IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA

HELD AT GABORONE

CASE NO: CACGB-096-14

MAHGB-000057-14

In the matter between:

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

and

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

RESPONDENTS' HEADS OF ARGUMENT

TABLE OF CONTENTS

INTRODUCTION

1. This issue at the heart of this case is the health and well-being of foreign prisoners incarcerated in prisons in Botswana. It concerns the refusal by the State to provide life-saving medication to HIV-positive prisoners, on the sole basis that they are foreigners.

2. The State appeals against a decision of the Gaborone High Court in which it declared unlawful, unconstitutional and invalid a decision refusing the first and second respondents Highly Active Antiretroviral Treatment ("HAART"). The appellants were ordered to enrol on HAART the first and second respondents and all other non-citizen inmates who meet the treatment criteria. The appellants were further ordered to bear the costs of the application, including the costs of two counsel.

3. The notice of appeal states that the appeal lies against the "*entire decision*" of the High Court. However, it goes on to stipulate very narrow grounds of appeal. In terms of Rules 18(1) to (4) of the Court of Appeal Rules,[1] all grounds of appeal must be clearly stated under distinct heads. The appellants ought therefore to be held to the narrow grounds stipulated in their notice of appeal. We advance the argument below without prejudice to that submission.

4. We note, moreover, that the appellants have abandoned the technical, *in limine* objections that they advanced in the High Court, and which they purported to persist with in their notice of appeal. We consequently do not address those points in these submissions.

[1] Cap 04:01.

THE FACTS

5. The crisp issue for determination in this case is whether the exclusion of HIV-positive foreign inmates from enrolment on anti-retroviral treatment is lawful and constitutional.[2]

6. In all material respects, the facts giving rise to this matter are uncontested on the papers. They are as follows.

7. The first and second respondents, Mr Tapela and Mr Piye, are Zimbabwean nationals who were serving prison sentences in Gaborone Central Prison.[3] Both of them were diagnosed with HIV while in prison.

8. HIV is a retro-virus that compromises the immune system of infected persons.[4] It uses the cells of an infected person to reproduce, and HIV then spreads throughout the body, infecting other cells – particularly CD4 cells, which perform a critical role in the co-ordination of the immune system.[5] If HIV is left untreated, the infection progresses and the immune system deteriorates, rendering the body more susceptible to opportunistic infections ("OIs").[6] The manifestation of OIs leads to what is clinically described as AIDS (Acquired Immune Deficiency Syndrome).[7] AIDS is a fatal condition marked by a series of OIs that lead, in time, to the deterioration of the immune system and premature death.[8]

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[2] High Court judgment vol. 1 p 21 para 22.
[3] FA vol. 1 p 55 para 7-8; Piye affidavit vol. 3 p 675 para 1. These allegations are admitted in the AA vol. 3 p 732 para 11.
[4] Expert affidavit vol. 2 p 300 para 15-16. The appellants did not respond to the expert affidavit at all, let alone dispute its contents.
[5] Expert affidavit vol. 2 p 300 para 15.
[6] Expert affidavit vol. 2 p 300 para 16; BONELA affidavit vol.3 p 644 para 13.
[7] Expert affidavit vol.2 p 301 para 19.
[8] Expert affidavit vol.2 p 300 para 16.

9. There is no known cure for HIV or AIDS. Combinations of anti-retroviral medications ("ARVs") are, however, clinically proven in their effect to supress the replication of HIV, and thus to improve life expectancy.[9] The use of a combination of ARVs, known as HAART, substantially reduces the incidence of OIs and results in significant reductions in morbidity and mortality rates of HIV-positive persons.[10] Without access to HAART, HIV inevitably progresses to AIDS and causes death.[11]

10. A CD4 count is generally used, both internationally[12] and in Botswana,[13] to determine when an HIV-positive person should start on HAART. In Botswana, HAART must be given to all adults and adolescents with a CD4 count of less than 350 cells/ul.[14]

11. As foreign prisoners, neither Mr Tapela nor Mr Piye were eligible in terms of the State's policy to have their CD4 counts or viral loads assessed.[15] Both prisoners sought the assistance of the third respondent, BONELA, to cover the costs to conduct the necessary tests.[16]

12. In August 2012, Mr Tapela's CD4 count measured 74 cells/ul.[17] In August 2009, Mr Piye's CD4 count measured 243 cells/ul.[18] Both of them were thus required, under Botswana's Treatment Guidelines, to be enrolled on HAART

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[9] Expert affidavit vol.2 p 302 para 23.
[10] Expert affidavit vol. 2 p 302 para 23; BONELA affidavit vol.3 p 644-646 paras 13-19.
[11] Expert affidavit vol. 2 p 305 para 40.
[12] Expert affidavit vol.2 p 304 para 36; WHO Guidelines vol. 2 p 319.
[13] Expert affidavit vol.2 p 304 para 37; Treatment Guidelines vol. 1 p 102 para 4.1.
[14] Treatment Guidelines vol.1 p 102 para 4.1.
[15] FA vol.1 p 57 para 16 and Piye affidavit vol. 3 p 676 para 6. The appellants do not dispute these allegations: AA vol. 3 p 743 para 12.
[16] FA vol. 1 p 57 para 18 and Piye affidavit vol. 3 p 676 para 7. Not disputed: AA vol. 3 p 743 para 12.
[17] FA vol. 1 p 60 para 29. Not disputed: AA vol. 3 p 743 para 15.
[18] Piye affidavit vol. 3 p 677 para 12.

at the State's expense.[19]

13. However, in or around early 2011, Messrs Tapela and Piye were each refused state-subsidised treatment, purportedly because paragraph 3 of Presidential Directive number Cab 5(b) of 2004 ("the Presidential Directive") provides for the "*provision of free treatment to non-citizen prisoners suffering from ailments other than AIDS"*.[20] This has been interpreted by the appellants to mean that foreign prisoners are entitled to be treated for all infections and ailments (including OIs) at government's expense, but that they will not be provided with ARVs.[21]

14. Both Mr Tapela and Mr Piye arranged for their enrolment on HAART to be paid for initially by family[22] and, when their families could no longer afford to assist, by a public interest organisation.[23] At the time of the application they were not certain, however, that they would continue to be so subsidised and their future access to treatment was insecure.[24] If they stopped treatment, they could become immune to first-line HAART and, if they did not go back onto treatment, they would die.[25]

15. On 9 August 2013, the Revised Botswana National Policy on HIV and AIDS ("the HIV/AIDS Policy") was published. It provides, inter alia, for universal access to treatment for HIV and AIDS.[26] In the light of the adoption of that Policy, the first and second respondents again applied for enrolment on

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[19] Treatment Guidelines vol. 1 p 102 para 4.1.
[20] Presidential Directive vol. 1 p 283, FA vol.1 p 58 para 20 and 22; Piye affidavit vol. 3 p 676 para 9.
[21] FA vol. 1 p 58 para 19-20; AA vol. 3 p 743 para 13.
[22] FA vol. 1 p 60 para 31; Piye affidavit vol. 3 p 677-678 para 13. Not disputed: AA vol. 3 p 743 para 15.
[23] FA vol. 1 p 60 para 32; Piye affidavit vol. 3 p 678 para 14. AA vol. 3 p 743 para 15.
[24] FA vol. 1 p 60 para 32; Piye affidavit vol. 3 p 678 para 14. AA vol. 3 p 743 para 15.
[25] FA vol. 1 p 60 para 33; Piye affidavit vol. 3 p 678 para 14-15. AA vol. 3 p 743 para 15.
[26] Policy, FA2, vol. 1 p 278 para 6.1.

