IN THE HIGH COURT FOR ZAMBIA **2011/HP/0719**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

IN THE MATTER OF:	AN APPLICATION UNDER ARTICLES 11, 12, 15 and 112 (d) OF THE CONSTITUTION OF ZAMBIA.
AND	
IN THE MATTER OF:	RULE 29 OF THE PROTECTION OF FUNDAMENTAL RIGHTS RULES AND REGULATIONS OF 1969; AND A PETITION

BETWEEN:

GEORGE PETER MWANZA	**1ST PETITIONER**
MELVIN BEENE	**2ND PETITIONER**
AND	
THE ATTORNEY GENERAL	**RESPONDENT**

Before the Hon. Mrs Justice J.K. Kabuka in Open Court at Lusaka, The 29th day of April, 2016.

FOR THE PETITIONERS:	Mr. I. Siamc, Lcgal Rcsourcc Chambers.
FOR THE RESPONDENT:	Mrs. P.Hlazo, Assistant Senior State Advocate, Attorney General'sChambers.

JUDGMENT

Cases and Legislation referred to:

1. Attorney General Vs Roy Clarke (2008) Z.R. 38 (SC).

2. Sata v Post Newspapers Limited and Another (1995) Z. R.??? (HC).
3. Resident Doctors Association of Zambia and Others v Attorney General (2003) Z. R. 33 (SC).
4. Malawi African Association and Others v Mauritania, Comm. No. 54/91, 61/91. 98/93, 164/97, 196/97 and 210/98, parags. 12, 120.
5. Tellis and Others v Bombay Municipal Corporation, AIR 1986 SC 180, parag. 73.
6. Farooque v Government of Bangladesh and Others, WP 92 of 1996.
7. Munyonsi and Another v Ngalabeka (1999) ZMSC 24.
8. Kingaipe and Another v Attorney General, 2009/HL/86 at p.42.
9. Zambia Sugar PLC v Fellow Nanzaluka Appeal No. 82/2001.
10. Airedale NHS Trust v Bland (1993) 1 All ER 821 at 857b.
11. Tapela and others v Attorney-General and others MAHGB-000057-14.

The Constitution of Zambia Cap.1 Articles 11;12; 15 and 112(d).

The Prisons Act Cap. 57 S. 88; 146.

The Prisons Rules as Amended by Act No. 16 of 2004 r.17(2); 44 (1) (e); 47 (A); 65; 73.

The Petitioners were at the material time prisoners detained at the Lusaka Central Prison. On 27th July, 2011 they filed a Petition in the High Court Principal Registry at Lusaka contending they both have the Human Immunodeficiency Syndrome (HIV+). They also contended: (i) owing to this medical condition, their doctors had prescribed anti-retroviral treatment (ART); (ii) that they are required to take the drugs on a daily basis in order to contain the virus; (iii) a healthy balanced diet is needed for the drugs to work properly; (iv) the Prison

authorities, represented by the Respondent in this case, are not providing such a diet; and (v) their living conditions in the cells are unfit for human habitation.

It was the Petitioners' further contention, they were able to have such diets prior to their incarceration. That if the Respondent adhered to feeding prisoners according to the quantity, quality and variety, as provided under the first schedule of The Prisons Act, a balanced diet for the Petitioners would, provisionally be met. What is provided to the Petitioners instead are meals which are inadequate both in quantity and quality. Contrary to rule 17 (2) of the Prison Rules, they are given a little maize samp for breakfast and one lump of thick porridge with beans or dried kapenta (anchovies) as lunch or supper. These meals are served between 06:00-07:00 and 12:00-15:00, hours. The thick porridge is also improperly cooked from rotten maize meal while the accompaniments are usually rotten beans or dried kapenta containing foreign particles. Despite being aware of the Petitioners medical condition and recommendations of medical doctors that they be provided with a variety of foods. The Respondents have ignored the said guidance thereby threatening the Petitioners' right to life. That inadequate food results in their suffering from side effects such as feeling weak and drowsy from the time they take the medication after 16:00 until the following morning when the next meal is made available.

The Petitioners further contended, the United Nations Human Rights Committee in General Comment No. 6 demands that the right to life be interpreted in an expansive manner; and the deprivation of adequate food leaves the Petitioners more likely to die from the virus. That on numerous occasions they have been denied from accessing ART drugs and therapy. The reason is failure by the Officer in Charge

of the prison to secure enough Prison warders to escort them to the Kabwata Clinic. As a result, the drugs are dispensed in the Petitioners absence, thus depriving them of any chance to have their CD4 count checked and to be generally, examined by a qualified Medical Practitioner.

Regarding inadequate living facilities, the contentions are that the holding cells at Lusaka Central Prison are overcrowded. The Petitioners are living in Cells measuring 5 x 4 metres originally intended for 20 inmates but currently holding 96. The Prison which was built in 1924 and intended for a maximum of 200 inmates now holds over 1600. Consequently, the Petitioners are unable to sleep or rest comfortably as they are forced to sleep in a seated or standing position, despite suffering the side effects of ART. That being subjected to such conditions constitutes torture, degrading and inhuman treatment which is prohibited and non derogable under Article 15 of the Constitution; and further violates the Petitioners right under Article 11 of the United Nations Standard Minimum Treatment of Prisoners Rules. This Article requires that windows to prison cells be large enough to enable the Prisoners to read or work by natural light. That they also ought to be so constructed as to be able to allow the entrance of fresh air whether or not there is artificial ventilation.

The Petitioners contended, overcrowding in the cells has literally left no ventilation which has led to the spread of communicable diseases such as TB. That TB complicates the Petitioners health condition and is a real threat on their lives that are protected under Article 12 of the United Nations Standard Minimum Treatment of Prisoners Rules. This Article requires that sanitary installations be adequate to enable every prisoner to comply with the needs of nature when necessary, in a clean and decent manner. Contrary to that position, the cells are

usually kept in unsanitary conditions without flushing toilets. Consequently, the only toilet available to the Petitioners emits a strong stench which is compounded by lack of ventilation. The Petitioners accordingly prayed:

(a) That it may be determined and declared that the Respondent's decision to feed them on thick porridge made from rotten maize, rotten beans and dried anchovies with foreign materials is inconsistent with the Constitution of Zambia, the International Covenant on Economic Social and Cultural Rights and the Standard Minimum Rules for the Treatment of Prisoners in that:

(i) It violates the Petitioners' fundamental rights guaranteed under Article 11 of the Constitution of Zambia;

(ii) It threatens violation of the Petitioners' fundamental right to life under Article 12 of the Constitution of Zambia;

(iii) It violates the Petitioners' fundamental protection from inhuman and degrading treatment under Article 15;

(iv) It violates the Petitioners' fundamental right to adequate food in Article 11 of the International Covenant on Economic, Social and Cultural rights to which Zambia is a party.

