilation and other poor prison conditions, the likelihood of transmission of TB in prison populations is high.[84] It means that the failure to enrol foreign HIV-positive prisoners on HAART endangers the health of all prisoners – whether HIV-positive or not, and whether foreign or Batswana. The refusal thus undermines the rights and freedoms of others, rather than enhancing them.

66. The State's approach is also contrary to the public interest.

67. Withholding HAART from a select number of prisoners will, in the long term, cost the government more money than providing ARVs to HIV-positive prisoners.[85] That is because the State is forced repeatedly to treat OIs across the prison population, rather than curbing their recurrence. Such increased expenditure cannot be in the public interest.

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[82] See BONELA affidavit, p 597 para 19.3.
[83] Expert affidavit, pp 266-267 paras 16-19; BONELA affidavit, pp 595-596 paras 13-19.
[84] Expert affidavit, p 272 para 43; BONELA affidavit, p 596 para 19.2.
[85] Expert affidavit, p 266 para 16; BONELA affidavit, p 595 para 13.

68. Moreover, the refusal to provide state-funded HAART to foreign, HIV-positive prisoners places them at risk of drug resistance to first-line HAART.[86] As the cases of Mr Tapela and Mr Piye show, foreign prisoners denied access to state-funded ARVs are likely to seek privately-funded treatment but will be forced to cease treatment when this is no longer affordable or viable. Inconsistent use of HAART increases the risk of drug resistance, and may result in HIV-positive persons no longer responding to first-line HAART and needing to enrol on second-line HAART, which is more costly and leaves fewer treatment options over time.[87] The prejudice to Mr Tapela and Mr Piya (and others in their situation), and its potential impact of treatment options, far outweighs any (as yet unidentified) benefit that the State may claim.

69. In the present case, the respondents have put up no evidence to demonstrate their lack of resources. They rely on bald assertion, in an attempt to justify the wholesale deprivation of fundamental rights. That approach cannot suffice. In the circumstances, we submit that the denial of HAART to foreign HIV-positive prisoners cannot be justified under s 15(4)(b) read with s 3 of the Constitution. Those provisions are violated by the State's conduct.

Conclusion on submissions on the merits

70. For all of the reasons above, we therefore submit that the applicants are entitled to the declaratory relief that they seek in prayers 1 to 6 of the notice of

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[86] BONELA affidavit, p 597 para 19.4.
[87] BONELA affidavit, p 597 para 19.4.

motion.[88] Messrs Tapela and Piye (and those in their situation) are also entitled to be provided immediately with HAART. Prayers 8 and 9 are directed toward such relief.

THE RESPONDENTS' TECHNICAL DEFENCES

71. Rather than engaging with the substance of this important case, the respondents have instead elected to raise a range of technical points to frustrate the determination of this application. Those points are without merit. Moreover, at least two of those points (concerning the purported deficiencies in the statutory notice and the amendment of the notice of motion) are not competently raised.

72. It is, with respect, wholly inappropriate for the respondents, as organs of state, to raise complaints of this kind – particularly since a number of them have previously been definitively determined. The State should lead by example in ventilating important cases, and in promoting compliance with the values and ideals enshrined in the Constitution.[89]

73. Moreover, those technical defences should not defeat the proper determination of this case. That is because cases should be "*decided upon their true issues*

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[88] Notice of motion, pp 18-19.

[89] See, in this regard, *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC) at para 68; *Van Straaten v President of the Republic of South Africa and Others* 2009 (3) SA 457 (CC) at para 9.

rather than technical points".[90] This Court will, we submit, use its broad remedial powers to identify the actual dispute between the parties, and to require the parties to take steps to resolve that dispute in a manner consistent with the constitutional requirements.[91] It should not, with respect, allow the respondents' attempts to preclude its determination, to prevail.

74. We nevertheless deal with each of the respondents' complaints briefly, in order to dispose of them.

Statutory Notice

75. First, the respondents argue that the applicants have failed to comply with section 4 of the State Proceedings (Civil Actions by or against Government or Public Officers) Act ("the State Proceedings Act")[92] because the applicants have allegedly raised new causes of action in this application that were not foreshadowed in the statutory notice.