HAART, by letter dated 29 August 2013.[27] No response from the appellants was recorded, nor were they enrolled on HAART. It follows that their requests must have been rejected.[28]

16. We submit that those are the relevant facts underpinning the appeal. The appellants complain, in their notice of appeal, that the High Court did not "*appreciate . . . the evidence adduced before it*". In the absence of elucidation in this regard, it is difficult to understand what aspects of the evidence the appellants contend was misconstrued. We point out, however, that no evidence was adduced by the State, either to place Messrs Tapela's and Piye's versions in dispute or to take issue with the expert evidence put up by the respondents in the court *a quo*. We therefore submit that the complaint is without merit, and that this ground of appeal cannot prevail.

SUMMARY OF ARGUMENT

17. The respondents oppose the appeal and ask that this Court confirm the High Court's order, in line with the relief sought by them in the notice of motion.

18. We submit that that is appropriate for the following reasons:

    18.1. The decision to refuse to enrol HIV-positive foreign prisoners on HAART, and the policy underlying that refusal, are in breach of the State's duty, under the common law and in terms of the Prisons Act 28 of 1961, to provide adequate healthcare to prisoners without discrimination.

[27] FA vol. 1 p 62 para 36; FA8 vol. 1 p 293; AA vol. 3 p 744 para 18.
[28] FA vol. 1 p 62 para 37; AA vol. 3 p 744 para 18.

18.2. That obligation is bolstered by the provisions of the National HIV/AIDS Policy which, properly interpreted, requires the provision of HAART at State-expense to foreign HIV-positive prisoners. If it does not, then the Policy is unlawful and the provisions of the Prisons Act must prevail.

18.3. The appellants contend they are entitled to withold HAART from HIV-positive foreign inmates because of the wording of a Presidential Directive that purports to allow free treatment to be provided to foreign prisoners in respect of "*ailments other than AIDS*". But they have failed to place the Presidential Directive before this honourable Court and consequently cannot rely on its terms. In any event, the Directive must be interpreted so as not to exclude the provision of HAART to foreign prisoners. If the Directive is not capable of such interpretation, then it is unlawful and *ultra vires*.

18.4. The refusal to provide HAART to foreign HIV-positive prisoners is an unjustifiable limitation of constitutionally entrenched rights to life, equality, freedom from discrimination, and freedom from inhuman and degrading treatment.

19. We will deal with each of these submissions in turn.

THE PRISONS ACT AND COMMON LAW OBLIGATIONS

20. The High Court declared that the refusal to enrol HIV-positive foreign prisoners who meet the treatment criteria on HAART was a breach of "*the duty owed to them by the [appellants], to be provided with basic health care*

services."[29]

21. The appellants have failed, in their notice of appeal, to stipulate the basis on which they appeal this order. The notice of appeal merely states that the "*Court erred in finding that the inmates are lawfully entitled to HAART*."[30]

22. We submit that the High Court's order in this regard was plainly correct. At both common law and in terms of the Prisons Act, the State has a duty to provide adequate medical treatment to all prisoners without discrimination. There is, by contrast, no legal provision that permits withholding treatment to foreign prisoners.

Common law

23. At common law, the State has a clear duty to protect and safeguard the health and bodily integrity of prisoners under its charge.[31] That is because prisoners' ability to make their own decisions and to carry them out has been generally constrained by their incarceration. The principle has most recently been affirmed by the South African Constitutional Court:

> *"A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments. One is s 12(1) of the [Act], which obliges the prison authorities to provide, within its available resources, adequate health care services, based on the principles of*

[29] High Court judgment vol. 1 p 33 para 43(c).
[30] Appellants Notice and Grounds of Appeal vol. 6 p 1090 para 3.4.7.
[31] *Mtati v Minister of Justice* 1958 (1) SA 221 (AD) at 22; *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 40A. For the approach in English law, see for example *Ellis v Home Office* [1953] a All ER 149 at 154; *Egerton v The Home Office* [1978] Crm LR 494; *Kirkham v Greater Manchester Police* [1990] 2 QB 283.

> *primary care, in order to allow every inmate [of a prison] to lead a healthy life. The obligation is also inherent in the right given to all prisoners by s 35(2)(e) of the Constitution to conditions of detention that are consistent with human dignity."*[32]

24. The common law also precludes regulation that is "*partial and unequal in [its] operation as between different classes*".[33] We submit a regime that provides HAART to prisoners who are citizens but denies it to foreign inmates, would fall foul of that requirement.

25. Congruent with these principles, this Court has recently affirmed the principle of the equal treatment of citizens and foreigners in matters of criminal justice:

> *"Those who offend the law within this jurisdiction must not only be treated equally but must be seen to be so treated."*[34]

The applicable statutory regime

26. In addition, Botswana's Prisons Act requires *all prisoners* to be provided with adequate healthcare services. It admits of no discrimination among them.

27. Section 56 of the Prisons Act compels the second appellant, the Permanent Secretary to the Minister for Health, to appoint a medical officer who "*shall be responsible for the health of <u>all</u> prisoners*."[35]

28. That officer must report on the health and treatment needs of the prisoners under his or her care, and may "*take or cause to be taken such action*

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[32] *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC) at para 17, Nkabinde J (for the majority) quoting the Supreme Court of Appeal's judgment, *Minister of Correctional Services v Lee* 2012 (3) SA 617 (SCA) at para 36 with approval. See also *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 40A-B; *Mtati* v. *Minister of Justice*, 1958 (1) S.A. 221 (A.D.) at 224.
[33] *Kruse* v *Johnson* [1898] 2 QB 91, applied in *Marobela v Botswana Motor Vehicle Insurance Fund* 1998 BLR 505 (HC).
[34] *Dlamini v The State* CLCGB-070-13 (31 July 2014) at para 17. See also Mwale judgment at para 74.
[35] Section 56(2) of the Prisons Act. Emphasis added.

(including the forcible feeding, inoculation, vaccination and any other treatment of the prisoner whether of the like nature or otherwise) as he considers necessary to safeguard or restore the health of the prisoner or to prevent the spread of disease".[36]

29. As held by the High Court, correctly in our submission, s 57(1) of the Prisons Act imposes a duty on medical officers to take measures to restore the health of all prisoners and prevent the spread of disease.[37] Contrary to the appellants' claim,[38] nothing in the Prisons Act limits or restricts the State's duty to provide medical care, or authorizes State officials to decide to do so.