(v) It contravenes the right to food under Article 20 (i) of the Standard Minimum Rules for the treatment of prisoners.

(vi) It violates the Petitioners' right to medical and health facilities under Article 112 (d) of the Constitution of Zambia.

(b) That it may be determined and declared that the Respondent's decision to prevent the Petitioners from accessing their anti-retroviral therapy and drugs and/collection of antiretroviral drugs on their behalf without the Petitioners being examined:

(i) threatens the Petitioners right to life as guaranteed under the Constitution.

(ii) is a by violation of their rights to adequate medical and health facilities as provided for in Articles 112 (d) of the Constitution of Zambia.

(c) That it may be determined and declared that the Respondent's decision to over crowd the holding cells at Lusaka Central Prison is

as violation of Article 15 of the Constitution of Zambia as it constitutes an infringement on the Petitioners' protection from torture, inhuman and degrading treatment.

(d) An award of damages for mental and emotional stress.

The Respondent filed an Answer in which it was admitted, the Petitioners are prisoners who are both HIV+ and on ART. The Respondent however, denied the Petitioners were fed on small quantities of rotten food and averred that, all prisoners on special diet are fed on rice. In addition, they also receive supplementary food brought by Churches Association of Zambia every Thursday. This food is intended for all prisoners who are HIV+ and those who are terminally ill. A clinic is also conducted within the prison premises to provide ART to all prisoners who are HIV+. Consequently, the Respondent denied the Petitioners are entitled to any of the reliefs they are seeking.

At the hearing of the matter, evidence of the Petitioners came from the 1st Petitioner **GEORGE PETER MWANZA, PW1.** It was his testimony that, he was apprehended for a case of defilement on 16th February, 2008; and incarcerated at the Lusaka Central Prison for over 4 years, before final disposal of the matter which resulted in his conviction. PW1 went on to testify, he is HIV+ and on ART. When he went to Kabwata Clinic on 3rd July, 2011 he was also diagnosed with TB upon which he was given specific guidelines to follow by medical personnel and these were that: the medication should be taken regularly at a particular time, without missing a single day. On getting a new consignment, there should be a proper check up by a Medical Practitioner and that a good diet was needed. According to PW1, none of the doctors instructions were being followed by the Prison authorities. When it was time to get a new consignment of drugs PW1 and others were told that there were inadequate numbers of Prison

Warders to undertake the task of escorting them to Kabwata Clinic. In such a situation, the officers would unilaterally and arbitrarily, decide who amongst them and how many, to take. The rest would remain and some would have their drugs brought by the same Prison Warders while others would not, thereby being made to miss taking the drugs. Failure to attend the Clinic also resulted in the Petitioners missing the CD4 count, which was supposed to be taken every six months.

PW1 said he was alarmed to see his fellow HIV+ prisoners who appeared healthier than himself, start dying. He was also concerned that they were not being given a balanced diet. He described a normal meal for the day, as a small quantity of samp for breakfast; lunch would equally be a small quantity of nshima with kapenta. PW1 brought a sample of the kapenta which from the Court's own ocular observation appeared a little powdery. The kapenta was produced in evidence as exhibit 'P1.' It was PW1's further evidence, due to inadequate food, they often experienced drowsiness as a side effect. They also could not easily access the only toilet available for fear of stepping on others, due to congestion. He said he had been taken to other prisons such as Kamfisa and Mukobeko Maximum, where he found the situation was the same. The said congestion has resulted in the inmates contracting TB, rash, boils and other contagious diseases. In concluding his evidence in chief, PW1 urged the Court to grant them the reliefs they are seeking.

When he was cross-examined, PW1 admitted, that the contents of his petition stating he discovered he was HIV+ in 2008, was not correct. He said he only learnt of his HIV+ status whilst already in prison, in the year 2011, upon which he started taking ART. That the doctor had advised them to eat a balanced diet such as rice or nshima with fresh or dry fish, meat, fruits and vegetables but the main meals offered to

them at Lusaka Central Prison consist of nshima and kapenta, only. PW1 said supplementary foods are made available occasionally, about once a month. He recalled the last time he had an egg was about six months before the date of trial. On opportunistic infections, his evidence was that he had contracted TB; diarrhorrea and rash whilst in prison. He admitted there was a mobile TB Clinic that attended to inmates.

PW2 was **Dr. CANISIUS BANDA,** a medical doctor and Public Health Specialist. He told the Court, he had been a Medical Doctor for 16 years. As at the date of hearing, in 2013, he was lecturing on infectious diseases at the University of Lusaka. He had encountered HIV in his capacity of a doctor, as a Lecturer, Administrator, and as a Health activist in Chongwe, where he founded a Non Governmental Organisation called: FACING THE CHALLENGE. PW2 explained, that HIV is an acronym for the Human Immunodeficiency Virus, which is the name of the germ that destroys the Human Immune System. The virus is referred to as Acquired Immunodeficiency syndrome because it is ordinarily, passed from one person to the other and the status of AIDS is brought about when the germ has destroyed the immune system. When this happens to an individual, that is when it is said he now has AIDS. CD4 cells are used as a Marker, to count the cells and determine whether one has AIDS or not. A CD4 count of less than 200 cells means a person has AIDS. It is possible to tell whether one has AIDS from opportunistic infections such as TB, Carposis Sarcoma and other related infections. When HIV destroys the system, germs take advantage and start causing such infections, which would not be there in a person without HIV.

PW2 went on to testify, that Highly Active Introviral Therapy is a combination of drugs given to an HIV+ person found with a CD4 count

of below 200. This treatment can even start at a CD4 count of 350. He said adherence to treatment in this regard means taking the right dose of the drugs without missing a single dose, daily, at the right time and these drugs have to be taken with food. PW2 further explained, the success of ART is that it supresses the viral loads of the virus, to undetectable levels. As a result, there is recovery and disappearance of opportunistic infections and an individual becomes healthy again. When this happens, even the ability to pass on the virus is reduced and there will be an improvement in the quality of life. The immune system will become normal. The person will have no opportunistic infections and someone who would have died will not die from HIV infection.

