IN THE HIGH COURT OF BOTSWANA HELD AT GABORONE

MAHGB-000057-14

In the matter between:

Dickson Tapela	1st Applicant
Mbuso Piye	2nd Applicant
Botswana Network on Ethics, Law on HIV/AIDS	3rd Applicant

and

Attorney General	1st Respondent
The Permanent Secretary, Ministry of Health	2nd Respondent
The Permanent Secretary, Ministry of Justice, Defence and Security	3rd Respondent

Advocates Gilbert Marcus SC, I. Goodman
(with Attorneys T. Rantao and T. Gaongalelwe) for the Applicants

Attorney Moloise (with him Attorney Ms Y. Sharp) for the Respondents

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J U D G M E N T

SECHELE J.

1. The 1st and 2nd Applicants both Zimbabwean nationals, are serving prisoners at Central Prison, Gaborone, pursuant to convictions entered against them in 2007. They are both HIV positive. The third applicant is a non governmental Organization advocating for the rights of people living with HIV/AIDS and other marginalized groups. Following the roll out of Highly Active Antiretroviral Therapy (HAART)

to citizen inmates and which therapy excluded them, the applicants brought a constitutional challenge, seeking a review of the decision to so exclude them from treatment. They also sought a declarator against the Respondents on grounds that the refusal to include them in the antiretroviral therapy roll out is violative of their constitutional rights, in particular, the right to life as guaranteed by Section 4 of the Constitution, the right not to be subjected to inhuman and degrading treatment under section 7 and the right to non discrimination under Section 3 and 15. They contend further that the refusal aforesaid runs counter to the letter and spirit of the national policy on HIV and AIDS as well as the respondents' duty to provide health care services to inmates. The applicants also seek, to the extent necessary, an order declaring Presidential Directive No. Cab 5(b) of 2004 unconstitutional, unlawful and invalid to the extent that it denies them and other non citizen inmates access to and enrolment on HAART.

2. At the hearing of this application the respondents took several legal points *in limine* and on the basis thereof, sought an outright dismissal of this application. The Respondents, in a nutshell, contended that:

(i) There was no compliance with the provisions of section 4 of the State Proceedings Act requiring service of a statutory notice prior to the institution of these proceedings.

(ii) The application, being a review, in terms of Order 61 of the Rules should have been brought within 4 months from the date on which the impugned decision was taken and that the aforesaid period having elapsed, this application could only be brought with leave of court. The respondents contended further and in the alternative that the application is non compliant with the provisions of Order 70 of the rules of court and therefore fatally defective.

(iii) That the Applicant's purported amendment of their notice of motion without leave of court or respondent's consent was of no force and effect.

(iv) That the application, to the extent that it sought under paragraphs 7 and 8 of the notice of motion, specific performance against the Respondents was in contravention of the provisions of section 9 of the State Proceedings Act and therefore incompetent.

(v) That to the extent that the applicants seek to invite this court to review a decision of the President, the application is

in contravention of the doctrine of separation of powers and therefore incompetent.

3. The applicants, in reaction, contended that the above points were not only unmeritorious but high handed. They contended that the State in matters where a constitutional challenge is raised, must facilitate rather than frustrate the ventilation of issues. They relied, for this proposition, on the decision of the constitutional court of South Africa in **Mohammed and Another v. The President of the Republic of South Africa and Others (Society for the abolition of the Death Penalty in South Africa and Another. 2001(3) SA 893 at page 921** wherein the court quoted with approval the words of Justice Brandeis in Olmstead *et al* v. **United States 277 US 438 (1928) at 485**:

> "In a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously. Government is the potent omnipresent teacher. For good or for ill, it teaches the whole people by its example...If the government becomes a law breaker, it breeds contempt for the law, it invites every man to become a law unto himself; it invites anarchy."