30. Discrimination between prisoners is also not permitted by the Prisons Act. Section 2 of the Act defines "prisoner" as "*<u>any</u> person, whether convicted or not, under detention in a prison*".[39] Section 65 further provides that "*<u>[e]very prisoner</u> shall be subject to this Act during the time of his imprisonment*".[40]

31. We submit that all prisoners are to be treated equally. In the words of the High Court, "*imprisonment equalizes all inmates regardless of their status or place of origin*."[41]

32. The power that the appellants purport to exercise – to discriminate between prisoners in the standard of care they receive – would have to be read into the Act if it were to exist. We submit that such a reading-in is not permissible if the trite tenets of statutory interpretation are followed, namely that: (1) a deviation from the plain meaning and text of an Act is only permitted if there

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[36] Section 57(1) of the Prisons Act. Emphasis added.
[37] High Court judgment vol. 1 p 27 para 31. See also Mwale judgment at para 51.
[38] AA vol. 3 p 743 para 14.
[39] Emphasis added.
[40] Emphasis added.
[41] High Court judgment vol. 1 p 29 para 32. See also Mwale judgment at para 55.

is a "*glaring absurdity*";[42] (2) that interpretations must be consistent with the Constitution;[43] and (3) that interpretations must be consistent with international obligations.[44]

33. It is submitted that under these principles, there can be no sanction of the refusal of HAART to foreign inmates.

NATIONAL POLICY

34. In relation to HIV and AIDS, the State's obligations towards prisoners in its care, are bolstered by the terms of the Treatment Guidelines and the HIV/ AIDS Policy.

35. Clause 4.1 of the Treatment Guidelines provides that:

> *"for all adults and adolescents (regardless of pregnancy status), either one of the following conditions require ART initiation:*
>
> - *WHO clinical stage 3 or 4, or*
> - *Any CD4 count* ≤ 350 cells µ/L"[45]

36. The Treatment Guidelines thus recognise that the initiation of HAART is a medical necessity once a person's CD4 count drops below a certain level, and mandates its initiation for anyone with a CD4 count of less than 350. This is consistent with the undisputed expert evidence of Dr Venter that HAART

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[42] *Quarries of Botswana Pty Ltd v Gamalete Development Trust and Others* 2011 (2) BLR 479 (CA); *Southern Africa Furniture Manufacturers Pty Ltd v Master Plans Pty Ltd and Others In* re Nchite 2011 (2) BLR 374 (HC)*; and Petrus and Another v The State* 1984 BLR 14 (CA) at p 24.
[43] *Ramantele v Mmusi and Others* CACGB 104-12, 3 September 2013 (CAC) at para 58 and *Attorney General v Dow* (1992) BLR 119 (CA) at p 140.
[44] *Attorney General v Dow* (1992) BLR 119 (CA) at p 140. See also *Petrus v the State* [1984] BLR 14 (CA) at p 37.
[45] Treatment Guidelines FA1 vol. 1 p 102 para 4.1. Emphasis added.

dramatically improves the life expectancy of HIV-positive people with low CD4 counts.[46]

37. The Guidelines must be read with the HIV/AIDS Policy, which is the most recent, and prevailing, statement of how HIV and AIDS must be treated in Botswana.[47]

38. The HIV/AIDS Policy must be construed as a whole.[48] Further, in terms of trite tenets of interpretation, the Policy must be interpreted in a manner consistent with the Constitution and the prevailing legislative scheme. Properly interpreted, we submit that the Policy requires the provision of HAART to all HIV-positive prisoners who meet the treatment criteria, without discrimination as to citizenship. That is clear from the following:

38.1. First, the HIV/AIDS Policy states that it:

> *"focuses specifically on providing the necessary procedures and parameters within which the response to HIV and AIDS will be conducted to best meet the needs of the citizenry. However, all such procedures and parameters, and the services they direct will, to the extent possible, be rendered to all residents of Botswana based on accepted criteria and costs."*[49]

As prisoners of the State, foreign prisoners must be treated as residents. We submit that the accepted criteria in relation to HAART are those set out in the Treatment Guidelines.

38.2. Second, paragraph 6.1 of the Policy provides for "*universal access to comprehensive HIV and AIDS treatment, care and support*

[46] Expert affidavit vol. 2 pp 303-304 paras 28-36.
[47] Policy FA2 vol. 1 p 272 para 1.8.
[48] Section 29(1) of the Interpretation Act.
[49] Policy FA2 vol. 1 p 271 para 1.5. Emphasis added.

services".[50] Although paragraph 6.3 provides that ARVs will be administered to citizens,[51] we submit that that clause cannot serve to preclude foreign prisoners from receiving HAART. That is because, as we have explained above, the State bears a special duty of care to those incarcerated, and must take adequate measures to safeguard their health. In the absence of an express exclusion, we submit that the State is obliged to provide HAART to <u>all</u> prisoners, whether foreign or Batswana.

38.3. Third, paragraph 7.1 of the Policy "*recognises the fundamental rights of all individuals as set out in Chapter II of the Constitution, including the right not to be discriminated against*."[52] Importantly, clause 7.1.4 provides:

> "*Every person in Botswana shall not be discriminated against in terms of access to health services. That notwithstanding, the Government may confer preferential treatment to its citizens.*"[53]

Once again, that clause cannot be interpreted to mean that foreign prisoners are excluded from receiving HAART at State expense. Because of their incarceration, prisoners have limited access to healthcare services and are dependant on the State for its provision. They cannot work to earn the necessary funds for enrolment on ARVs during their incarceration and, as was the case for Mr Tapela

[50] Policy FA2 vol. 1 p 278 para 6.1. Emphasis added.
[51] Policy FA2 vol. 1 p 278 para 6.3; p 279 para 6.3.4.
[52] Policy FA2 vol. 1 p 280 para 7.1.
[53] Policy FA2 vol. 1 p 280-281 para 7.1.4.

and Mr Piye,[54] will consequently be effectively prevented from receiving the treatment that they require. Put differently, refusing to fund the provision of HAART to HIV-positive foreign prisoners does not amount to preferential treatment of citizens; rather, it constitutes a substantive denial of medical care to a category of prisoners based only on their nationality. That is plainly not an exclusion that the Policy (or the common law, or the applicable statutory regime) anticipates or permits.

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

> "*Openness to negative consequences as a result of AIDS and refers to the likelihood of suffering harm from the effects of sickness and death due to AIDS. It can be applied to individuals, or to groups of people such as household, organisations, or societies. Vulnerability is made worse by poverty, fragmented social and family structures, and gender inequality.*"[55]

38.5. We submit that prisoners are vulnerable persons within the meaning of that definition.[56]

38.6. Finally, one of the objectives of the Policy is to prevent the spread of HIV[57] and to prevent new infections.[58] To that end, it undertakes to "*ensure access to prevention information, techniques and services to*

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[54] See FA vol. 1 p 60 para 30; Piye affidavit vol. 3 p 677 para 13. These allegations are not denied: AA vol. 3 p 743 para 15.
[55] Policy FA2 vol. 1 p 269.
[56] See also *Lee v Minister for Correctional Services* 2013 (2) SA 144 (CC).at para 17, where the South African Constitutional Court found that "*[p]risoners are amongst the most vulnerable in our society to the failure of the state to meet its constitutional and statutory obligations.*"
[57] Policy FA2 vo. 1 p 273 para 2.1.1
[58] Policy FA2 vol. 1 p 275 para 4.1.

all persons."[59] Enrolment on HAART significantly lowers an HIV-positive person's viral load and thus reduces the risk of their transmitting the virus to others.[60] Seen in this light, the provision of HAART to HIV-positive foreign prisoners is a measure that assists in preventing the spread of HIV.