On the effect of discontinuing ART he said that would be a tragedy as the virus would continue multiplying to damage the immune system and opportunistic infections would continue to proliferate. Chances of premature death would also be high. A similar position results if ART is not administered correctly because the medicines are actually toxic. He stressed the importance of a balanced diet for a person on ART if the drugs are to work well and inhibit the progression from HIV+ to AIDS. He pointed out, that Luke Montagne one of the discoverers of the HIV virus says, with proper nutrition and protection from opportunistic infections such as malaria, the body itself has the capacity to fight the virus.

As to what constitutes a balanced diet, PW1's evidence was that generally, it means eating energy foods such as carbohydrates; body building such as proteins; and protective foods such as vitamins. That a balanced diet was important for people on ART and the needs vary from individual to individual. It is determined for each person by considering the Body Mass Index divided by the Height. Where the

result is less than 18, the person must have supplements to meet the nutritional needs. Hence, a blanket giving of food to people with different needs may not meet their individual requirements. He said a meal consisting of nshima and kapenta only, is not balanced as it would just provide carbohydrates and protein, respectively, without any vitamins. That a proper diet helps to manage the side effects of the ART drugs and any inadequacy in the food would have side effects depending on what category of food was missing. He gave as examples, diahorrea, vomiting, organ damage, altered concentration, bad dreams, mild disorientation etc.

In cross-examination, PW2 said as a highly active kind of therapy the side effects of ART are worsened if not managed properly and without a good diet, one could actually die.

In defence of the matter the Defendant called three witnesses (DW1-3).

DW1 was **OLIVER LISEBA**, the Officer-in-Charge of the Lusaka Central Prison. He told the Court that, as at the date of hearing the matter, he had held that position for about nine months and was relying on the records in his custody. According to these records, the 1st Petitioner George Peter Mwanza underwent a voluntary counselling and testing for HIV from Kabwata Clinic on 7th July, 2011 and was found to be HIV+. Thereafter he was put on ART and had been accessing his drugs regularly. That the Petitioners in this case are not the only inmates who are HIV+ as there are many others who also require to collect their drugs. A system is in place to allow for this, but there was one occasion where the inmates overpowered the escorting Officer and three of them escaped. That is when security measures were put in place to have a focal person go and collect the drugs on behalf of the others, whenever it was noticed that the levels of the drugs had gone down. It was DW1's further evidence, that in 2012

Lusaka Central Prison became an ART Centre and upon his transfer to Mukobeko, the 1st Petitioner was given enough ART drugs from the Centre to last at least 3 months. That the individual prisoners keep their own drugs and are free to take them at their convenience.

Coming to the allegations of poor quality and insufficient quantities of food, DW1's evidence was that, food is issued in accordance with S.88 of the Prisons Act of 1966 and the dietary scale has never been amended. That the quality is good and obtained from different suppliers. The supplies are always checked by an environmentalist before buying, to ensure they are of good quality. On lack of balanced diet, his response was that, as long as the First Schedule to the Prisons Act is not amended, the diet will still remain the same. In order to contain the situation in the meantime however, the Prison Officers have been proactive to the plight of the HIV+ inmates, those living with diabetes and other such ailments, by allowing well wishers such as Church Women from Kabwata Parish to provide foodstuffs which include meat, fruits and other assorted foods. This is all done to ensure that there are no side effects experienced by inmates, such as those on ART.

According to DW1 there were no inmates who experienced side effects as a result of unbalanced diet. He said although on special application, prisoners are allowed to receive food from their relatives on daily basis, the real solution to the problem lies in reform of the Prisons Act. In its current format, the restrictions placed on dietary provisions may be exceeded and open the Prison Officers to audit queries. Regarding side effects resulting from poor diet, DW1's answer was that, there is now a clinic within the prison premises with a qualified Medical doctor, Clinical officer and HIV Focal person, as well as other support staff to attend to sick inmates and they even keep

medical records of their patients. On the complaints related to congestion, unsanitary conditions and inadequate ventilation, DW1 admitted, the Prison was build to accommodate only 160 inmates but was now holding over 1,100 inmates. Whereas each cell has a capacity to accommodate 15 inmates the same currently holds, 75. Although they had tried to install electric fans and transfer some prisoners to other prisons, this has been of little help. According to DW1, the only solution to the problems brought about by congestion is the expansion of existing prisons and construction of new ones across the country.

When he was cross-examined, DW1 confirmed he was the one directly responsible for ensuring Prisoners' general well being. This includes ensuring those that are HIV+ have access to medication. He confirmed the Petitioners were incarcerated in 2008 and he found them already there in January, 2013 when he was transferred to the Lusaka Central Prison. He also confirmed, that his testimony regarding the Petitioner's medical information was based on records under his custody but added, he had also interviewed the inmates, individually. That is how he came to learn that the 1st Petitioner was jailed for defilement and with the current incarceration being for his second such case. DW1 confirmed, that the ordinary diet provides for 250g x 2 meals per day and any other provisions must follow this scale. He denied, prisoners are given rotten food and receive an egg every six months but confirmed, breakfast consists of rice or samp whilst lunch is nshima served with beans or kapenta and vegetables from the garden, whenever they are available. He asserted, that drugs are accessible particularly with the presence of a focal person to ensure this is done. He maintained, there were only two occasions when ARV's were got on the Petitioners' behalf by their 'buddies' and denied any allegation that either of them ever missed accessing their drugs. In conclusion, it was his plea for HIV activists to step in and push for law reforms of the

Prisons Act which he referred to as an archaic piece of legislation. That in so doing, the living conditions of HIV+ Prisoners and prison conditions generally, would be improved.

DW2 was **NYEMBEZI KASALO MALAKATA**, an Environmental Officer who has been working with the Ministry of Health since she qualified in 2004. She is also an authorised officer under the Food and Drugs Act Cap. 95. At the time of giving evidence, she was based at the Lusaka Central Prison Health Centre, having been transferred there in April, 2011. That her duties were to provide for the health of the people including inmates as she analyses foods, water quality and inspects any other issues that affect the environment and human beings. She ensures that all food brought for the inmates is examined and declared fit for consumption before it is allowed to be given to inmates. Whatever she finds unfit she condemns and it is destroyed. She confirmed the environment is not conducive for human habitation as the number of inmates is higher than the available accommodation. This is what results in airborne diseases such as TB. On diet, her evidence was that, she is not an expert on the issue, all she could confirm was that the prisoners were receiving minimum requirements of food with room for extras.

In cross-examination, she said both low and high quality foods are accepted as long as the same was fit for human consumption. She also takes samples to the Public Health analyst whenever she was in doubt. She said she was privy to how food is stored although it was not her duty to ensure safe storage. It was also not her duty to ensure the diet was balanced. She ended her evidence by confirming, that the current detention conditions at Lusaka Central Prison were not fit for human habitation whether one was HIV+ or not.

