

Section 1

Implementing the Operational Plan in Prisons

By Jonathan Berger

The State is required to take reasonable legislative and other measures. ... The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.¹

Introducing *N v Government of the Republic of South Africa*

From April 2004, the ALP devoted a significant share of its resources towards monitoring the implementation of the *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa* (Operational Plan), adopted by Cabinet on 19 November 2003. Amongst other things, the Operational Plan details a public sector ARV treatment programme that makes reference to the provision of appropriate care in prisons.

But as our 2005 annual review showed, the divide between policy and reality for prisoners at Westville Correctional Centre (WCC) was enormous:

Preparation for litigation against the Westville Correctional Centre in Durban, the Department of Correctional Services (DCS) and the Department of Health began in October 2005. ...



Remembering the Westville prisoners at a TAC march on the Union Buildings on the Global Day of Action (23 August 2006)

1. *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at paragraph 42

After consultation with some HIV positive prisoners, the ALP immediately wrote to the DCS and the WCC authorities to notify them of this complaint and asked that those prisoners whose HIV infection met clinical guidelines for ARV treatment are provided access to it. Despite undertakings by the DCS ... that they would work expeditiously to provide prisoners with access to ARV treatment, they were very slow to act.

Thus despite assurances from DCS officials with whom the ALP met in December 2005 that they would indeed ensure the prisoners' access to ARV treatment, little progress was made. Numerous attempts by the ALP to follow up on the commitments made at the December meeting proved fruitless. It soon became clear that nothing short of litigation would help to break the inertia. Thus papers were filed in the Durban High Court in April 2006 on behalf of fifteen prisoners at WCC and the TAC, alleging that government was unreasonably restricting access to ARV treatment. In particular, the case sought an order compelling the state "with immediate effect to provide antiretroviral treatment, in accordance with the ... Operational Plan, to the First to Fifteenth Applicants, and any and all other similarly situated prisoners" at WCC.²

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Outcome of the application

The matter – which was the first major challenge to the implementation of the Operational Plan to go to court – was argued before Justice Pillay at the end of May 2006. A few weeks later – on 22 June 2006 – the state was ordered immediately to remove all restrictions to ARV treatment at WCC.² It was also ordered to file an affidavit within two weeks setting out the steps it intended to take to make ARV treatment available to all prisoners at WCC who wanted and needed it. This did not happen. Instead, government applied for leave to appeal.

The ordinary effect of any application for leave to appeal against a decision of the High Court is to suspend the operation of the order pending the outcome of the appeal. However, the rules of court make provision for successful applicants to approach the court for an order to compel implementation in certain circumstances, such as those applicable to this case. This is indeed what happened, with the applicants arguing as follows:

The very purpose of the main application has always been to expedite the ARV treatment to which the inmates are entitled under the Constitution. Their case has always been that the respondents have 'delayed without good cause in circumstances where life and death mattered'. It was also why this court concluded that its intervention was necessary. It concluded that 'intervention by this court is called for to ensure that the respondents urgently comply with their constitutional and statutory obligations not only to the first fifteen applicants ... but also to similarly situated prisoners'. That is the purpose of the main order. It is to avoid further delay and to ensure that the inmates get the urgent medical treatment to which they are entitled under the Constitution. ...

The question in these circumstances is whether the implementation of this court's main order should again be suspended and delayed until after the appeals in this matter have been finalised. We submit that it would be outrageous to do so. It will not only perpetuate the ongoing violation of the inmates' constitutional rights but will unlawfully cause them suffering they are entitled to avoid, permanent damage to their health against which they are entitled to be protected and for some of them avoidable death against which they have a right to be protected.³

2. *N v Government of Republic of South Africa (No 1)* 2006 (6) SA 543 (D)

3. Heads of Argument at paragraphs 9 and 10 (footnotes omitted)

Yet despite the order compelling the state to act,⁴ it still did not implement the original order. Instead, it filed an application for leave to appeal against the interim implementation order. This was indeed surprising, as the law on the issue was decidedly against the granting of leave in such circumstances. Justice Nicholson, who heard the second application to compel the state to implement the original order of 22 June 2006, explained in his judgment of 28 August 2006:

The authorities do not view with particular favour appeals from implementation orders. These have taken place – I gather – on extremely rare occasions. It is somewhat ironic and sad that both occasions relate to the government seeking to avoid the effect of court orders for the provision of ARVs.⁵

By the time the second application to compel was brought, the irreparable harm that the applicants had sought to guard against had finally arrived. On 6 August 2006, MM – the seventh applicant – died of an AIDS-related illness. Despite being diagnosed with a similar illness (and therefore eligible for ARV treatment) in November 2003, he only received access on 12 July 2006. By then – some 32 months later – it was too late. But for others it was not, with Justice Nicholson’s decision finally getting the state to act. In his strongly worded judgment handed down on 28 August 2006, Justice Nicholson ordered the respondents to implement the original orders “unless and until” set aside on appeal. This included the obligation to file an affidavit “setting out the manner in which it ... [would] comply with ... [the] order” by 8 September 2006.



Remembering the Westville prisoners on the Global Day of Action, 23 August 2006

4. *N v Government of Republic of South Africa (No 2) 2006 (6) SA 568 (D)*
 5. *N v Government of Republic of South Africa (No 3) 2006 (6) SA 575 (D)* at paragraph 15

Implementation of the order

The state's affidavit, which was indeed filed on this date, was unfortunately found to be wanting in several respects, leaving far too many questions unanswered. Most troubling was that it showed that the government had a particularly narrow understanding of Justice Pillay's order, failing to understand the relationship between the provision of ARV treatment and other essential interventions. Disturbingly, such an approach flies in the face of much rhetoric over the years regarding a comprehensive and holistic approach to the epidemic. In particular, concerns regarding the following issues were raised:⁶

- The identification of prisoners at WCC in need of ARV treatment;
- HIV and CD4 count testing;
- Opportunistic infections;
- Nutrition, the timing of meals and the so-called "wellness programme";
- HIV prevention interventions;
- Co-operation between respondents;
- Internal monitoring and evaluation; and
- Independent assessment of implementation of the plan.

The state's reply to the ALP's commentary indicated that the parties were indeed quite far apart. As a recent journal article notes:

In reply, the State provided important new information on various aspects of its HIV/AIDS programme at WCC but also disputed many of the allegations. When read together with its affidavit of 8 September 2006, the reply does not adequately address all of the applicants' concerns. The stage was thus set for ongoing legal proceedings.⁷

The broader political context, however, suggested that an out-of-court settlement was indeed possible. As the same journal article recorded:

[T]he parties were poised to consider the possibility of resolving the outstanding issues through negotiations instead of unnecessary further litigation. According to the applicants, "there is sufficient common ground between the parties upon which a final settlement in this matter may be negotiated".

Initially, settlement talks did not go well. A first meeting between the parties' representatives – which took place at WCC in mid-December 2006 – ended when the ALP and TAC delegation walked out after it had become obvious that the government's representatives had not been mandated to address the eight areas of concern that had been raised in advance of the meeting – both in court papers and in correspondence. Instead, the state delegation was only prepared to discuss the actual provision of ARV treatment at WCC and not the provision of comprehensive HIV-related services, as indeed required by the Operational Plan.

After leaving the meeting, TAC representatives sent a letter to the Deputy President in which they expressed concern regarding the failed meeting and requested that she intervene – particularly given the applicants' continued willingness to discuss a settlement and the significant developments that were taking place more broadly and which ultimately culminated in the development and adoption

6. For further discussion on the deficiencies in the plan, see Adila Hassim and Jonathan Berger, "Case review: Prisoners' right of access to anti-retroviral treatment" (2006) 7(4) *ESR Review* 18 at 18 – 19

7. *Ibid* at 18 - 19

of a new national *HIV & AIDS and STI Strategic Plan for South Africa, 2007-2011* (NSP). In January 2007, the TAC received a response from the Minister of Correctional Services in which he expressed regret at the way the meeting had ended, invited the parties to continue negotiating and mandated his deputy – Ms Loretta Jacobus – to deal with the matter.