39. We therefore submit that the prevailing policy enactments also require the State to provide all prisoners with ARVs.

40. In the absence of an express legislative provision that allows for prisoners to be refused enrolment on State-funded HAART merely due to their nationality,[61] and in light of the policy provisions above, we submit that all prisoners – whether citizens or foreigners – are legally entitled to be enrolled on HAART once their CD4 count drops below 350 cells/uL. Any refusal to enrol them is thus unlawful.

41. It follows that the HIV/AIDS Policy must be interpreted, to the extent possible, to allow HIV-positive foreign prisoners to be enrolled on HAART. If such interpretation was not reasonably possible (which we submit it is), then the Policy would not comply with the requirements of the common law and the Prisons Act, which prevail.[62] It would be invalid to that extent.

42. In those circumstances, the Policy cannot be invoked to justify the appellants'

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[59] Policy FA2 vol. 1 p 275 para 4.1. Emphasis added.
[60] See BONELA affidavit vol. 3 p 646 para 19.3.
[61] The Presidential Directive is not a legislative provision.
[62] See *Diau v Botswana Building Society* 2003 (2) BLR 409 (IC) in which it was held that
> *"the "HIV/AIDS Policy augments rather than detracts from the constitution, to the extent that the constitution entrenches the right to equality, human dignity, liberty and the right to privacy. It is not law. It therefore does not impose any direct legal obligations. However, to the extent that its provisions are consistent with the values espoused by the constitution, breach of its provisions may, in an appropriate case, constitute breach of constitutional provisions."*

decision to refuse, or their conduct in refusing, to enrol HIV-positive foreign prisoners who require treatment, on HAART. Such conduct is unlawful, and should be set aside.

THE PRESIDENTIAL DIRECTIVE

43. In the High Court, the State contended that the refusal to grant Messrs Tapela and Piye (and other foreign prisoners in their position) treatment was lawful, because it was authorised by the terms of a Presidential Directive.[63] The Directive is purportedly recorded in a notice issued by the second appellant, the Permanent Secretary: Ministry of Health, and produced in the papers as annexure FA3, which records that the Presidential Directive provides, in relevant part:

> *"Addressees are hereby informed that the following have been approved:*
>
> *. . .*
>
> *Provision of free treatment to non-citizen prisoners suffering from ailments other than AIDS".*[64]

44. The High Court correctly recorded that the Directive itself had not been placed before the Court. It was only presented with a savingram that purports to record the terms of a proposed Directive.[65] (The appellants do not, in their notice of appeal, challenge this finding. They only take issue with the Court's interpretation of the Directive.[66]) Annexure FA3 states that certain measures

[63] AA vol. 3 p 744 para 20.
[64] Directive FA3 vol. 1 p 283.
[65] High Court judgment vol. 1 p 23 para 24.
[66] Notice of Appeal vol. 6 p 1089 para 3.4.2.

have been "*approved*" by Presidential Directive Cab 5(b) of 2004. But that approval appears to issue from the office of the Permanent Secretary to the Ministry of Health (the second appellant) and is titled "*Proposed changes to Presidential Directive Cab 13(c) 2002*".

45. It is therefore not clear, on the papers, whether the Directive has been brought into effect and, if it has, whether the correct party passed such resolution. Despite being called on to produce a record of the decisions under challenge,[67] the appellants (who include the President) have not produced the Presidential Directive at all. We submit that on that basis, they are precluded from relying on it at all, and there is consequently no basis disclosed on the papers for refusing HAART to foreign prisoners.

46. Even assuming, however, that the Presidential Directive was issued by the President and is in force (which the respondents do not concede), it does not provide a lawful basis for refusing treatment to foreign inmates. That is because, on a proper interpretation of its terms, it does not require foreigners to be refused treatment and, if it does, it is both *ultra vires* and unlawful. We deal with each of these contentions in turn.

Interpretation

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

47.1. First, it must be interpreted to promote, rather than restrict, the

[67] See Notice of Motion vol. 1 p 49.

fulfilment of constitutional rights.[68]

47.2. Second, it has been overtaken by the terms of the HIV/AIDS Policy, which was published after it.[69] As explained above, the Policy provides for universal access to ARVs.

47.3. As held by the High Court, the treatment of HIV through the provision of HAART is not excluded on the plain language of the Directive. The Directive, on its terms, only limits the treatment of AIDS. But AIDS is distinct from the virus that causes it, HIV.[70]

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

49. Congruent with that, the High Court found that the Directive (as purportedly recorded in the savingram) did not exclude the provision of HAART to HIV-positive foreign prisoners. It found that the Directive only dealt with AIDS, which the Court held to be distinct from HIV.[71] The provision of HIV treatment, it found, was not precluded. Its findings are, with respect, plainly correct.

The ultra vires challenge

50. The Directive is, in any event, *ultra vires* and consequently invalid.

51. It is trite that the exercise of public power is constrained by the scope of the

[68] *Ramantele v Mmusi and Others* CACGB 104-12 (3 September 2013) (CAC) (*Mmusi*) at para 58.
[69] The Directive was issued on 26 March 2004, while the Policy was published in 2012.
[70] Expert affidavit vol. 2 p 300 para 16.
[71] High Court judgment vol. 1 p 23 paras 26-27.

empowering provision under which it is taken.[72] A decision that is taken beyond the scope of the empowering provision is *ultra vires* and invalid, and can be set aside by a Court on review.[73]

52. This Court has held:

> *"Where the ambit of an administrative authority's powers are challenged as being ultra vires the starting point appears to be first, to enquire whether the empowering statute, i.e. from whence the power is derived allows for a tacit or implied power. Secondly and more particularly important, to determine the scope and purpose and to find out whether the powers entrusted upon the authority serve the scope and purpose of the legislation in question and thirdly whether the general principles of justice and legality have not been infringed by the authority".*[74]

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

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

54.1. Nowhere does the Prisons Act, the old Public Health Act,[75] or the 2013 Public Health Act[76] authorise the President to issue directives concerning medical treatment (or the denial of it).[77] The appellants have further offered no evidence of any delegation to this effect. To

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[72] *Murima and Another v Kweneng Land Board* 2002 (1) BLR 18 (HC).
[73] See, for example, *Good v the Attorney-General* (2) [2005] 2 BLR 337 (CA); *Botswana Association of Tribal Land Authorities v The Attorney-General* 2007 (3) BLR 93 (HC) at 99; *Patson v the Attorney-General* 2008 (2) BLR 66 (HC).
[74] *Botswana Motor Vehicle Insurance v Marobela* 1999 (1) BLR 21 (CA) at 27.
[75] Chapter 63:01.
[76] Act 11 of 2013.
[77] *Minister of Labour and Home Affairs and Another v Botswana Public Employees Union and Others* CACGB-083-12 (22 April 2014) at para 72 et seq.

the contrary, as submitted above, the Prisons Act requires all prisoners to be provided with adequate healthcare services and permits no discrimination on the basis of citizenship.