The last defence witness, **DW3** was a Registered Nurse, **KASAPO SIAME**. It was her evidence that, from January, 2011 she had been working from the Lusaka Central Prison as an extension Officer. She screens patients and sometimes dispenses medicines. It was in the course of such duties that she met the 1st Petitioner with whom she thereafter had personal interactions, as a patient. This was at Kabwata Clinic before Lusaka Central Prison became an ART Centre. It was her testimony, the 1st Petitioner tested positive to HIV on 9th July, 2010 and the file was opened from Kabwata Clinic. After a CD4 count was done on 23rd July, 2010, he was commenced on ARV's. According to DW3, the 1st Petitioner has never missed collecting his ARV's except for 2 occasions when they were collected on his behalf by the Officer-in-Charge, Offender Management. He also never missed his CD4 count during the period he was under her management. That as Sister-in-Charge, she ensured there was a doctor to attend to the inmates who complain of ill heath and Clinical Officers were also available on daily basis. She recalled that the 1st Petitioner had complained of ill health sometime in 2011 but did not know whether he was attended to by a doctor. He was later diagnosed with TB and commenced on treatment. That he had on several occasions complained of feeling unwell and was attended to. She last attended to him when he was transferred to Kabwe Central Hospital. She said the ART Centre at Lusaka Central Prison started dispensing medicine in November, 2010 and the drugs are available all the time. The records show the 1st Petitioner started taking medication with CD4 count of 138 and it increased to 313 up to 394. From there, there was a decline due to opportunistic infections.

In cross-examination, DW3 said the records show the 1st Petitioner started accessing drugs from Lusaka Central Prison from February, 2013. That she was not the only one who was attending to him.

Initially he was taking the drugs every two weeks, this was increased to every month and finally to every three months.

This was the whole evidence led in the matter, after which Counsel for the parties filed written submissions.

In their submissions, Learned Counsel for the Petitioners argued, there are three legal issues requiring resolution by this Court and these are:

(1) **Whether or not the Petitioners had access to adequate nutrition both in quality and quantity whilst incarcerated at Lusaka Central Police Station.**
(2) **Whether or not the Petitioners had access to anti-retroviral treatment (ART) at all times whilst incarcerated at Lusaka Central Prison.**
(3) **Whether or not the cells at Lusaka Central Prison are overcrowded, poorly ventilated and unsanitary.**

Counsel referred to a number of International Instruments, regional treaties to which Zambia is a signatory that provide for the right to life and the right to be free from cruel, inhuman and degrading treatment. Whilst acknowledging the same are not binding on this Court, Counsel argued international guidelines, treaties and decisions of Courts from other jurisdictions do provide useful criteria for Government and Courts to follow in Zambia. He cited the Supreme Court decision in **Attorney General vs Clarke (1) and Sata v Post Newspapers Limited and Another (2)** as authority for the submission.

On the first issue of inadequate food in both quantity and quality his arguments were that, the food provided to the Petitioners was insufficient both in quantity and quality, contrary to the Prison Rules found in the Prison Act 56 of 1966. Counsel referred to the 1st Petitioner's evidence, that he was given two meals a day; maize samp

for breakfast; and thick porridge with beans or kapenta for lunch and; that this food was often rotten or badly cooked. He also noted, the Officer-in-Charge in his evidence confirmed, prisoners are given two meals a day with rice for breakfast and nshima and kapenta or eggs for lunch. Whilst the Environmental Health Officer according to Counsel, further conceded, that this would not constitute a balanced diet.

Taking into account the evidence of Dr Banda (PW2), stressing the importance of adequate nutrition for prisoners on ART in order to strengthen an individual's immune system and slow the progression to HIV. Counsel submitted, that a balanced diet was needed for ART to be effective and a balanced diet can also reduce side effects from ART. That, it is clear two meals a day consisting of porridge, maize samp and beans or kapenta was not a balanced diet and violated the National Aids Policy as well as the UN Minimum Standard Rules for the Treatment of Prisoners. As authority for the submission, he referred to the Prisons Act 56 of 1965 ("Prisons Act") and Rules 17, 47 and 65 of the Prison Rules issued under S. 146 of the Prisons Act. Rule 17 (2) states that:

> **"The officer-in-charge shall ensure that the rations supplied to Prisoners are of good quality and that every prisoner receives the rations to which he is entitled in accordance with the First Schedule....."**

Counsel noted, the first schedule referred to, lists various groups of foods that should be provided to prisoners and the rations for each type of food are in different quantities. He referred to the groups of food listed as part of the ordinary diet and submitted, according to the schedule, one item of each of the groups consisting of carbohydrates, proteins and vitamins, constitutes the daily diet. The Petitioners' contention however, is that their diet falls significantly below the

requirements, contrary to rule 65 which requires that: "(1) the Chief Officer shall be responsible for ensuring that every article of food to the prisoners is sound and of good quality.....; (2) the Chief Officer shall take special care to see that the rations issued to prisoners meets the diet to which he is entitled." Further, that Rule 47 (a) requires the Medical Officer to at least once a month:

> **"inspect every part of the prison and during such inspection, pay special attention to the sanitary state of the prison, the health of the prisoners, and the adequacy and proper cooking of the diets".**

Counsel submitted, the failure to provide Petitioners with a balanced diet contravenes Prison Rules 17(2) and 65 (2). While the failure to address the poor quality of food contravenes Prison Rules 17(1), 47(a) and 65 (1). In extension, that the failure to provide the Petitioners with adequate nutrition in both quantity and quality violates their right to life guaranteed under article 12 (1) of the Constitution which states that:

> **"A person shall not be deprived of his life intentionally except in execution of the sentence of a Court in respect of a criminal offence under the law in force in Zambia of which he has been convicted."**

The Court was urged to interpret the right to life in a generous and purposive manner as it is a fundamental right guaranteed under the Constitution. The case of **Resident Doctors Association of Zambia and Others v Attorney General (2)** was cited as authority where the Supreme Court re-affirmed, that fundamental rights should be given a "generous and purposive construction.....so as to confer on a person the full measure in the enjoyment of the right....." Counsel further referred to numerous decisions from other countries with similar Constitutions to that of Zambia and which have interpreted the right to life broadly. Amongst the cases referred to is the case of **Lantsova v The Russian Federation (3).** According to Counsel, the

HRC in that case interrogated whether there was a violation to the right to life guaranteed under article 6 (1) of the ICCPR when the state failed to provide Lantsova, a pre-trial detainee, with adequate medical attention which then resulted in his death. The HRC noted parag 9.2 stating that, *"it is incumbent on States to ensure the right to life of detainees, and not incumbent on the latter to request protection.....It is up to the State party by organizing its detention facilities to know about the state of health of the detainees as far as may be reasonably expected."*

The case of **Malawi African Association and Others v Mauritania (4),** was also referred to, where the African Commission held that, denying prisoners food and medical attention, among other things, violated the right to life. In that matter, prisoners received a small amount of rice per day. They received no meat, resulting in some dying of malnutrition. Finally, Counsel noted, that the Constitution provides the Court with some guidance on how to assess the scope of the right to life guaranteed under article 12(1). He referred to article 110(1)(d) of the Zambian Constitution which requires that the Directive Principles of State Policy and the Duties of a citizen ("Directive Principles") shall guide the Executive, the Legislature and the Judiciary, as the case may be, in the .....application of the Constitution and any other law."

