

**MINISTER OF HEALTH AND OTHERS v TREATMENT ACTION CAMPAIGN AND
OTHERS (No 2) 2002 (5) SA 721 (CC)**

SUMMARY

- *Held*, that, although the concerns raised on behalf of the appellants were relevant to the ability of government to make a 'full package' available throughout the public health sector, they were not relevant to the question whether Nevirapine should be used to reduce mother-to-child transmission of HIV at those public hospitals and clinics outside the research sites where facilities in fact existed for testing and counselling.
- *Held*, further, that in evaluating government's policy, regard had to be had to the fact that the present case was concerned with newborn babies whose lives could be saved by the administration of Nevirapine to mother and child at the time of birth. The safety and efficacy of Nevirapine for this purpose had been established and the drug was being provided by government itself to mothers and babies at the pilot sites in every province. The administration of Nevirapine was a simple procedure. Where counselling and testing facilities existed, the administration of Nevirapine was well within the available resources of the State and, in such circumstances, the provision of a single dose of Nevirapine to mother and child where medically indicated was a simple, cheap and potentially lifesaving medical intervention.
- *Held*, further, that the provision of a single dose of Nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV was, as far as the children were concerned, essential. Their needs were most urgent and their inability to have access to Nevirapine profoundly affected their ability to enjoy all rights to which they were entitled. Their rights were most in peril as a result of the policy that had been adopted and were most affected by a rigid and inflexible policy that excluded them from having access to Nevirapine. The State was obliged to ensure that children were accorded the protection contemplated by s 28 that arose when the implementation of the right to parental or family care was lacking. The concern was with children born in public hospitals and clinics to mothers who were for the most part indigent and unable to gain access to private medical treatment

which was beyond their means. They and their children were in the main dependent upon the State to make health care services available to them.

- *Held*, further, that the government policy was an inflexible one that denied mothers and their newborn children at public hospitals and clinics outside the research and training sites the opportunity of receiving a single dose of Nevirapine at the time of the birth of the child. A potentially lifesaving drug was on offer and where testing and counselling facilities were available it could have been administered within the available resources of the State without any known harm to mother or child. In the circumstances, the finding of the High Court that the policy of government insofar as it confined the use of Nevirapine to hospitals and clinics which were research and training sites constituted a breach of the State's obligations under s 27(2) E read with s 27(1)(a) of the Constitution was correct. Implicit in this finding was that a policy of waiting for a protracted period before taking a decision on the use of Nevirapine beyond the research and training sites was also not reasonable within the meaning of s 27(2) of the Constitution.
- *Held*, further, that in the present case the Court had the duty to determine whether the measures taken in respect of the prevention of mother-to-child transmission of HIV were reasonable. Throughout the country health services were overextended. HIV/AIDS was but one of many illnesses that require attention. It was, however, the greatest threat to public health in the country. There were daunting problems confronting government as a result of the pandemic. And besides the pandemic, the State faced huge demands in relation to access to education, land, housing, health care, food, water and social security. These were the socio-economic rights entrenched in the Constitution, and the State was obliged to take reasonable legislative and other measures within its available resources to achieve the progressive realisation of each of them. In the light of the country's history, this was an extraordinarily difficult task. Nonetheless it was an obligation imposed on the State by the Constitution. The rigidity of government's approach when the proceedings had commenced affected its policy as a whole. If it was not reasonable to restrict the use of Nevirapine to the research and training sites, the policy as a whole would have to be reviewed. Hospitals and clinics that had testing and counselling facilities should have been able to prescribe Nevirapine where that was medically indicated. The training of counsellors ought to include training for counselling on the use of Nevirapine. This was not a complex task and it should not have been difficult to equip existing counsellors with the necessary additional knowledge. In addition, government would need to take reasonable measures to extend the testing and counselling facilities to hospitals and clinics throughout the public health sector

beyond the test sites to facilitate and expedite the use of Nevirapine for the purpose of reducing the risk of mother-to-child transmission of HIV.

- *Held*, further, that there was no merit in the argument that the only power that this Court had in the present case was to issue a declaratory order.
- *Held*, further, that a factor that needed to be kept in mind was that policy was and should be flexible. It could be changed at any B time and the Executive was always free to change policies where it considered it appropriate to do so. The only constraint was that policies had to be consistent with the Constitution and the law. Court orders concerning policy choices made by the Executive should therefore not be formulated in ways that precluded the Executive from making such legitimate choices.
- *Held*, further, that a declaration 'declaring that any law or conduct that was inconsistent with the Constitution was invalid to the extent of its inconsistency' had to be made in the present matter. The declaration had to be in a form which identified the constitutional infringement. Whether remedial action had to be specified was a separate question involving a different enquiry. The Court had identified aspects of government policy that are inconsistent with the Constitution. The decision not to make Nevirapine available at hospitals and clinics other than the research and training sites was central to the entire policy. Once that restriction was removed, government would be able to devise and implement a more comprehensive policy that would give access to health care services to HIV-positive mothers and their newborn children, and would include the administration of Nevirapine where that was appropriate. The policy as reformulated had to meet the constitutional requirement of providing reasonable measures within available resources for the progressive realisation of the rights of such women and newborn children.
- *Held*, further, that it was essential that there be a concerted national effort to combat the HIV/AIDS pandemic. The government had committed itself to such an effort. Its policy failed to meet constitutional standards because it excluded those who could reasonably be included where such treatment was medically indicated to combat mother-to-child transmission of HIV. That did not mean that everyone could immediately claim access to such treatment, although the ideal was to achieve that goal. Every effort, however, had to be made to do so as soon as reasonably possible.