54.2. Section 47(1) of the Constitution vests executive power in the President, and authorises him to exercise those powers subject to the provisions of the Constitution.[78] But executive powers do not include a unilateral power to supplement or amend the provisions of validly enacted legislation. This would fundamentally undermine the constitutionally-ordained separation of powers, and the legislative powers conferred on Parliament in s 86 of the Constitution.[79]

55. The respondents expressly took issue with the President's lack of authority to issue the Directive in the founding papers.[80] In response, the appellants merely asserted that the Directive was "*motivated by National Policy and national interest"*.[81] We submit that the onus rests on the State to indicate the source of the President's purported power to issue that Directive.[82] We submit that they have not done so because he does not, in law, possess such powers.

56. It follows that the Presidential Directive is *ultra vires* and invalid, to the extent that it precludes foreign prisoners from enrolling on HAART, at State expense, during their incarceration.

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[78] *Attorney General v Oatile* 2011 (2) BLR 209 (CA) at p 221.
[79] *Botswana Motor Vehicle Insurance v Marobela* 1999 (1) BLR 21 (CA) at p 31. See also *Botswana Railway's Organization v Setsogo & Others* 1996 BLR 763 (CA) at 804B-C; *Peloewetse v The Permanent Secretary to the President and Others* 2000 (1) BLR 79 (CA).
[80] FA vol. 1 p 65 para 41.1.
[81] AA vol. 3 p 745 para 25.
[82] See, for example, *Van Rensburg v Naidoo* 2011 (4) SA 140 (SCA) at para 39 and *Chairman, Board on Tariffs and Trade & others v Teltron (Pty) Ltd* 1997 (2) SA25 (A) at 31F-H.

The unlawfulness challenge

57. Even assuming that the President had the power to issue the Directive (which is denied), we submit that he could not issue it in the face of, and contrary to, legislation expressly providing for all prisoners to be provided with adequate healthcare – including HIV-positive foreign prisoners. That is because his executive powers do not permit him to contravene or circumvent, by fiat, legislative provisions imposed by Parliament.[83]

58. This Court has affirmed that–

> *"substantive rights … and particularly constitutional rights should not in the normal course be abrogated or diminished by regulations or other instruments made by administrators, contrary to the guiding principles of their parent Acts."*[84]

59. In *Murima and Another v Kweneng Land Board*[85], Collins AJ held that–

> *"directives have no force of law at all. Neither the President nor the Cabinet may rule by decree and if the respondent (and the police) understood the directives to confer legal authority upon them … then they were, to say the least, deluded."*

60. We have set out the statutory enactments and policy provisions that provide for universal access to HAART by any prisoner whose CD4 count drops below 350 cells u/L. We do not repeat those submissions here. Suffice it to state that the prevailing legislative and regulatory regime provides for all HIV-positive prisoners – whether foreigners or Batswana – to enrol on HAART

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[83] *Minister of Labour and Home Affairs and Another v Botswana Public Employees Union and Others* CACGB-083-12 (22 April 2014) at para 81; *Botswana Motor Vehicle Insurance v Marobela* 1999 (1) BLR 21 (CA) at p 31 and *Murima and Another v Kweneng Land Board* 2002 (1) BLR 18 (HC).
[84] *Minister of Labour and Home Affairs and Another v Botswana Public Employees Union and Others* CACGB-083-12 (22 April 2014) at para 100.
[85] 2002 (1) BLR 18 (HC).

when such treatment becomes appropriate. The Directive is unlawful and invalid to the extent that it contravenes that regime.

61. On this further basis, we submit that the Presidential Directive is invalid, and must be set aside. The High Court's finding that the Directive is "*irrational and invalid*"[86] is, we submit, correct and ought not to be overturned on appeal.

CONSTITUTIONAL OBLIGATIONS

62. Finally, the High Court held that prisoners retain the residuum of their human rights despite the curtailment of their liberty.[87] It declared that the refusal to provide HAART to foreign prisoners was consequently a violation of sections 3, 4, 7, and 15 of the Constitution.

63. In their notice of appeal, the appellants appear only to take issue with the High Court's decision that withholding HAART violates the right to life.[88] No grounds are advanced for appealing the Court's order declaring a violation also of sections 3, 7 and 15 of the Constitution. We make the following submissions without prejudice to our contention that the appellants have not specifically appealed these latter aspects of the Court's decision.

64. We submit that the High Court was correct to find that the State's conduct in denying HAART to HIV-positive foreign prisoners is unconstitutional and invalid because it violates those prisoners' constitutional rights to life (s 4(1) of the Constitution); freedom from inhuman and degrading punishment (s 7),

[86] High Court judgment vol. 1 p 34 order at (d).
[87] High Court judgment vol. 1 p 25 para 28.
[88] Notice of Appeal vol. 6 p 1089 para 3.4.3.

and equality (s 3 and s 15).

65. We submit that in considering the constitutionality of the conduct at issue, this Court is enjoined to apply three key principles of interpretation:

65.1. First, constitutional rights must be afforded a broad and generous interpretation.[89] This Court in *Ramantele v Mmusi and Others* held that–

> *"in interpreting the Constitution … the Court must adopt a generous and purposive approach in order to breathe life into the Constitution having regards to liberal democratic values and (where necessary) with the aid of international instruments and conventions on human rights to which Botswana has subscribed."*[90]

65.2. Second, the opposite approach is to be applied in considering limitations of constitutional rights, which must be construed narrowly.[91]

65.3. Third, domestic law is to be interpreted in a manner that does not conflict with Botswana's international obligations.[92]

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

The right to life

67. The High Court held that the "*deprivation of life-saving HAART run[s] counter*

[89] *Diau v Botswana Building Society* 2003 (2) BLR 409 (IC) at para 42.
[90] *Ramantele v Mmusi and Others* CACGB 104-12, 3 September 2013 (CAC) at para 69. See also *Attorney-General v Moagi* 1982 (2) BLR 124 (CA) and *Petrus and Another v The State* [1984] BLR 14 (CA) at pp 34D-H and 35A-E.
[91] *Attorney-General v Dow* [1992] BLR 119 (CA) at 132A-B.
[92] *Attorney General v Dow* [1992] BLR 119 (CA) at 132A-B.

to the letter and spirit of s 4 … and is unlawful."[93] Section 4(1) of the Constitution provides:

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

68. We submit that the High Court's finding is correct, and that the right to life is plainly violated by the refusal to provide HAART to HIV-positive foreign prisoners, which condemns them to certain and premature death.

