
CERTIFICATE IN TERMS OF RULE 18(6) OF THE CONSTITUTIONAL COURT RULES

BOTHA, J:

I hereby certify that the requirements set out in subparagraphs (i), (ii) and (iii) of Rule 18(6) of the Constitutional Court Rules have been met.

_____

C BOTHA
JUDGE OF THE HIGH COURT

TAC v MINISTER OF HEALTH / MECS – 11 March 2002

JUDGMENT

BOTHA, J:

In this matter the respondents filed an application for leave to appeal against an order made by me on 14 December 2001.

The application was an application for a certificate in terms of Rule 18(6) of the Rules of the Constitutional Court and also, in the alterative presumably, for leave to appeal to the Supreme Court of Appeal.

At the hearing the application for leave to appeal to the Supreme Court of Appeal was abandoned.

The applicants filed an application that leave to execute the order against the first to ninth respondents be granted pending the appeal. I assume that no order is brought against the tenth respondent because, as appeared from the papers in the main application, the tenth respondents is already substantially complying with the order.

The application for a certificate and the application for leave to execute were heard on 1 March 2002.

On 27 February 2002 the Premier of the province of Kwazulu Natal filed an affidavit that he did not intend to pursue the appeal and that he had no objection against the execution of the order appealed against. He was represented by Mr Unterhalter. The fifth respondent was the member of the executive council (MEC) for health for the province of Kwazulu Natal.

Mr Moerane SC, who with messrs Coppin and Vally appeared for the respondents, disputed the Premier's authority to intervene. In the end I ruled that the Premier, as the person in whom the executive authority of the province vested in terms of section 125(1) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), had the right to assert his authority and to represent the province. It had been argued by mr Moerane that his decision to intervene had to be countersigned by a member of the executive council, and in particular by the erstwhile fifth respondent, in terms of section 140(2) of the Constitution.

I ruled that the decision to intervene was not a decision as contemplated in section 140(1), which , in terms of section 140(1) had to be in writing.

Thereupon the matter proceeded even though mr Moerane had indicated that the respondents would appeal against my ruling relating to the intervention of the Premier. At the same time mr Marcus, who, with mr Majola, appeared for the

applicants, indicated that the applicants would abandon the order against the fifth respondent in view of contents of the affidavit filed by the Premier of Kwazulu Natal.

I am of the view that I should grant a positive certificate for the purposes of the Constitutional Court Rule 18(6) in respect of all three the categories listed there. The matter is contentious and it is of great public concern. As far as section 27 of the Constitution if concerned, it is to a large extent *res nova*.

Mr Marcus asked me to order that the Minutes of the Minmec meetings be ordered to be part of the record. They were the minutes of meetings of the minister (the first respondent) and the members of the executive councils (MEC's) of the nine provinces (the other respondents) which the applicants tried to produce at the hearing. Eventually the applicants abandoned the attempt to produce these minutes. In view of the fact that I was able to arrive at a finding in favour of the applicants without those minutes, I cannot see why they should be included in the record. I shall make no order in this regard.

Mr Moerane argued that the application was premature and that leave to execute could only be granted after the Constitutional Court had granted leave to appeal.

In my view the argument of mr Moerane is ill founded.

The automatic suspension of an order in terms of Rule 49(11) comes into effect when an appeal is noted or when an application for leave to appeal has been made. Where the court that has the power to grant leave to execute is the court that made the order, it follows that the order is suspended when the appeal is noted, or the application for leave to appeal lodged, with the court that made the order. In that context I am of the view that the lodging of the application for a certificate should be considered to be the lodging of an application for leave to appeal. If not, at the very least, it must be considered to be the noting of an appeal. Any other construction would lead to the anomalous result that where there is a direct appeal to the Constitutional Court only, there can be no automatic suspension of the order until the stage for the filing of an application for leave to appeal in terms of Constitutional Court Rule 18(7) has been reached.

However, if Rule 49(11) is not applicable to a situation where an appeal is to be made to the Constitutional Court by notice of the wording of Rule 49(11), I am of the view that the common law should then apply. See **South Cape Corporation v Engineering Management Services 1977(3) SA 534 AD at 544 H – 545 G** for the common law in such a situation. In my view, for the purposes of the common law the filing of the application for the certificate must be considered to be the actual noting of the appeal. It is the first and necessary step in the noting of an appeal. It would lead to anomalous situations if an order is implemented and then suspended when an application for leave to appeal is filed in terms of Constitutional Court Rule 18(7).