76. We submit that this point *in limine* is not competently raised in accordance with the process envisaged in Order 33 of the Rules of the High Court:

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[90] *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C) at 254C.
[91] *Head of Department Mpumalanga, Department of Education v Hoerskool Ermelo* 2010 (2) SA 415 (CC) at para 97.
[92] 24 of 1966.

76.1. Order 33 requires a party complaining of an irregular step to bring a formal application, within 14 days, to set aside that step or proceeding.[93]

76.2. In this instance, the statutory notice was sent on 29 August 2013. The notice of motion was filed on 3 February 2014. Yet, the first time the respondents raised any issue with the breadth of the application was in any answering affidavit filed on 19 March 2014. That was not only more than 14 days after the notice of motion was filed, but was also not raised properly as required under Order 33.

77. The complaint is therefore not properly before the Court and cannot be considered.

78. In any event, the complaint is without merit. The statutory notice is broadly stated and sufficiently anticipates all causes of action advanced in these proceedings. All the relevant facts have been placed before the Court, and the respondents have had a proper opportunity to respond and to defend the case. There is accordingly no competent basis on which to non-suit the applicants.

Leave of the Court

79. The respondents further allege that the applicants failed to specify the rule of court on which they rely in bringing the application, in purported breach of Order 12, Rule 1 of the Rules of the High Court.

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[93] *Kagiso Tiro v Attorney General* CACGB-039-12 para. 61.

80. Again, this complaint is brought out of time and without proper compliance with Order 33 of the Rules of the High Court. As with the previous complaint, it should be disregarded on this basis alone.

81. In any event, the Rules of the High Court do not require the applicants to specify the rule on which they rely. Order 12, Rule 1 states:

> *"Except where proceedings by way of petition are prescribed by law every application shall be brought on notice of motion supported by an affidavit as to the facts upon which the applicant relies for relief, and the notice of motion shall be in Form 7 in the First Schedule with such variations as circumstances require."*

82. We do not reproduce Form 7 in the First Schedule here to avoid prolixity. Suffice it to say that nothing in Form 7 requires the applicants to specify the rule on which they rely. The complaint is accordingly unfounded and cannot preclude the determination of the application.

The time bar complaint

83. Next, the respondents claim that the applicants have brought their review more than four months after the impugned decision was taken, and are thus out of time.

84. That complaint is unfounded. The applicants challenge the respondents' failure to accede to the request made by the applicants on 29 August 2013 to enrol Mr Tapela and Mr Piye on HAART, in the face of the adoption of the HIV/AIDS

Policy.[94] The impugned decisions were taken less than four months prior to launching this application, taking into account the Court vacation from 15 December 2013.

85. Even if the application was out of time (which is denied), we submit that any delay should be condoned. That is because the refusal to enrol the applicants on HAART – and the prejudice that it entails – is ongoing. There is thus no finality in the decision and no basis to preclude a challenge being brought late.

86. Even if this Court were to determine that there was a delay in bringing the review and that it could not be condoned, that would still not non-suit the applicants. This Court would still be seized with an application for declaratory relief which would fall to be determined. Accordingly, the complaint is not dispositive of the application.

The amended notice of motion

87. The respondents also complain that the applicants amended their notice of motion without complying with the amendment procedure imposed by Order 32 of the Rules of the High Court.

88. Again, the complaint is not raised in accordance with the requirements of Order 33 and should be disregarded on this basis alone.

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[94] FA pp 30-32 para 36-37, 38.1 and 40. See also *Council Secretary (Central District Council) v Mphitlhang and Others* CACGB-073-12.

89. But in any event, the complaint is plainly opportunistic and without merit. The amended notice of motion was filed 4 days after the application was initially launched, and merely corrected a typographical error in the original notice of motion (which mistakenly sought relief in favour of the second and third applicants, rather than the first and second applicants). That amendment plainly entailed no prejudice to the respondents and could never have properly been objected to by them.

90. Their attempt to preclude the application on such flimsy grounds is unbecoming and should, we submit, be censured by this Court.

Complaints as to remedy

91. Finally, the respondents contend that the remedy sought by the applicants cannot be granted and renders the entire application incompetent. They say so for two purported reasons:

    91.1. First, they contend that the applicants cannot seek a final interdict against the Government because this is contrary to section 9 of the State Proceedings Act.