4. The Applicant contended further that the points were, in any case, not competently raised in terms of the provisions of Order 33 of the Rules of court which provides;

> " (1) Any party to any cause in which an irregular or improper step in proceeding has been taken by any party may apply to the judge to set it aside:

"Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall be entitled to make such application.

(2) Application in terms of rule 1 shall be on notice to all parties *mutatis mutandis* as provide for in rule 18(1) of Order 20"

5. I will, without further ado, proceed to deal with these points:

Non compliance with the provisions of Order 32 of the Rules of court.

The applicants' notice of motion dated 3rd February 2014 made incorrect references to the parties involved. At paragraph 2, for example, the Notice of Motion makes reference to the 3rd applicant when such should have been the 1st applicant. This error is repeated at paragraphs 3 and 4 of the Notice of Motion. The applicants no doubt picked this error soon after filing their papers and on 7th February 2014 filed an amended Notice of Motion. The respondents' gripe with this is that the applicant did not, before filing such an amended notice of motion, seek their consent or failing such consent, seek leave of court. The applicants were also duty bound, so argue the respondents, to either file an amended statutory notice or a fresh one altogether.

6. Order 32 (1) of the rules of court provides as follows:

"Failing consent by all parties, the judge may, at any stage of the proceedings, on application allow either party to alter or amend

his pleadings, in such manner and on such terms as may be just and all such amendments shall be made as may be necessary for purposes of determining the real question in controversy between the parties."

7. The amendment *albeit* done in contravention of the provisions of Order 32 aforesaid, was of a cosmetic nature. It was a mere correction of the description of the parties and was necessary for purposes of determining the real question in controversy between the parties. This amendment was effected immediately after the papers were filed and it is highly unlikely that the Respondents had by that time taken any steps in their defence which could but for the amendment, have been different from the one that they subsequently filed. This amendment did not prejudice the respondents in any manner whatsoever. Rules of court, it must be noted are not a snare waiting to catch the unwary but are intended to ensure that the field of litigation is level for all. The courts, in their endeavor to achieve this purpose will not sacrifice substance over form especially in those cases like the present, where no demonstrable prejudice has been shown. In **Moolman v. Estate Moolman 1927 CPD 27 the court held at page 29:**

> "... the practical rule seems to be that amendments will always be allowed unless the application to amend is *malafide* or unless such amendment would cause an injustice to the other side which cannot be compensated by costs; in other words, unless the parties cannot be put back for purposes of injustice in the same position as they were when the pleadings which it is sought to amend were filed."

8. Intertwined with the respondent's complaints on applicant's amendment without consent or leave of court, is the Statutory Notice Complaint. The respondent's complaint herein is that an Amended Statutory Notice or indeed a fresh one altogether should have been issued with the Amended Notice of Motion. It is not always necessary that each time there is an amendment of the Notice of Motion this is to be followed by either an Amended Statutory Notice or a fresh one. Whether or not this is to be will depend on the nature and substance of the amendment. A cosmetic amendment of the nature under reference did not, in my view require the drastic measures insisted upon by the respondents. A statutory notice, it must be noted, is not a pleading *perse* but a notification of a complaint yet to be filed. It gives an overview of the general tenure of the complaint such that the State appreciates and anticipates the gist thereof. The substance of the notice remained intact despite the amendment. These two points are unmeritorious and must fail. The amendments will therefore stand.

9. ***Review application out of time***

Order 61 (8) of the Rules of Court provides:

> "Except with leave of the judge on good cause shown no application for review shall be brought later than four

months after the handing down of the decision or conclusion of the proceedings complained of."