That in determining the content of the right to life provided for under article 12(1), the Court was urged to look to article 112(d) of the Constitution as states that "the State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities." Counsel again cited a host of foreign decisions to support the submission. Amongst them were the cases of **Tellis and Others v Bombay Municipal Corporation (5) and**

Farooque v Government of Bangladesh and Others (6) where the Bangladesh Supreme Court held that, ' though the directive principles under their Constitution could not be enforced they 'can be seen for interpreting the meaning of the right to life.' The submission on the issue was that, the Petitioners' right to life guaranteed under article 12 (1) of the Constitution was violated when they were denied adequate food in quality and quantity while in prison. Counsel proceeded from that premise and further submitted, the failure to provide the Petitioners with adequate nutrition in both quality and quantity violated their right to be free from inhuman and degrading treatment under article 15 which states that:

> **"no person shall be subjected to torture or to inhuman or degrading punishment or other like treatment."**

Counsel referred to the case of **Munyonsi and Another v Ngalabeka (7)**, in which the Supreme Court found that a Plaintiff who had been detained on two separate occasions, firstly in a filthy cell with a blocked toilet with urine and human excrement on the floor and spent the night standing without any food; and secondly spent three days in the cells and was not given food for three days had been subjected to cruel, inhuman treatment. Counsel acknowledged, that the Supreme Court in *Munyonsi* does not appear to be addressing the article 15 right to be free from inhuman or degrading treatment. He however argued, it was nonetheless its view that detention in such deplorable conditions, constituted inhuman treatment and is relevant in determining the scope of the prohibition against inhuman treatment guaranteed under article 15. A number of foreign decisions were again referred to, in aid of the submissions.

Coming to the second issue, on the lack of access to adequate ART, it was argued the first Petitioner testified, he had trouble obtaining his ART drugs and to havc his CD4 count done regularly. He indicated

there often was no one to accompany him to the clinic to obtain his drugs resulting in him missing doses. Counsel submitted, the evidence of PW2, was that adherence to treatment is critical to the health of a person living with HIV who is required to take the drugs daily, at the same time, as often as prescribed and in the correct dosage. That failure to adhere to treatment can result in the deterioration of an individual's immune system and leave him vulnerable to opportunistic infections.

Finally, on the third issue of poor prison conditions. It is worth noting that, during the hearing when the application to move the Court for a scene visit to the Lusaka Central Prison was made, the Court indicated; the state of prisons countrywide was a notorious fact of which it could take judicial notice. Counsel argued, the question before the Court is whether such conditions, namely overcrowded cells, resulting in Petitioners having to sleep sitting or standing, lack of ventilation and poor sanitary conditions, including unsanitary toilets, constitutes inhuman and degrading treatment. He submitted, that Zambian Courts, international and regional mechanisms and other jurisdictions have addressed similar prison conditions and have found that they do constitute inhuman and degrading treatment. The *Munyonsi* case was cited as authority. Numerous foreign decisions were also referred to.

In response to the Petitioners' claim that a number of their Constitutional rights have been violated by allegedly feeding them on rotten food and preventing them from accessing ART which is a violation of the Petitioners' right to adequate medical and health facilities provided for in Article 112(d) of the Constitution of Zambia. Learned Defence Counsel argued, Article 112 (d) of the Constitution of Zambia falls under what are called the Directive Principles of State

Policy, a part of the Constitution, listing economic, social and cultural rights as expressly non-justiciable. That the case of **Kingaipe and Another v Attorney General (8)** relied on by the Petitioners merely made a broad statement. This was to the effect that, in applying any international instrument, the Court will, or at least should have regard to the relative weight to be attached to the instrument in question. Secondly, that Zambia is a dualist State. A case will probably not be considered if it conflicts with local decisions made by a Court of equal or comparable jurisdiction; and it is in this regard that the case of *Sata v Post Newspapers Limited and Another* which the Petitioners have also relied on becomes instructive.

Coming to the specific issues raised, the general position taken by the Defence was whether the Petitioners' complaints arose from decisions made by the Prison Authorities. On the first issue, concerning the diet, it was observed, the Petitioners have pleaded they are fed on *rotten food* with *foreign materials* which is inconsistent with the Constitution of Zambia (paragraph 24 (a) page 5 of the Petition).

In their written submissions, however, the Petitioners have stated that the food provided to them was insufficient both in quality and quantity contrary to rule 56 of the Prison Rules found in the Prison Act of 1965 (paragraph 5, page 8, Petitioners' submissions). The submissions on the point were that, this is an attempt by the Petitioners to sneak into Court an issue that has not been pleaded and for that reason, should not be entertained. In the alternative, that the Petitioners have not demonstrated to the Court what constitutes *'adequate food'* or *'a balanced diet'*. The Petitioners have consistently in their submissions inter changeably used the phrases *'adequate food'*, *'balanced diet'* and *'adequate nutrition'*, when infact these phrases do not mean the same thing. That neither the expert witness nor the Petitioners placed before Court, a report to show the clinical stages (clinical categories) of

the Petitioners to enable the Court address the caloric requirements for each stage (estimate of K Cals/Kg). The Respondents' witness (Officer-in-Charge) however, in his evidence testified that food is provided to prisoners including the Petitioners. Supplementary food is also provided to them with the support of co-operating partners such as churches. Counsel submitted, there has been no decision to feed prisoners, including the Petitioners rotten food; and that the Petitioners, are not fed on rotten food.

Regarding the second issue on access to health, Defence Counsel referred to evidence before Court, that Lusaka Central Prison is an ART Centre. That the Petitioners and other prisoners on ART have received good quality medical care and have been under regular supervision of medical specialists from the Prison ART Centre. It was submitted, that the Petitioners have misapprehended Article 12(1) of the Constitution which they seek to rely on. That the Petitioners have neither adduced evidence to show that a *decision* was made by the Respondent to *prevent* them from accessing ART nor have they demonstrated before Court that they are prevented from accessing ART.