    91.2. Second, they claim the application amounts to an unlawful interference in executive decision-making, and violates the separation of powers.

92. Those complaints manifest a clear misunderstanding of the applicable constitutional approach, and an ignorance of the jurisprudence of the Courts. Both complaints have been raised previously, and decisively rejected.

Interdictory relief

93. This Court plainly has the jurisdiction to consider the application, and to grant appropriate relief in respect of it. Its power to do so flows from s 18 of the Constitution, which provides:

> *(1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.*
>
> *(2) The High Court shall have original jurisdiction—*
>
> *(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; or*
> *(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section, and may make such orders, issue such writs and give such direction as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of sections 3 to 16 (inclusive) of this Constitution.*

94. Section 18(2)(b) affords the High Court broad powers – including to grant interdictory or mandatory relief against the State. Kirby J has confirmed that:

> *"powers [in s 18(2)(b)] are very wide, and are to be interpreted as such. To the extent that any other law enacted by Parliament sought to cut down such powers, it would, to that extent, be inoperative. Thus, notwithstanding the provisions of s 9 of the State Proceedings (Civil Actions by or against Government or Public Officers) Act, this court [the High Court] could grant an interdict against the government if that was necessary or appropriate to enforce one of the entrenched sections of the Constitution*

guaranteeing the fundamental rights and liberties of the individual."[95]

95. That is equally true in respect of non-constitutional claims. The Court of Appeal has confirmed that s 9 of the State Proceedings Act does not prohibit the grant of interdicts or orders of specific performance against the State, but merely provides that such orders should be made when the law requires.[96]

Review

96. The Court's powers of review are provided for in Order 61 of the High Court Rules, which permits review of decisions "*of any tribunal, board or officer performing judicial, quasi-judicial, or administrative function*".

97. It is trite law that courts are empowered to review decisions of the executive, public bodies, statutory corporations and quasi-judicial bodies.[97] This Court has held that "*exercises of public power are reviewable if they fail to meet the standards of legality or rationality*".[98]

98. The decision to refuse the first and second applicants access to HAART, and the adoption of the Policy, and the issue of the Presidential Directive all constitute the exercise of public power that is reviewable on the grounds set out in this application. The respondents' claims to the contrary are without merit.

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[95] *Kobedi v State* 2002(2) BLR 502 (HC), 513D-G, affirmed in *Medical Rescue International Botswana Limited v the Attorney General and* Others 2006 (1) BLR 516 (CA).
[96] *Patson v the Attorney-General* 2008 (2) BLR 66 (HC).
[97] See, for example, *Council Secretary* above n 17; *Good v the Attorney-General* (2) [2005] 2 B.L.R. 337 (CA); *President of the Republic of Botswana and Others v Bruwer and Another* [1998] B.L.R. 86 (CA); *Botswana Association of Tribal Land Authorities v The Attorney-General* 2007 (3) BLR 93 (HC); and *Patson*.
[98] *Botswana Association of Tribal Land Authorities* at 99.

Conclusion on the technical defences

99. We therefore submit that the respondents' technical defences are without merit and must be rejected by this Court.

CONCLUSION

100. For all the reasons set out above, we submit that the applicants are entitled to the relief sought in the notice of motion.

101. In addition, the applicants seek a punitive order as to costs. We submit that this is warranted, given the facts that:

101.1. The respondents have unduly delayed the proceedings, by failing to file their answering affidavit at the appropriate time and after an order had already been granted against them (requiring a rescission of that order);

101.2. They have failed meaningfully to engage with the merits of the dispute – notwithstanding its importance – and have instead elected to advance technical defences that have previously been disposed of; and

101.3. They have thereby sought to frustrate the ventilation of the issues in dispute.

102. In the circumstances, the applicants seek costs of the application, including the costs of two counsel, on the attorney-client scale.

ADVOCATE GILBERT MARCUS SC

ADVOCATE ISABEL GOODMAN

ATTORNEY TSHIAMO RANTAO

27 May 2014

LEGISLATION

1. Interpretation Act 20 of 1984.
2. State Proceedings (Civil Actions by or against Government or Public Officers) Act 24 of 1966.
3. Prisons Act Chapter 23:03.