10. The respondent's contention is that the instant application is a review application in terms of Order 61(1) of the rules of this court and should have been brought within the requisite period of four months. The applicants, according to the respondents, are out of time and should have sought leave of court before their application could be entertained. Their cause of action, according to the Respondents, arose in 2007 when the applicants were first refused treatment. What however transpired in 2007 is this:

The 1st and 2nd applicants were diagnosed with HIV whilst in prison. In order to determine whether or not they were to be enrolled on HAART their viral load and CD4 count had to be assessed. They were refused such assessment on grounds that they were non citizens. The applicants then embarked on a campaign to seek assistance from the 3rd applicant and it was not until 2010 that the 3rd applicant came to their rescue by financing the assessment of their viral load. The assessment revealed that the applicants were overdue for HAART enrolment. Following the publication of the HIV/AIDS policy on 9th August 2013 the 1st and 2nd applicants formally requested to be enrolled on HAART failing

which they will launch this application. It was this refusal (by inaction) that became the subject matter of this review application. It is against the above background that the respondent's contention that the application is out of time is to be determined.

11. The four months period envisaged by Order 61(8) of the rules must, in my view be reckoned not from 2007 but from the date on which the applicants first made the request post the HIV/AIDS policy adoption and this is from 29th August 2013. The aforesaid period of four months period could have elapsed on 29th December 2013 but for the court vacation that commenced on 15th December 2013. The computation of the four months period will therefore exclude the period between 15th December 2013 to 31st January 2014. This is in terms of the provisions of Order 77 (4) as read with Order 77(2)(i) of the rules of court. Order 77 (4) aforesaid provides:

> "Unless with leave of the judge or with consent of all the parties to the action, the period of the court vacation commencing on 15th December shall be excluded in reckoning any period prescribed by these rules or by any order or direction for serving, filing or amending any pleading."

Order 77(2)(i) for its part provides as follows:

> "Where there is reference to a period of time consisting of a number of months after or before a specified day, the number of months shall be counted from, but not so as to include the month in which the specified day falls, and the period shall be reckoned as being limited by and including____.

(i) The day immediately after or before the specified day, according as the period follows or precedes the specified day, and

(ii) The day in the last month so counted having the same calendar number as the specified day, but if such last month has no day with the same calendar number, the last day of the month."

12. In terms of the above rules the period of four months must be reckoned from September 2013 but excluding the period between 15th December 2013 to 31st January 2014. The application was filed on 3rd February 2014 which was well within the four months period prescribed by Order 61 (8) of the rules. This point, therefore, ought to fail. It is for the reasons set out above, dismissed.

13. **Specific performance against the State**

The applicants have at paragraphs 7 and 8 of their notice of motion sought an order compelling the 2nd and 3rd respondents to provide them and other non citizen inmates with HAART. The respondents have however contended that the orders sought are in the nature of specific performance which is contrary to the provisions of section 9 of the State proceedings Act [Cap 10:01] of Laws of Botswana.

14. Section 9 of the State Proceedings Act aforesaid provides as follows:

"(1) Nothing contained in this Act shall be construed as authorizing the grant of relief by way of interdict or specific performance against the government, but in lieu thereof the court may make an order declaratory of the rights of the parties.

(2) The court shall not in any action grant any interdict or make any order against a public officer if the effect of granting the interdict or making the order would be to give any relief against the government which could not have been obtained in any action against the government.

15. In **Medical Rescue International Botswana Ltd v. The Attorney General and Others [2006] 1 BLR 516 (CA)** the Court of Appeal had occasion to interpret the provisions of section 9 of the State Proceedings Act (supra). The court held at page 528 E – F:

> "In respect of the interdict argument, therefore, this court holds that it is competent for a court to grant an interim interdict to maintain a status quo pending the determination of an application for judicial review of administrative proceedings and that the provisions of section 9 of the State Proceedings Act does not prevent this."

16. Similarly in **Patson v. The AG [2008] 2 BLR 66** Kirby J (as he then was) stated at page 79 F – G that:

> "I can see no logical reason why Mandamus should not lie against a minister or an official in respect of the improper use of or the failure to use a prerogative or common law power affecting the rights of a citizen. Of course this logic would apply only to those exercises of prerogative power which as stated in the CCSU case, have now become largely administrative in nature such as the issue of passports, and not where high policy is involved."