69. The appellants take issue with this aspect of the High Court's decision. In the High Court, they argued that HIV is distinct from other illnesses because there is no cure for it, and death is consequently inevitable for HIV-positive prisoners. They also claimed that because there is no assurance that foreign prisoners will receive treatment upon their release, the State has a duty *not* to provide treatment to prevent the prisoners developing resistance when treatment ceases.

70. Each of these arguments is unfounded.

71. Prisoners in the position of Messrs Tapela and Piye will die if they do not receive HAART timeously.[94] Indeed, the Government's own Treatment Guidelines confirm that even "*short delays (less than a month) in initiating treatment are associated with increased mortality, especially for individuals with very low CD4 counts (less than 100 cells/ul)*".[95] By contrast, enrolment

[93] High Court judgment vol. 1 p 30 para 33. See also Mwale judgment at paras 103-106.
[94] Expert affidavit vol. 2 p 305 para 40.
[95] Treatment Guidelines FA1 vol. 1 p 97 para 3.2.

on HAART renders their HIV a manageable, if chronic, condition.[96]

72. Prisoners are, by virtue of their incarceration, not able to earn sufficient income to pay for their own treatment.[97] Their consequent inability to access HAART places them at a real risk of preventable, premature death,[98] and violates their right to life.

73. Regional and international law strongly supports a finding that the refusal to provide ARVs to detained prisoners constitutes a violation of the right to life:[99]

73.1. The Human Rights Committee, considering a communication made in terms of Article 6 of the International Covenant on Civil and Political Rights (ICCPR),[100] has stated that States, "*by arresting and detaining individuals [undertake] the responsibility to care for their life. … Lack of financial means cannot reduce this responsibility*."[101] Botswana ratified the ICCPR on 8 September 2000 and is, we submit, bound by that principle.

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

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[96] See Mwale judgment, para 26.
[97] See the South African case of *B and Others v Minister of Correctional Services and Others* 1997 (6) BCLR 789 (C).
[98] Expert affidavit vol. 2 p 305 paras 38-40.
[99] Reference to Botswana's international and regional obligations can provide useful guidance on the nature and scope of existing constitutional rights: see *Attorney General v Dow* (1992) BLR 119 (CA) at p 151.
[100] 16 December 1966, United Nations, UNTS 999, p 171.
[101] *Ms. Yekaterina Pavlovna Lantsova v The Russian Federation*, Communication No. 763/1997, U.N. Doc. CCPR/C/74/D/763/1997 (2002).

Charter.[102] We submit that the finding is equally applicable in Botswana.[103]

74. It means, moreover, that foreign prisoners will often have a justiciable claim to treatment even when they return to their own countries. In any event, the appellants cannot rely on the potential failure of another country to justify falling short of their own constitutional and legislative obligations.

75. In the circumstances, we submit that the decision to withold HAART from foreign prisoners (and any policy or Directive that purports to authorise such denial) violates s 4(1) of the Constitution. We submit that because an infringement of s 4 is not capable of justification in law, the State has no legal basis to seek to justify that limitation.[104] Its conduct in denying foreign HIV-positive prisoners HAART is, we submit, unconstitutional.

The right not to be subjected to inhuman and degrading treatment

76. The High Court also held that the refusal to provide HAART at State expense to HIV-positive foreign prisoners violates s 7(1) of the Constitution, which entrenches the right to be protected against cruel, inhuman and degrading punishment. Section 7(1) states:

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

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

[103] See also the various international legal instruments, declarations and statements dealt with the in Mwale judgment at paras 30-46.

[104] *Nchindo and Others v Attorney General of Botswana and Another* CACLB 056-09 [2010] BWCA 49 (CA) at para 47-50 and *Attorney-General v Ahmed* [2003] BWCA 18 (CA) at p 161.

77. Botswana precedent strongly supports the High Court's finding that the failure to provide prisoners with necessary medical care constitutes a violation of the s 7 right:

77.1. In *Mokoena v The State*,[105] this Court confirmed (relying on an unreported case of Nganunu CJ)[106] that one of the factors relevant to determining whether a sentence was grossly disproportionate and thus violated s 7(1) of the Constitution, was the fact that the prisoner at issue was HIV-positive and would be unable to access appropriate treatment.

77.2. Similarly, in *Binda and Another v The State*,[107] the High Court found that the refusal to provide a foreign HIV-positive prisoner with access to ARVs might constitute inhuman treatment, and/or sufficient grounds for departing from the prescribed minimum sentence that had been imposed. On that basis, it granted leave to appeal against the sentence imposed. The Court held:

> *"In proscribing torture, inhuman or degrading treatment, the Constitution of Botswana lays down a moral standard which must be observed. The United Nation Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment include in the definition of 'torture' any act by which severe mental pain and suffering is intentionally inflicted on a person for the purpose of punishing him for an act he has committed. It does not include mental pain and suffering arising only from, inherent in or incidental to lawful sanctions. Inhuman treatment is treatment which is destitute of natural kindness or pity, brutal, unfeeling and cruel, see the definition of 'inhuman' in the Oxford English Dictionary. The*

[105] 2008 (1) BLR 151 (CA).
[106] *Moyo and Others v The State* (Crim App 12/06), unreported.
[107] 2010 (2) BLR 286 (HC).

> *intentional refusal of vital medical care can, in my view, be characterised as inhuman treatment. The applicant I believe suffers severe mental pain when he is denied ARV treatment when Batswana inmates receive it. The denial of this treatment is not inherent in or incidental to imprisonment but derives from the alleged discriminatory practice by the prison authorities.*"

78. In *Mosetlhanyane and Another v Attorney General*,[108] this Court held that an administrative decision refusing the appellants the right to sink a borehole was a violation of s 7. The Court affirmed that the right under s 7 "*is absolute and unqualified*".[109] The Court added that:

> *"whether a person has been subjected to inhuman or degrading treatment involves a value judgment. It is appropriate to stress that in the exercise of a value judgment, the Court is entitled to have regard to international consensus".*[110]

79. That a denial of necessary treatment renders punishment inhuman and degrading, is also supported by international and foreign jurisprudence:

79.1. The European Court of Human Rights has held that the deportation of a person with AIDS from the United Kingdom (where he could access treatment) to St Kitts (where there was no effective medical or palliative treatment for his condition) constituted inhuman and degrading treatment in violation of article 3 of the European Convention of Human Rights.[111] That is because, as the Court later elucidated:

> "*As regards the types of 'treatment' which fall within the scope of article 3 of the Convention, the court's case law*

[108] Court of Appeal Civil Appeal CACLB-074-10 (27 January 2011).
[109] Above at para 19.
[110] As above.
[111] *D v United Kingdom* (1997) 24 EHRR 423, particularly at paras 51-53.