DOMESTIC CASES

4. *Attorney-General v Dow* [1992] BLR 119 (CA).
5. *Binda and Another v The State* 2010 2 BLR 286 (HC).
6. *Botswana Association Of Tribal Land Authorities V The Attorney-General* 2007 (3) BLR 93 (HC).
7. *Botswana Railway's Organization v Setsogo & Others* 1996 BLR 763.
8. *Botswana Motor Vehicle Insurance v Marobela* 1999 (1) BLR 21 (CA).
9. *Council Secretary (Central District Council) v Mphitlhang and Others* CACGB-073-12.
10. *Diau v Botswana Building Society* 2003 (2) BLR 409 (IC).
11. *Estelle v Gamble* 429 US 97 (1976)
12. *Good v the Attorney-General* (2) [2005] 2 B.L.R. 337 (CA).
13. *Kagiso Tiro v Attorney-General* CACGB-039-12 (CA).
14. *Kobedi v State* 2002(2) BLR 502 (HC).
15. *Medical Rescue International Botswana Limited v the Attorney General and Others* 2006 (1) BLR 516 (CA).
16. *Mokoena v The State* 2008 (1) BLR 151 (CA).

17. *Moyo and Others v The State* (Crim App 12/06), unreported.
18. *Murima and Another v Kweneng Land Board* 2002 (1) BLR 18 (HC).
19. *Nchindo and Others v Attorney-General and Another,* 2010 (1) BLR 205 (CA).
20. *Patson v the Attorney-General* 2008 (2) BLR 66 (HC).
21. *Peloewetse v The Permanent Secretary to the President and Others* 2000 (1) BLR 79.
22. *President of the Republic of Botswana and Others v Bruwer and Another* [1998] B.L.R. 86 (CA).
23. *Ramantele v Mmusi and Others* CACGB 104-12 (CA).

FOREIGN CASES

24. *August v Electoral Commissioner* 1999 (3) SA 1 (CC).
25. *B and Others v Minister of Correctional Services and Others* 1997 (6) BCLR 789 (C).
26. *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs* 1992 (2) SA 56 (ZS).
27. *D v United Kingdom* (1997) 24 EHRR 423
28. *Egerton v The Home Office* [1978] Crm LR 494.
29. *Ehrlich v Minister of Correctional Services* 2009 (1) SACR 588 (E), 2009 (2) SA 373 (E).
30. *Ellis v Home Office* [1953] All ER 149.
31. *Goldberg v Minister of Prisons* 1979 (1) SA 14 (A), [1979] 3 All SA 238 (AD).
32. *Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd* 1972 (4) SA 249 (C).

Ermelo 2010 (2) SA 415 (CC).

34. *Kirkham v Greater Manchester Police* [1990] 2 QB 283.
35. *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC).
36. *Minister of Correctional Service v Kwakwa* 2002 (4) SA 455 (SCA).
37. *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A).
38. *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* 2001 (3) SA 893 (CC).
39. *Municipality of Mossel Bay v the Evangelical Lutheran Church* [2013] ZASCA 64.
40. *National Scrap Metal (Cape Town) (Pty) Ltd v Murray & Roberts Ltd* 2012 (5) SA 300 (SCA).
41. *Odafe and Others v Attorney General and Others* (2004) AHRLR 205 (NgHC 2004).
42. *Pharmaceutical Manufacturers Association of SA and Another; In re Ex Parte President of the Republic of South Africa and Others,* 2000 (2) SA 674 (CC).
43. *Pretty v United Kingdom* (2002) 35 EHRR 1.
44. *Strydom v Minister of Correctional Services* 1999 (3) BCLR 342 (W).
45. *Van Straaten v President of the Republic of South Africa and Others* 2009 (3) SA 457 (CC).
46. *Whittaker and Morant v Roos and Bateman* 1912 AD 92 at 122.
47. *Wightman t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA).

INTERNATIONAL AND REGIONAL TREATIES AND JURISPRUDENCE

48. African Charter on Human and Peoples' Rights, 21 I.L.M. 58 (1982).

49. Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

50. International Covenant on Civil and Political Rights, 16 December 1966, United Nations, U.N.T.S. 999, p. 171.

51. *Ms. Yekaterina Pavlovna Lantsova v. The Russian Federation*, Communication No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (2002)