17. The 1st and 2nd Applicants want this court to order the respondents to enroll them on HAART forthwith. The question that then arises for the court's determination is whether or not the enrolment on HAART is an administrative exercise of prerogative power and not a matter of the high policy envisaged by the Patson case (supra).

18. The presidential directive on the basis of which the 1st and 2nd Applicants were excluded from HAART is not before me. What has been produced is a Savingram from the 2nd Respondent confirming the approval of free treatment to non citizen prisoners suffering from ailments other than AIDS. Dispensing medicinal drugs (or the withholding thereof) is an administrative matter and cannot, by any stretch of imagination be classified as a matter of high policy exclusive to the executive. Specific performance is, in such circumstances grantable. This, I believe, also takes care of the respondent's argument on separation of powers. These two points therefore also fail.

Order 70 argument

The respondents contended under this head, that the applicants should have proceeded under the provisions of Order 70 and not Order 61 of the rules. Order 70, it will be noted is tailor made to

accommodate applications for redress in terms of section 18 of the constitution. It provides under Rule 1:

> "An application by any person for redress in terms of subsection (1) of Section 18 of the Constitution of Botswana shall be by way of Notice of Motion calling upon the party or parties, against whom redress is sought, to show cause why an order in terms of a draft (to be attached to the notice of motion) should not be granted."

19. Save to concede that the application makes no mention of the provisions of Order 70 aforesaid, the substance, not the form, of the application should be the primary determinant.

> See; **Prinsloo vs Johannesburg City Council 1969 (2) SA 355**.

20. It is to me neither here nor there that the application did not make specific reference to the provisions of Order 70. In this regard Order 5 of the rules is of moment. It provides:

> "(1) subject to rule 2, non compliance with any of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void unless the Judge so directs, but the proceedings may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and on such terms as the Judge may think fit.
>
> (2) No proceedings shall be void or be rendered void or wholly set aside under Rule 1, or otherwise by

reason only of the fact that the proceedings were begun by means other than those required in the case of the proceedings in question by any provision of these rules."

20. The above order goes on to provide under rule 3 (1) that applications to set aside proceedings for irregularity be brought in terms of Order 33(1) with 10 days notice to the opposite party to remove causes of complaint. Order 33(1) which I have dealt with earlier in this judgment is intended to minimize delays as well as save costs. Through the procedure set out there under, a party will be made aware at the earliest possible opportunity of the objections to his papers so that he can advise himself accordingly. All the points raised by the respondents, save perhaps the one on separation of powers, were good candidates for the Order 33(1) procedure. The objection promotes form over substance and is for that reason dismissed. I must also state for the record that constitutional challenges are matters of grave importance and this court will be less inclined in matters such as this to lay undue emphasis on technical inelegance, for a party who seeks shelter under the sanctuary of the constitution should not lightly be turned away.

21. **The merits**

The factual background to this matter has been set out earlier in this judgment. On the papers before me as well as the arguments advanced in motivation thereof, the following are common cause.

1. That the applicants and other prison inmates who are not citizens of Botswana are excluded from HAART therapy while their counterparts who are citizens of Botswana are enrolled thereon.

2. That such exclusion is discriminatory of the applicants and other inmates who are non citizens.

22. The crisp issue that arises for my determination, therefore, is whether or not this exclusion is reasonably justifiable in a democratic society and or in the public interest.

23. The applicants have sought shelter under certain provisions of the Constitution of Botswana, notably sections 4, 7 and 15 thereof. Section 4 guarantees the right to life. Section 7 guarantees the right not to be subjected to torture or inhuman and degrading punishment while section 15 guarantees non discrimination on grounds *inter alia*, of one's place of origin.