> *refers to 'ill-treatment' that attains a minimum level of severity and involves actual bodily injury or intense physical or mental suffering. Where treatment humiliates or debases an individual showing a lack of respect for, or diminishing, his or her human dignity or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of article 3. The suffering which flows from naturally occurring illness, physical or mental, may be covered by article 3, where it is, or risks being, exacerbated by treatment, whether flowing from conditions of detention, expulsion or other measures, for which the authorities can be held responsible."*[112]

79.2. A similar approach was adopted by the English Court of Appeal in *JA (Ivory Coast) and ES (Tanzania) v Secretary of State for the Come Department*.[113] Based on *D v United Kingdom,*[114] the Court found that the State has special duties of care towards prisoners in its custody, which it may not have towards the rest of the population or the generality of unlawful entrants into the country – including the duty to provide them with medical treatment.[115] The Court distinguished the State's responsibility towards different categories of foreign nationals in the provision of medical care on the basis of the State's assumption of responsibility over the person (through imprisonment or otherwise) and the critical state of the claimant's health.[116]

79.3. The US Supreme Court has also found that the failure to provide incarcerated prisoners with necessary medical treatment

[112] *Pretty v United Kingdom* (2002) 35 EHRR 1 at para 52. Emphasis added.
[113] [2009] EWCA Civ 1353.
[114] Above n 93.
[115] At para 9.
[116] As above.

constituted cruel and unusual punishment in violation of the Eighth Amendment:

> *"If a State elects to impose imprisonment as a punishment for crime, I believe it has an obligation to provide the persons in its custody with a health care system which meets minimal standards of adequacy. As a part of that basic obligation, the State and its agents have an affirmative duty to provide reasonable access to medical care, to provide competent, diligent medical personnel, and to ensure that prescribed care is in fact delivered. For denial of medical care is surely not part of the punishment which civilized nations may impose for crime.*"[117]

79.4. The United Nations Human Rights Committee has affirmed this approach under article 7 of the International Covenant on Civil and Political Rights (the prohibition on cruel, inhuman and degrading treatment), affirming that State parties are obliged to comply with certain minimum standards regarding conditions of detention regardless of their level of development and economic or budgetary considerations.[118]

80. We submit that similar considerations apply in this case. On the undisputed evidence, the refusal to provide HAART to HIV-positive foreign prisoners exposes them to an increased risk of contracting OIs, and to substantial prospects of a premature death.[119] It also results in intense (but preventable) physical suffering and indignity, and breaks the physical resistance of the

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[117] *Estelle v Gamble* 429 US 97 (1976) at 116. See also para 33 of the High Court judgment in which Sechele J holds: *"It is impermissible for the [State] to indirectly extend the limits of punishment by withholding certain services to which inmates are lawfully entitled."*

[118] *Mukong v Cameroon* Communication No. 458/1991, UN Human Rights Committee (HRC), 21 July 1994, available at: http://www.refworld.org/docid/4ae9acc1d.html [accessed 19 May 2015] at para 9.3.

[119] Expert affidavit vol. 2 pp 303-304 paras 27-34.

person.[120] Mr Tapela and Mr Piye both expressed fear about what the future holds, and anguish over their risk of premature death.[121]

81. We submit that the High Court's finding that the refusal to provide HAART constitutes an infringement of s 7 of the Constitution contrary to moral standards and the sanctity of life, is correct. There can be no justification under law for this violation. The High Court's declaration of a violation of s 7 of the Constitution must consequently stand.

Equality and non-discrimination

82. The High Court found that the refusal to provide foreign HIV-positive prisoners with HAART also violated sections 3 and 15 of the Constitution. From its notice of appeal, the appellants do not appear to take issue with the Court's finding that the refusal constitutes discrimination against foreign prisoners. They only appeal the High Court's finding that the limitation of foreign prisoners' equality rights is not reasonably justifiable or in the public interest.[122]

83. We submit that the failure to provide HAART to foreign prisoners living with HIV plainly violates s 15 of the Constitution.

84. Section 15 of the Constitution pertinently provides:

> *"**Protection from discrimination on the grounds of race, etc.***
>
> *(1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is*

[120] FA pp vol. 1 pp 58-60 paras 22-28; Expert affidavit p 300 para 16 and pp 302-305 paras 23-40; Piye affidavit vol. 3 pp 676-677 paras 10-11.
[121] FA vol. 1 p 60 para 33; Piye affidavit vol. 3 p 678 para 15.
[122] Notice of appeal vol. 6 p 1089 para 3.4.5.

discriminatory either of itself or in its effect.

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

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

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

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

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

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

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

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

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

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

88.2. Second, s 15(4) permits only that a "law" may make provision for certain limitations to the right. On the ordinary meaning of the word "law", such a limitation would have to be contained in validly enacted legislation such as the Prisons Act. As held in *Murima and Another v Kweneng Land Board*,[123] Presidential Directives have no force of law. The Executive cannot, by decree, justifiably limit constitutionally enacted rights.[124]

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

> *"**Fundamental rights and freedoms of the individual***
>
> *Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely—*
>
> *(a) life, liberty, security of the person and the protection of the law;*
>
> *. . .*
>
> *the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitations of that protection as are contained in those provisions, being limitations*

[123] 2002 (1) BLR 18 (HC).
[124] See *Minister of Labour and Home Affairs and Another v Botswana Public Employees Union and Others* CACGB-083-12 (22 April 2014) at para 100.

> *designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest."*

88.4. This Court has explained the relationship between s 3 and the other provisions of Chapter II of the Constitution as follows:

> *"Section 3 is the substantive umbrella section which entrenches the inherence of the set out fundamental rights in each individual or person…but of course, subject to the rights and freedoms of others or public interest*."[125]

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

> "*I therefore agree with the respondents that the derogations contained in section 15(4) of the Constitution are not unchecked. They must be rational and justifiable either as being intended to ensure that the rights and freedoms of any individual do not prejudice the rights and freedoms of others or as being in the public interest*".[126]

89. It means that s 15(4)(b) can only justify a limitation of the right to equality where such limitation is intended to protect the public interest or to safeguard the rights and freedoms of others. Neither of those requirements is met in this case.

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[125] *Ramantele v Mmusi and Others* CACGB 104-12, 3 September 2013 (CAC) above n 25. See also *Geofrey Khwarae v Bontle Onalenna Keakitse and Others* (MAHGB-000291-14) at paras 180,188 cited in the Mwale judgment at para 76.

[126] *Ramantele v Mmusi and Others* CACGB 104-12, 3 September 2013 (CAC) at para 72. See also *Nchindo and Others v Attorney-General and Another*, 2010 (1) BLR 205 (CA) at 219A.

No public interest or protection of the rights of others

90. We point out that the State bears the onus of showing why a limitation is necessary in the public interest or to protect the rights and freedoms of others.[127]

91. In the present case, the appellants baldly assert that the Government is not able to provide ARVs to all Batswana[128] and that its policy to refuse HAART to foreign prisoners is motivated by the national interest, which includes considerations of financial resources and expenses. They further state that aid is needed even to provide ARVs to Batswana citizens and that providing HAART to foreign prisoners would thus cause a perception that the Government was behaving irresponsibly towards its citizens.[129] However, they have failed to put up any evidence in support of their contentions.