The argument that leave to execute can only be granted when leave is granted by the Constitutional Court, makes no sense. On that basis there will inevitably be a period of implementation of the order followed by a period when execution is suspended. It makes no sense.

For these reasons the argument that the application is premature, is rejected.

In the application for leave to execute the applicants asked that orders 1 and 2 be carried out immediately. In the alternative they asked that it be declared and that it be ordered that doctors in the public health sector are entitled to make Nevirapine available to pregnant women and their babies if in the judgment of the attending medical doctor, acting the consultation with the medical superintendent of the facility concerned, this is medically indicated which at least shall include that the woman concerned has been appropriately tested and counselled.

In the founding affidavit reference is made to the fact that it was common cause in the main application that 70 000 children are infected with HIV/AIDS each year. Then it is alleged that if Nevirapine were only prescribed outside the pilot sites in an additional 15% of the cases where the mother is HIV positive, it would mean that it will be prescribed in an additional 10 500 cases per year. If mother to child transmission (MTCT) of HIV can be prevented in one third of the cases by the administration of Nevirapine, it would result in a saving of 10 lives a day.

It is alleged that if the implementation of orders 1 and 2 is delayed, it would cause irreparable prejudice. It was contended that the orders 1 and 2 only require the respondents to administer Nevirapine where they were in a position to do so.

The first to ninth respondents all filed affidavits in opposition to the application.

The first respondent pointed out that the respondents are not opposed to the providing of Nevirapine outside the present research and training sites, and that they are regularly reviewing and extending their programme. From an initial 160 access points they have now progressed to 200.

Then several points are made such as:

(a) that most babies are born at clinics without the intervention of doctors;
(b) patients are not necessarily seen by the same doctor;
(c) that there is no capacity outside the research and training sites for the immediate implementation of a MTCT prevention programme;
(d) that the implementation of the order will compromise other services and prejudice other patients;
(e) that the implementation of the order will lead to a diversion of resources and budgetary distortions;

(f) that orders 1 and 2 do not require the respondents to administer Nevirapine only where they are in a position to do so;

(g) that the implementation of the order will cause chaos and disruption in the public health system.

Dr Simelela made an affidavit in which she described the package of care that has to be provided to prevent MTCT of HIV and referred to problems experienced in the provinces.

Affidavits are filed by the other respondents in which the point was made that orders 1 and 2 cannot be immediately executed and that execution will compromise other services.

On behalf of the fourth respondent it is stated that the programme is being rolled out as fast as possible. It is said that if counseling is done by professionals staff, it will have a negative impact on other services.

It is estimated that it will cost R66 150 000 to make Nevirapine available at all the facilities.

On behalf of the ninth respondent the allegation is made that there is no facility outside the pilot sites with the expertise and capacity for appropriate counseling and testing.

Mr Marcus argued that the respondents misconstrued the import of prayers 1 and 2. They will only apply where the structures for testing and counseling exist. He pointed out that it was not the applicants' case that the present programme being implemented should be extended everywhere in the country.

He pointed out that it was not in dispute that 10 lives a day could be saved if the order is implemented.

He contended that the court had the power to grant the alternative prayer and referred to section 73 of the Constitution and referred the court to **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977(3) SA 534 AD at 545 C – D**, and **Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban and others 1986(2) SA 663 AD at 676 D**.

Mr Moerane argued that the court had no power to order execution as it would amount to a policy decision. He relied on the doctrine of the separation of powers and contended that a court had no power to grant orders 1 and 2. they are indeed a nullity and invalid.

On the facts he contended that the allegation of the respondents that they do not have the capacity to implement orders 1 and 2 must be accepted.

In respect of the alternative prayer he contended that it cannot be granted because it amounts to an amendment of the order. In this regard he referred to **Minister of Agricultural Economics and Marketing v Virginia Cheese and Food Co (1941) (Pty) Ltd 1961(4) SA 415 T**.

I have to consider the potentially of irreparable harm, the prospects of success of the appeal and the balance of convenience.

The affidavits of the respondents abound with general allegations, and a repetition of matter that has already been dealt with in the main application. The pertinent allegation that an implementation of the order will result in the prevention of at least 10 deaths per day is not denied.

The respondents in essence say that they cannot implement the order, or that, if they were to implement it, it would be disruptive.