Finally, on the third issue of overcrowding, where the Petitioners have submitted, that the decision by the Respondent to subject them to inhuman and degrading treatment contrary to Article 15 of the Constitution of Zambia; and asking the Court to take *Judicial Notice* of the prison conditions at Lusaka Central Prison. Defence Counsel submitted, it would be an error in law for this Honourable Court to take judicial notice of the Prison conditions at Lusaka Central Prison and from there, conclude or come to a conclusion that the Petitioners were subjected to inhuman and degrading treatment. They relied for

the submission, on the case of **Van Zyl v The People (1961) ZR 140 (C)** as held that:

> **"Courts are not concerned with conditions prevailing in prisons And other penal institutions except in so far as the question arises whether defendant is a suitable subject for treatment given by a particular institution."**

In concluding her submissions, Learned Counsel for the Respondent urged, the Petitioners have not brought any evidence before Court, that they were fed on rotten food nor have they provided a report to the Court on their clinical categories to determine their caloric requirements. The Petitioners have also failed to rebut evidence before Court that Lusaka Central Prison is infact an ART Centre and the Petitioners are not denied access to ART. There is no evidence before Court, that has been shown by the Petitioners that they are subject to inhuman and degrading treatment. There was also nothing to support their argument that their rights under Articles 15 and 112 (d) of the Constitution of Zambia were infringed. The Court was accordingly, urged to dismiss the Petition with costs to the Respondent.

I have considered the evidence, submissions by learned Counsel on both sides, the law and other authorities to which I was referred, from which I find the material facts of the case are common cause. It is common cause that the Petitioners are Prisoners who are both HIV+ and at the material time were incarcerated in the Lusaka Central Prison. It is also common cause, that there is congestion in the prison in that a holding cell intended to accommodate 15 Prisoners, currently accommodates 75 or more and the whole Prison intended for 160 inmates accommodates over 1,100. Consequently, that there is no space for the Petitioners to lie down and sleep. Hence, they are forced to spend the nights either standing or sitting. As a result of the

congestion, there are difficulties to navigate through the 'packed' humanity to access the inadequate toilet facilities. The Petitioners evidence, there was only one toilet per cell which does not flush; ventilation is also inadequate and the stench from the unsanitary condition of the ablution facilities is unbearable, was not challenged by the Respondent. Neither was the evidence that food availed to the Petitioners is not only insufficient, in that they are fed small quantities twice a day but also lacks in nutritional value as it does not constitute a balanced diet; does not address the specific needs of the Petitioners; and other ailing prisoners who have special needs and for whom a balanced diet, is a must.

The only questions to be resolved as put by the Petitioners themselves are whether: (i) their lives have been safeguarded by ensuring they have access to anti-retroviral treatment (ART) at all times whilst incarcerated? (ii) access to adequate nutrition both in quality and quantity has been provided? (iii) the conditions in which they are detained, constitute inhuman and degrading treatment? Further, the Court also has to decide whether such grievances, if established, are justiciable or not, as correctly pointed out by learned Counsel for the Respondent. I will now proceed to consider these issues in the order in which they have been stated.

Access to anti-retroviral treatment (ART)

The Petitioners evidence on access to ART was that there were inadequate numbers of Prison Warders to undertake the task of escorting them to Kabwata Clinic. Hence, the officers have resorted to unilaterally and arbitrarily, decide who and how many from amongst them, to take to the said Clinic. Those who remained would have their drugs brought by the same Prison Warders while others would not, thereby being made to miss taking the drugs. That failure to attend

the Clinic also resulted in the Petitioners missing the CD4 count, which was supposed to be taken every six months. The question to be answered is whether this evidence has disclosed violation of various International Instruments and /or Covenants on Prisoners health, as argued by the Petitioners.

The fact that several International Instruments address the need for everyone, including prisoners, to have access to health is not one that requires any debate. **The International Covenant on Economic, Social and Cultural Rights** Article 12 for instance, recognises the right of every person to enjoyment of the highest attainable standard of physical and mental health. While Principle 24 of the **Body of Principles for the Protection of all Persons Under Any Form of Detention or Imprisonment** provides that:

> *"A proper medical examination shall be offered to a detained or imprisoned person as promptly as possible after his admission to the place of detention or imprisonment, and thereafter medical care and treatment shall be provided whenever necessary. This care and treatment shall be provided free of charge."*

Further, Principle 9 of the **Basic Principles for the Treatment of Prisoners** states in mandatory terms that, 'prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal status'. **The UN Standard Minimum Rules for the Treatment of Prisoners,** require that, a medical officer should be provided to see all sick prisoners daily and those who complain of illness. The **African Charter** provides for the right to enjoy the best attainable state of health. **The Kampala Declaration on Prison Conditions in Africa** recommendations, among others, are that prisoners should have living conditions which are compatible with human dignity. It also recommends that special attention should be

paid to vulnerable prisoners and that non-governmental organisations ought to be supported in their work with these prisoners.

Zambia is a party to all the cited International Instruments which guarantee a prisoner good medical care and food. However, none of these instruments have been domesticated through incorporation into our national statutes. In dealing with the position of undomesticated International Instruments, the Supreme Court in the case *Attorney General Vs Roy Clarke*, held that:

> **"In applying and construing Zambian statutes, courts of law can take into account international instruments to which Zambia is a signatory. However, these instruments are only of persuasive value, unless they are domesticated in the laws."**

In an earlier case, of **Zambia Sugar PLC v Fellow Nanzaluka (9)** the Supreme Court failed to give effect to the provisions of the International Labour Convention No. 158 of 1982 because it was not domesticated.

The Petitioners complaints on access to ART and other medical examinations incidental to being HIV+ was challenged by the Respondent through the evidence of the Officer-in Charge (DW1). His testimony was that, the Petitioners have always had regular access to ART except for two isolated occasions which were explained as having been triggered by lack of Prison Warders to accompany the prisoners who included the Petitioners, to access their provisions of the drugs from Kabwata Clinic. The Prison authorities feared taking the risk of escorting them without adequate security after three inmates on a previous occasion, took advantage of insufficient manpower and escaped. Further, although there was conflicting evidence on when exactly a clinic was established within the premises of the Prison. The Respondent's own witnesses, DW1 said it was in 2012 while DW3 in

her evidence in chief, said it was in 2010. I have considered that DW3 who did not refer to the records on the point, testified, the 1st Petitioner was being attended to from Kabwata Clinic from where he was diagnosed HIV+ in July 2010. This was contrary to the evidence of DW1 who referred the records and the 1st Petitioner himself. Their evidence was that, the HIV+ diagnosis was made in 2011.