24. The exclusion that has formed the subject matter of these proceedings is contained in the 2nd Respondent's savingram of 26th

March 2004 and which savingram has its genesis in the presidential directive Cab 5 (b) of 2004. This directive is said to have approved the provision of free treatment to non citizen inmates suffering from ailments other than AIDS but despite its cardinal importance, the directive has not been placed before me. What has been presented instead is a savingram from the 2nd Respondent which sought to disseminate to the addressees thereof the contents of the directive in so far the issue of payment for medical services by non citizens was concerned. The savingram, to the extent relevant, provides:

> **"PROPOSED CHANGES TO PRESIDENTIAL DIRECTIVE CAB LS/C 2002 ON THE PAYMENT FOR MEDICAL SERVICES BY NON CITIZENS**

25. Addressees are hereby informed that the following have been approved through Presidential Directive Cab 5 (b) of 2004.

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

26. The wording of the Savingram has been the source of intense debate before me. Taken literally the Savingram can be interpreted to mean that non citizen inmates are entitled to free medical

treatment for ailments other than AIDS. AIDS on the other hand is not an ailment but a conglomeration of different ailment (called opportunistic infections) that descend on an HIV infected person whose immunity has been compromised thereby.

See; **Expert Affidavit at paragraph 16.**

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

savingram intended to exclude HIV related ailments from its operation the savingram will still suffer another handicap. AIDS, according to the applicants' expert is not a specific disease but a manifestation of opportunistic infections (OIS).

Ref. Paragraph 19 of the Expert's affidavit.

28. The respondents, by applicants' own admission are treating these but have withheld the more potent HAART from them while providing it to citizen inmates. HAART according to the applicant's expert not only keeps HIV mutation in check but drastically reduces the recurrence of opportunistic infections in HIV positive people. The withholding of HAART from the applicants will enable their HIV to replicate and thereby relegate them to the terminal stage known as AIDS. To this end, HAART is not only a medical necessity but a life saving therapy the withholding of which will take away a constitutionally guaranteed right to life. The applicants, it must be noted have had their liberty curtailed pursuant to a sentence of a court of law. The residuum of their rights under the Constitution of Botswana, however, remains intact and so are their rights under the Prisons Act. Two cases,

both cited by the applicants are particularly apposite in this regard:

29. In **Estell v. Gamble 429 U.S. 97** Marshall J. who was seized with a case in which an inmate of the Texas Department of Corrections who had suffered injury in the course of Prison Work and subsequently complained that he had been subjected to cruel and unusual punishment in breach of the Eighth Amendment of the American Constitution, stated after citing several authorities:

> "These elementary principles establish the government's obligation to provide medical care for those whom it is punishing. An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met. In the worst cases, such failure may actually produce physical torture or a lingering death. In Kemler, supra, the evils of most immediate concern to the drafters of the amendment. In less serious cases, denial of medical case may result in pain and suffering which no one suggests would serve any penological purpose. The infliction of such unnecessary suffering is inconsistent with contemporary standards of decency as manifested in modern legislation codifying the common law view that it is but just that the public be required to care for the prisoner, who cannot by reason of the deprivation of his liberty, care for himself.... We therefore conclude that the deliberate indifference to serious medical needs of prisoners constitute the unnecessary and wanton infliction of pain proscribed by the eighth amendment. This is true whether the indifference is manifested by prison doctors in their response to prisoners' needs or by prison guards intentionally denying or delaying access
>
> to medical care or intentionally interfering with the treatment once prescribed."

30. Nearer home in B and Others v. Minister of Correctional Services and Others High Court Cape of GoodHope Provincial Division 1997(6) BCLR 789 (c) the court had occasion to deal with a case wherein the inmates of Pollsmoor Prison in Cape Town sought a declarator on terms, inter alia, that they and other HIV positive prisoners while in custody and control of the respondents have a right to proper and adequate medical attention, care and treatment on the grounds of their HIV status. In the course of its judgment the Court stated at paragraph 49:

> "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 a lia*, 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." After all, as was pointed out by Mr Scholtz, section 35(2)(e) of the Constitution does not provide for "Optimal Medical Treatment" or the best available medical treatment." But only for "adequate medical treatment."