To the extent that they say that they cannot implement the order, they misconstrue my judgment. It was clearly not the intention to order them to extend the programmes at the pilot sites to the rest of the country or even to provide equivalent treatment there. For that reason, for instance there was a deliberate omission of breast feeding from the requirements prescribed in order 2.

The whole basis of order 2 is that it should be dependant in the capacity of the facility concerned to implement it. Therefore requirements like testing and counseling were prescribed as *minima* that had to be complied with.

Order 2 orders the respondents to prescribe Nevirapine when it is medically indicated, that is after there has been testing and counseling. It does not order the respondents to test and counsel pregnant women outside the research and training sites with a view to the prescription of Nevirapine. Order 2 becomes applicable when the requirements of testing and counseling happen to hve been met.

The respondents wish to read order 2 as an order that obliges them in all cases outside the pilot sites to administer Nevirapine. If that is the interpretation of order 2, then the whole order becomes ambiguous, because then the distinction between order 2 and the subsequent orders will fall away. If there is such an ambiguity, it can be resolved by reference to the contents of the judgment. See **Administrator, Cape and another v Ntshwanqela and others 1990(1) SA 705 AD at 716 G**. If reference is made to the judgment, it is clear that order 2 is not aimed at a wholesale extension of the prescription of Nevirapine outside the pilot sites, but only aimed at ordering the respondents to do something which they have so far refused to allow, namely to prescribe Nevirapine where it is medically indicated, that is where it can be done because the preconditions for its prescription already exist.

Some point was made in the answering affidavit, but not in argument, of the fact that order 2 requires the prescription of Nevirapine to be done after a consultation with the medical superintendent of the facility concerned. The point was made that the title superintendent was not universal in the health system, some hospitals being managed by Hospital General Managers. There is no magic in the title medical superintendent. Every facility must, somewhere along the line, have a medical officer who is, professionally and medically speaking, in charge of it. He or she may not even be on the site. That person should be consulted. The whole idea is that the professional hierarchy should not be subverted, by-passed or kept in the dark. In my view, any medical officer doing duty at a facility will know what medical officer is, medically speaking, in charge of the facility.

As far as the prospects of success are concerned I consider it unlikely that the order granted will be reversed. At best the respondents may achieve some modification of it.

If order 2 is implemented, and the appeal succeeds, the result will be that the health facilities will have suffered some inconvenience here and there and that resources, especially human resources, will have been strained.

In many cases that will be an inconvenience that ethically motivated health workers will gladly assume. At the same time there will be a gain in lives saved which cannot be considered a loss even if the Constitutional Court should find that parallel access to Nevirapine should not have been granted at all.

If the order is suspended and the appeal were to fail, it is manifest that it will result in the loss of lives that could have been saved. It would be odious to calculate the number of lives one could consider affordable in order to save the respondents the sort of inconvenience that they foreshadow. I find myself unable to formulate a motivation for tolerating preventable deaths for the sake of sparing the respondents prejudice that can not amount to much more than organizational inconvenience.

The applicants have based their case on the assumption that an 10 500 pregnant women outside the pilot sites will receive Nevirapine at state facilities in a full year. That amounts to less than 900 per month, more or less thirty and day. These women will not present themselves at the same time at the same facility. They are spread all over the country and they will only require Nevirapine when they are due for labour.

I cannot see why the health system cannot absorb such an extra load. In most cases the women will already have been making use of the health system for the purposes of ante-natal care and testing.

Objections such as that there are no rooms available for counseling and that lay counselors have to be appointed and training for counseling are not valid in the context of order 2. Proper counseling facilities may form part of the ideal situation that will be achieved once there has been a complete roll out of the programmes at the research and training sites. Order 2 concerns access to Nevirapine in less than ideal circumstances to reduce or avoid the so called missed opportunities.

For all these reasons I am of the view that leave to execute should be granted.

I agree with mr Moerane that it would not make sense to give leave to execute in respect of order 1, which is of a declaratory nature.

As far as costs are concerned I shall make the usual order, namely that the costs shall be costs in the appeal.

In the result the following order is made:

1. **Pending the appeal in this matter the first to fourth and the sixth to ninth respondents are ordered to give effect to paragraph 2 of the order of court granted in this matter on 14 December 2001.**

2. The costs of this application shall be costs in the appeal.

_____

C BOTHA
JUDGE OF THE HIGH COURT