On the evidence, I find the Clinic at Lusaka Central Prison was only established after 2011. I also note that, in cross- examination DW3 conceded the Clinic within the prison was established as an ART Centre in 2012 and since then, it has medical personnel available to inmates at all times. These include a qualified Medical Doctor; Clinical Officers; a Nurse and an HIV Focal Person. As a result, ART drugs are now dispensed from the Prison Clinic and are readily available to the residents including the inmates. This evidence was not challenged by the Petitioners. Neither was DW3's further evidence, the official records show at the time that the 1st Petitioner started taking medication in 2011, his CD4 count was 138, it increased to 313 and further, up to 394. From there, there was a decline due to opportunistic infections, including TB. It was also her evidence, the 1st Petitioner, started accessing drugs from the Lusaka Central Prison ART Centre from February, 2013 and she gave him a three months supply of ART drugs upon being transferred to Kabwe General Hospital.

I find, the said unchallenged evidence establishes that, although access to supply of ART drugs for HIV+ prisoners generally, was originally sourced from outside the prison premises. This resulted in logistical challenges in identifying the best way for ensuring each individual prisoner collected their own supply, personally. Further, that when necessary, they did infact have access to a doctor for review

and for CD4 counts to be taken. As at the date of trial in September, 2013 however, the challenges relating to these issues were resolved when the Lusaka Central Prison Clinic became operational and also became an ART Centre. Consequently, that the complaint relating to access to ART was thereby resolved. I accordingly find, the Petitioners claim that their lives have not been safeguarded by ensuring they have access to anti-retroviral treatment (ART) at all times whilst incarcerated, not established by the evidence led.

I further note in this regard, that the Prisons Act and Rules do infact provide for access to medical care by prisoners. The Prisons Act in section17 states that, the general care of the health of prisoners is reposed in the medical officer who should visit the prison daily where practicable or when called upon by the officer in charge. The Prisons Rules attendant to the Prisons Act, contains provisions which enhance the medical care and the provision of food for prisoners. The medical officer can direct modifications in diet (Rule 40 (1) (e) and report to the officer- in-charge of any sick prisoner with such recommendations as he may think proper, on the supply of additional or alternative food. Rule 24(1) places a duty on the officer in charge of a prison to maintain a prison hospital clinic or sick bay and Rule 44 further provides for a normal hospital diet for prisoners admitted in hospital.

Considering this evidence, I find no basis for declaring that the Petitioners' right to life as guaranteed under the Constitution was threatened by the Respondent's violation of their rights to adequate medical and health facilities as provided for in Articles 112 (d) of the Constitution of Zambia.

Access to adequate nutrition both in quality and quantity

Coming to the second issue, in his evidence, DW1 the Officer-in-Charge of the Lusaka Central Prison was very clear, that the problem

of inadequacy of food was due to the archaic law which has a dietary scale that limits the quantity of food that should be given to prisoners. That this law has never been amended. According to him, exceeding the limits set, to accommodate special needs would invite sanctions against a Prison Officer. His evidence further suggested, there was lack of capacity to provide a balanced diet when he testified that, what is provided for breakfast is maize samp/ rice and lunch consists of nshima with either beans or kapenta. Other food varieties are only given when available and the regular sources are external partners such as NGO's and Faith Based Organisations, in particular the women of Lusaka Parish.

The two issues raised under this head relate to quantity of the food, the quality of the same food and lack of nutritional value. Starting with the quantity of food, Rule 17 of the Prisons Rules addresses this issue in the standard ordinary daily diet for Prisoners which is reproduced herebelow:

(Rule 17)

PRISON RATIONS

PART I

"ORDINARY DIET: DAILY ISSUE

Group A	
Fresh meat	113 grams
or Fresh fish	170 grams
or Dried fish	85 grams
Group B	
Maize meal	454 grams
or Millet meal	454 grams
or Rice (unpolished) (see Note 1)	340 grams
or Bread (see Note 1)	454 grams

Group C

Bread	226 grams
or Porridge, flour and rice (see Note 2)	226 grams

Group D

Protone soup powder	11 grams
or Milk non-fat skimmed	0.2 litres
or non-fat powder	14 grams

Group E

Fresh vegetables	113 grams
or Potatoes or sweet potatoes	226 grams

Group F

Beans or peas	13 grams
or Lentils	113 grams
or Dhal	113 grams
or Groundnuts (see Note 2)	113 grams

Group G

Fresh fruits (in season)	113 grams

Group H

Dripping	28 grams
or Margarine	28 grams
or Vegetable cooking oil	14 grams
or Red palm oil	4 grams

Group I

Salt (iodised if possible)	7 grams

Group J

Sugar	14 grams

Group K

Cocoa	14 grams

Group L

Chillies or peppers	4 grams

One item of each of the above groups to constitute the daily diet."

It is clear from the above daily diet that it conforms with the three main categories of foods required to constitute a balanced diet as testified by the medical doctor, PW2. Foods in Groups A and F are proteins; Groups B and C are carbohydrates while E and G provide vitamins. The quantities however appear to be minimal and I agree with submissions from Learned Counsel for the Petitioners in this regard, that if this diet was followed it would sufficiently, provide for the nutritional value required by the prisoners.

The unchallenged evidence led by the Petitioners however, established that while the prisoners are certainly fed on a breakfast generally, consisting of maize samp; and lunch of nshima with either kapenta or beans. The nutritional values provided by these individual meals only amount to carbohydrates and protein, without any vitamins. PW2 testified, a balanced diet required that each particular meal should have a component of carbohydrates for energy; proteins for body building; and vitamins as protective foods. Further, that the quantity depends on the particular individual's weight and height. Although it is clear that the quantities have limits which may not meet individual requirements. Yet as already discussed, on recommendation of a medical officer, prisoners who are ill may have their diet altered to meet their medical needs (Rule 40 (1) (e). By rule 73, there is an obligation to act on the same when it states in mandatory terms, that: *'The Chief Officer shall carry into effect all written directions of the medical officer respecting alterations in the diet or treatment of any prisoner'*. If this avenue does not address the situation, the individual prisoner is by rule 88 entitled to seek redress by way of an application or complaint. It was not the Petitioners evidence that they did pursue their grievance through this channel.