92. The High Court correctly found that the State had failed to adduce appropriate evidence to justify its claim that the public interest supported the refusal of HAART to foreign prisoners. It noted that the State had failed to provide any evidence on the following issues:

    92.1. a medical officer's report as required to be made in terms of the Prisons, Act;

    92.2. proof that providing HAART to foreign prisoners would place an

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[127] See *Minister of Home Affairs v National Institute for Crime Prevention and the Re-Integration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC) at para 34; *Phillips v Director of Public Prosecutions, (Witwatersrand Local Division)* 2003 4 BCLR 357 (CC) at para 20; *Moise v Greater Germiston Transitional Local Council of Greater Germiston* 2001 8 BCLR 765 (CC) at para 19*; Gumede v President of the RSA* 2009 3 BCLR 243 (CC) at para 37; *Qozeleni v Minister of Law and Order* 1994 3 SA 625 (E) at p 640F-J; and *Attorney General of Trinidad and Tobago v Morgan* 45 [1985] LRC 9, as quoted by the Kenya High Court in *National Media Group Limited v Attorney General* [2007] 1 EA 261 (HCK).
[128] AA vol. 3 p 744 para 22.
[129] AA vol. 3 p 745 para 25.

undue strain on the budget;

92.3. the number of prisoners requiring HAART;

92.4. the cost of enrolment; and

92.5. evidence to juxtapose the cost that the State incurs in treating OIs that result from failing to manage the underlying HIV through HAART.[130]

93. The appellants' reliance on bald assertion cannot suffice and should, we submit, be rejected. As the South African Supreme Court of Appeal has confirmed:

> *"A bare or unsubstantiated denial will only pass muster where there is no other option available to a respondent due to, for example, a lack of knowledge, and nothing more can be expected of the respondent. A bare denial, in circumstances where a disputing party must necessarily be conversant with the facts averred and is in a position to furnish an answer (or countervailing evidence) as to its truth or correctness, does not create a real and genuine dispute of fact. A proper answer to material averments under reply requires, at the minimum, a separate and unequivocal traversal of each and every such allegation which the party seeks to contest.*"[131]

94. Concrete evidence is particularly important in constitutional litigation where Government respondents must satisfy a court that they lack the necessary resources fully to realise a constitutional right. Yet, the appellants have failed to adduce any evidence of their purported inability to meet their constitutional obligations.

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[130] Id at para 32.

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

95. In contrast to the appellants' approach, the High Court found that the uncontroverted evidence put up by the respondents demonstrated that the refusal of HAART to HIV-positive foreign prisoners is inimical to both the rights and freedoms of others and the public interest. It held that the limitation to the prisoners' right to freedom from discrimination and equality could not reasonably be justified. It also found that the denial of HAART exposed HIV-positive persons to premature death, and increased the likelihood of the transmission of contagious infections to other inmates regardless of their nationality.[132] Finding that the non-treatment of foreign prisoners posed a danger to citizens too, the Court held that it could never be in the public interest in a democratic society to withhold treatment where that results in death and infection of others.[133]

96. We submit that those findings are clearly borne out by the facts on the papers:

96.1. Rather than protecting the rights of others, the refusal to provide HAART to HIV-positive foreign prisoners does the exact opposite: it places other prisoners at an increased risk of contracting HIV. That is because the viral load of HIV-positive people is higher when they are not on HAART than it is when they are.[134] In the closed environment of a prison, that means that HIV-positive prisoners who are not on HAART are far more likely to infect their co-prisoners. Once released from prison, such persons may then expose the broader community to infection.

96.2. Similarly, the refusal to provide HAART to HIV-positive foreign

[132] High Court judgment vol. 1 p 33 para 40.
[133] Id at para 40.
[134] See Expert affidavit vol. 2 p 305 para 39; BONELA affidavit vol. 3 p 646 para 19.3.

prisoners increases all inmates' and prison staff's chances of contracting infectious OIs, like tuberculosis ("TB"). TB is the lead OI and it recurs in prisoners living with HIV who are not placed on HAART.[135] Due to overcrowding, bad ventilation and other poor prison conditions, the likelihood of transmission of TB in prison populations is high.[136] It means that the failure to enrol foreign HIV-positive prisoners on HAART endangers the health of all persons in the prison environment – whether HIV-positive or not, and whether foreign or Batswana. The refusal thus undermines the rights and freedoms of others, rather than enhancing them.

96.3. The State's approach is also contrary to the public interest. Withholding HAART from a select number of prisoners may, in the long term, cost the government more money than providing ARVs to HIV-positive prisoners.[137] That is because the State is forced repeatedly to treat OIs across the prison population, rather than curbing their recurrence. Such increased expenditure cannot be in the public interest.

96.4. Moreover, the refusal to provide State-funded HAART to foreign, HIV-positive prisoners places them at risk of drug resistance to first-line HAART.[138] As the cases of Mr Tapela and Mr Piye show, foreign prisoners denied access to state-funded ARVs will, where their funds permit, seek privately-funded treatment but will be forced to cease

[135] Expert affidavit vol. 2 pp 300-301 paras 16-19; BONELA affidavit vol. 3 pp 644-646 paras 13-19.
[136] Expert affidavit vol. 2 p 306 para 46; BONELA affidavit vol. 3 p 645 para 19.2.
[137] Expert affidavit vol. 2 p 300 para 16; BONELA affidavit vol. 3 p 644 para 13.
[138] BONELA affidavit vol. 3 p 646 para 19.4.

treatment when this is no longer affordable or viable. Inconsistent use of HAART increases the risk of drug resistance, and may result in HIV-positive persons no longer responding to first-line HAART and needing to enrol on second-line HAART, which is more costly and leaves fewer treatment options over time.[139] The prejudice to Mr Tapela and Mr Piye (and others in their situation), and its potential impact of treatment options, far outweighs any (as yet unidentified) benefit that the State may claim.

97. In the circumstances, we submit that the High Court was correct to find that the denial of HAART to foreign HIV-positive prisoners cannot be justified under s 15(4)(b) read with s 3 of the Constitution. Those provisions are violated by the State's conduct. Its findings and order in this regard must stand.

CONCLUSION

98. For all the reasons set out above, we respectfully submit that the appeal should be dismissed, and this Court should confirm the High Court's order, including the order as to costs. We further seek that the appellants be ordered to bear the costs of the appeal, including the costs of two counsel.

99. In the event that the Court does not decide in the respondents' favour, we urge the Court to apply the principles set out in *Attorney General v Oatile*[140] that unsuccessful private parties litigating constitutional rights against the

[139] BONELA affidavit vol. 3 p 646 para 19.4.
[140] 2011 (2) BLR 209 (CA) at p 242. See also *Nchindo & Others v Attorney-General of Botswana & Another* CACLB-056-09 [2010] BWCA 49 at para 71 and *State v Marapo* (2002) AHRLR 58 (BwCA 2002) at para 26.

State should not be ordered to pay the costs of the State.

ADVOCATE GILBERT MARCUS SC

ADVOCATE ISABEL GOODMAN

ATTORNEY TSHIAMO RANTAO

16 July 2015

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