31. Section 56 of the Prisons Act [Cap 21:03] or Laws of Botswana provides for the appointment of a medical officer responsible for every prison. Such medical officer is responsible for the health of all prisoners in the facility under his supervision and is expected to tender reports both to the officer in charge of the prison and to the permanent Secretary in the Ministry of Health about "circumstances connected with the prison or the treatment of prisoners which at anytime appear to him to require consideration on health or medical grounds."

32. The respondents have, despite the cardinal importance of the medical officer's input not availed to the court any information about his findings on the circumstances connected with the treatment of the applicants and neither have they presented to the court any information that could, on a balance of probabilities, support their argument to the effect that the provision of HAART to non citizen inmates will place an undue strain on their budget. Singularly lacking is also any information on the number of none citizen inmates that require HAART enrolment and the costs

associated with such enrolment. Also lacking is any information that could at the very least juxtapose the costs of providing HAART to that of treating recurrent opportunistic infections on non citizen inmates. The closest the respondents have come to addressing

this is at paragraph 25 of Dr Seipone's answering affidavit wherein she states:

> ".....the Directive was motivated by matter of national policy and national interest. Amongst those is lack of financial resources to which, by now, so much has been spoken. ARVs are an extremely expensive treatment to which the government of Botswana despite being subsides (sic) still needs the assistance of foreign aid in to acquire. Because of this financial constraint, as already mentioned the government is unable to adequately cater for the provision of this treatment to all its affected citizens. Currently the most serious conditions are being treated and when ideally the treatment should be afforded to all affected persons. To provide the same to foreign residents let alone those convicted of a criminal element would result in a perception of irresponsibility towards its citizens."

32. This statement speaks volumes. Firstly the respondents decry government's lack of financial resources and secondly, they raise a moral argument to the effect that the applicants are convicted criminals who should not, in any case, benefit from their crime by the provisions of HAART at the expense of the very people whom they have wronged. This latter argument however loses sight of the fact that incarceration and deprivation of liberty is all that was substracted from the constitutional rights of these people.

Punishment in the form of imprisonment equalizes all inmates regardless of their status and place of origin.

33. It is impermissible for the respondents to indirectly extend the limits of punishment by withholding certain services to which inmates are lawfully entitled on account of their status as "convicted non citizen inmates." The position espoused by the respondents also cast doubt on the *bonafides* of their claim that it is rather through lack of resources that they are unable to provide HAART to non citizen inmates. To wrap up on this point, the deprivation of life saving HAART to the 1st and 2nd applicants, and indeed to other non citizen inmates run counter to the letter and spirit of section 4 of the constitution of Botswana and is unlawful. Before I conclude however, I need to address the respondent's argument to the effect that it is justifiable for them to discriminate against the applicants and that what they term "positive" discrimination is sanctioned by section 15(4) (b) of the Constitution of Botswana. Section 15 provides as follows:

> " (1) Subject to the provisions of subsection (4), (5) and (7) of this section, no law shall make my provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to the provisions of subsection (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) .....
>
> (4) Subsection(1) of the section shall not apply to any law so far as that law makes provision
>
> (a) .....

(b) With respect to person who are not citizens of Botswana
(c) .....
(d) .....
(e) Whereby persons of any such description as is mentioned in subsection (3) of this action may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to the nature and special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society."

34. The exclusion of non citizen inmates from HAART therapy can only be justified if it is reasonably justifiable in a democratic society and in the public interest. The following statement by the Court of Appeal in **Unity Dow v. The Attorney General 1992 BLR 119 at page 154 D – E** holds good to this day.

> ".....Botswana is a member of the community of civilized 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."