That position notwithstanding, although the evidence led did not establish that the food on which the Petitioners are fed was as described by themselves, 'rotten.' This evidence still established the daily diet constitutes of samp or rice for breakfast and nshima served with kapenta or beans in afternoon. On the said evidence, I have no difficulty in finding although the daily, dietary schedule of rations provides for a balanced diet; it is the Prison authorities failure to comply with this schedule that has resulted in the Petitioners not being provided with such diet. The real grievance as I understand it however, is that the Petitioners nutritional needs require a special diet to address their particular condition which the State is failing to provide. Consequently that this poses a threat to their lives, thus violating the right to life which is guaranteed in Article 12 (1) of the Constitution.

The question raised here is whether a prisoner can compel the State to enforce these rights. I will return to this issue later.

Inhuman and degrading treatment due to prevailing detention conditions

In support of their allegation they were being subjected to inhuman and degrading treatment, the Petitioners relied on the conditions of the detention facilities and highlighted overcrowding as the main contributing factor. Common cause evidence was that, a Cell intended for 15 prisoners with one toilet was being used by over 75 prisoners, the toilets do not flush and due to congestion, the facilities are inaccessible at night. I accept that such conditions are certainly fertile ground for contracting of opportunistic communicable diseases, which the Petitioners contended by reason of their HIV+ status, was compromising their immune systems, further. In this regard the 1st

Petitioner referred to having contracted TB, a position confirmed by DW3, in her evidence.

On overcrowding, the 1st Petitioner's evidence that the congestion was such that it is not possible to lie down and sleep and the prisoners were compelled to sleep in a standing or sitting position was not challenged by the Respondents. Neither was the further evidence, that the ablution facilities are inadequate. Due to the large number of inmates, ablutions were performed without any privacy and this congestion also led to unsanitary conditions, resulting in an unbearable heavy stench. This situation is further compounded by inadequate natural ventilation, contrary to the Prison Rules requiring that there be sufficient natural light and flow of air in detention facilities. In reaction to these allegations the Respondent through the evidence of DW1, did not deny the same but merely explained the only solution was to construct new holding facilities. That this would reduce the congestion which apparently, was identified as the main cause of the conditions complained of by the Petitioners as earlier highlighted. I again find the evidence overwhelmingly in support of the conditions complained of by the Petitioners. I find for one to be subjected to such conditions certainly constitutes inhuman and degrading treatment, within the meaning of Article 15 of the Constitution of Zambia which guarantees the protection of any persons from being subjected to such treatment.

Whether reliefs sought by the Petitioners are justiciable

This brings us to the question whether the allegations that have been established are justiciable. Put simply, can a prisoner enforce these rights through the courts, for the State's failure to provide them?

In urging the Court to find in the affirmative, Learned Counsel for the Petitioners relied on the Directive Principles of State Policy contained in the Constitution, under Article 112(d) which provide that:

> **"The State shall endeavour to provide clean and safe water, adequate medical and health facilities and decent shelter for all persons, and take measures to constantly improve such facilities and amenities."**(underlining for emphasis mine)

Counsel implored the Court to apply a very broad purposive construction of the right to life; and find that lack of a balanced diet in HIV+ persons; access to health facilities; and subjection to unsanitary detention conditions; should constitute a life threatening situation.

It cannot be disputed that an HIV prisoner like any other HIV patient, requires special diet to assist him in his recovery. But such needs must however, be balanced against the needs of other patients other than prisoners, who may also require special diet and other medical needs.

The issue whether failure to provide access to health for prisoners is justiciable was considered in the English case of **Airedale NHS Trust v Bland (10)** and the Court of Appeal came to the conclusion that:

> ***".....while the prohibition on violation is absolute, the duty to provide care is restricted to what one can reasonably provide. No one is under a moral duty to do more than he can, or to assist one patient at the cost of neglecting another. The resources of the National Health Service are not limitless and choices have to be made."***

The South African Constitutional Court also had occasion to consider the issue in the case of **B and Others v Minister of Correctional Services (10).** This case was quoted by the High Court of Botswana in **Tapela and Others v Attorney-General and Others (11),** which concerned HIV+ prisoners who sought a declaration that while in the

custody and control of the respondents, they had the right to proper and adequate medical attention, care and treatment violated on the grounds of their HIV+ status. The Court had occasion to consider an aspect of financial constraints by the State to provide the inmates with adequate medical treatment. The words of the Learned Judge in conclusion were as follows:

> *"In principle, I agree with Mr. Seligson submission that lack of funds cannot be an answer to a prisoners' constitutional claim to adequate medical treatment. Therefore, once it is established that anything less than a particular form of medical treatment would not be adequate, the prisoner has a constitutional right to that form of medical treatment and it would be no defence for the prison authorities that they cannot afford to provide that form of medical treatment. I do not, however agree with the proposition that financial conditions and budgetary constraints are irrelevant in the present context. What is adequate medical treatment cannot be determined in vacuo. In determining what is "adequate", regard must be had to inter alia, what the State can afford. If the prison authorities should, therefore, make out a case that as a result of budgetary constraints, they cannot afford a particular form of medical treatment or that the provision of such medical treatment would place an unwanted burden on the State the court may very well decide that the less effective medical treatment which is affordable to the State must in the circumstances be accepted as "sufficient or "adequate."* (underlining for emphasis mine)

The above conclusion was drawn against a background where medical rights are specifically guaranteed by the Constitution of South Africa, including the prisoners' right to adequate medical treatment. The effect of the decision was that, where an aggrieved prisoner sought redress from the court to enforce his constitutional right to adequate medical care. The court would however, still take into consideration budgetary constraints faced by the State before granting the relief sought. As already pointed out, the Constitutional of Zambia has no provision guaranteeing the citizens adequate medical treatment, but only Directive Principles of State Policy contained under Article 112(d). This Article merely directs what government policy should address on such issues as social, cultural and economic rights of citizens but

does not oblige the State to provide the same. Nor entitle an aggrieved person to seek legal redress for any violation of such rights.

In the premises, it would appear that although the State has a duty to provide adequate medical care and food to prisoners in general, it has no obligation to provide a special diet to particular patients such as HIV+ prisoners, to assist them in their recovery. Such patients are currently, left at the mercy of other stake holders like NGO's; faith based organisations or charitable associations.

In the event, I must come to the inevitable conclusion, that although the claims relating to lack of balanced diet; degrading and inhuman treatment have been proved, they are however, not justiciable under the provisions of the Constitution Article 112 (d), on which they were grounded.

As the case raised Constitutional issues, I find an appropriate order in the circumstances, is for each party to bear own costs of the action and I so order.

Leave to appeal is granted.

J.K. K A B U K A

JUDGE