35. In this regard the following Articles of the African Charter on Human and People's rights are of moment: Article 1 therefore provides that:

"The member states of the Organization of African Unity parties to the present charter shall recognize the rights, duties and freedoms enshrined in this charter and shall undertake to adopt legislative or other measures to give effect to them."

36. Article 2 for its part provides as follows:

"Every individual shall be entitled to the enjoyment of the rights and freedom recognized and guaranteed in the present charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status."

37. Lastly, Article 16 of the same charter provides that:

"states parties to the present charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

38. While the above charter has no force of law in Botswana it is nevertheless an international obligation that this country has undertaken and subject to which its laws must measure up.

39. According to the applicant's expert the withholding of HAART makes HIV positive inmates more vulnerable to opportunistic infections including tuberculosis which according to him is the leading cause of death in people living with HIV.

See; Paragraphs 41 and 42 of Willem Daniel Francois Venter's affidavit.

40. Pulmonary T B according to this expert spreads though transmission of airborne droplets which may linger in the air for quite some time when indoors where there is little sunlight. The denial of HAART to HIV positive inmates not only exposes them to premature death but increases the likelihood of HIV transmission as well as other life threatening contagious infections like tuberculosis to other inmates regardless of their HIV status and one may add, nationality.

41. Against the above background, a catch 22 situation arises. The non treatment of non citizen inmates poses a danger to the very citizen inmates the respondents have tried so hard to protect. Upon contracting these opportunistic infections the costs of treatment, needless to say, will be escalated. It can never be in the public interest nor can it ever be reasonably justifiable in a democratic society like ours, that the provision of life saving medication like HAART is withheld with the ultimate result that the group of people so deprived become more infections to others or die in our hands. Section 57(1) of the Prisons Act (supra) clearly imposes a duty on a medical officer assigned to any particular prison not only to take measures to restore the health of prisoners under his care but also to prevent the spread of disease.

42. The actions of the respondents in so far as they deny the 1st and 2nd Applicants and other non citizen inmates access to HAART enrolment are unlawful.

43. I will in the circumstances make the following orders:

a) The decision of the 2nd respondent (or anyone acting under his authority) to refuse to provide the 1st and 2nd applicants with access to and /or enrolment on Highly Active Retroviral Treatment (HAART) is hereby set aside and declared invalid.

b) The refusal to provide HAART to the 1st and 2nd applicants is violative of their rights as enshrined under section 3,4,7 and 15 of the Constitution of Botswana.

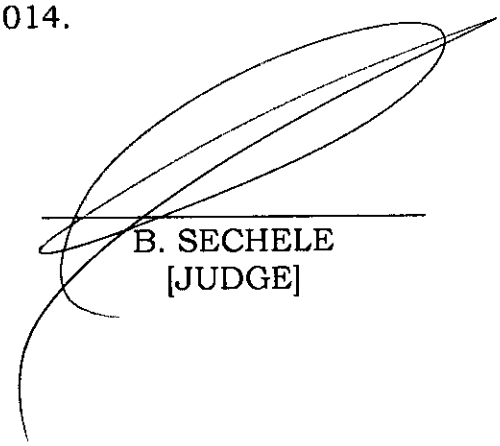
c) The refusal to provide HAART to the 1st and 2nd applicants is in breach of the duty owned to them by the respondents, to be provided with basic health care services.

d) The 2nd Respondent's savingram dated 26th March 2004 is to the extent that it seeks to exclude the 1st and 2nd applicants from HAART enrolment is irrational and invalid.

e) The respondents shall enroll the 1st and 2nd Applicants and other non citizen inmates whose CD4 cell counts has reached the threshold for HAART enrolment under the treatment guidelines on HAART.

f) That the respondents bear the costs of this application and which costs are to include the costs of two counsel.

DELIVERED IN OPEN COURT AT GABORONE ON THE 22ND DAY OF AUGUST 2014.



B. SECHELE
[JUDGE]

Rantao Kewagamang Attorneys for the Applicants
Attorney General for the Respondents