Settlement negotiations

Two processes then followed in parallel: the resumption of settlement negotiations as well as the continuation of the legal process. Given the history of the matter, which showed that progress did not happen in a vacuum but only when DCS felt under pressure to act, we realised that mere talks – without anything further – would not suffice. We therefore decided to proceed with a settlement meeting (21 February 2007) as well as to set the matter down for a hearing to determine the reasonableness of the state's plan for providing ARV treatment at WCC – as contemplated by the original court order – some three weeks later (15 March 2007). The mid-March deadline, in our view, would give the talks a sense of urgency. It did.

At the first settlement meeting in 2007, the parties agreed to set up a small task team – with representation from the ALP, TAC, DCS and the DoH – mandated to thrash out the substance of a settlement based on the eight areas of concern as set out in the ALP's correspondence. The task team was to work quickly and to report back to a second meeting of the principals, which was to take place before the March 15th deadline.

This is what in fact happened. Two full-day task team meetings (28 February and 5 March) and numerous electronic notes between the parties resulted in a draft *National Framework for a Comprehensive HIV and AIDS Plan for Correctional Centres* (National Framework), which was tabled at the second settlement meeting for discussion. The parties debated – and reached consensus – on the handful of issues that the task team had been unable to resolve. The task team was then mandated to finalise the text of the National Framework, based on the agreements reached at that meeting. In addition, the parties' legal teams were mandated to finalise the settlement – which was to incorporate the

finalised National Framework, understood by all to be the very basis upon which the case was to be settled.

But then the state's legal team intervened and the deal was scuppered. While the National Framework was indeed finalised, it did not become part of any settlement agreement. Instead, the state shortly thereafter reneged on what had been agreed to at the second settlement meeting – apparently on the basis of its legal team's advice – and simply returned to

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the very narrow position it had originally adopted at the December 2006 meeting. At this stage – the afternoon of 14 March 2007 – it was too late for the hearing to continue, so a postponement was sought and obtained. Notwithstanding the state's bad faith, the hearing was postponed indefinitely because, at that point, we still believed that a settlement was possible.

Where to from now?

The NSP recognises the need for individual departments – such as DCS – to develop and implement sector-specific strategic and operational plans:

It is envisaged that all government departments and sectors of civil society will use this plan as a basis to develop their own HIV and AIDS strategic and operational plans to achieve a focussed, coherent, country-wide approach to fighting HIV and AIDS. ... After it has been adopted by SANAC, the NSP should be used in developing sector plans at national, provincial and district level. Yearly operational plans should be based on realistic objectives that are linked to the NSP's objectives, interventions and targets.⁸

8. NSP at pages 54 and 145 respectively

In addition, the NSP recognises prisoners as one of a number of populations of people at higher risk of HIV infection:

Incarceration is a risk factor for HIV and is correlated with unprotected sex and injecting drug use in correctional facilities, but may also include risk of blood exposure as a product of violence and other factors. Interventions for risk reduction include provision of voluntary testing and counselling, condom provision, addressing rape, and addressing intravenous drug use. Male prisoners are predominantly vulnerable but risks extend to female prisoners. Little is known about the extent of HIV in South African correctional services, nor the relationship between known risk factors and HIV acquisition in South Africa.⁹

DCS has been informed that we are keen to finalise the already agreed-upon National Framework as a sector-specific strategic plan. It remains to be seen whether the state will show the requisite leadership and rise to the challenge, as set out in the NSP, or if the issue of access to comprehensive HIV-related services in prisons across the country has to be resolved through adversarial litigation. Our choice is to partner with government in addressing the management of HIV/AIDS in prisons. We hope that they too will choose the non-confrontational route.

But in respect of WCC itself, it appears as if the hearing into the reasonableness of the state's plan for that facility will indeed take place. While there have been some positive developments – such as increased access to condoms and three meals now being served at three distinct mealtimes – the overall situation at WCC remains unacceptable. Access to HIV testing services, for example, remains extremely limited. Concerns about the quality and quantity of food served remain. Other non-negotiable concerns have yet to be addressed. Unless and until the provision of ARV treatment at WCC is indeed done in accordance with the Operational Plan, as required by the now year-old order of Justice Pillay, the resumption of legal proceedings seems all but inevitable.



From left: Michelle Govender (ALP attorney), Elizabeth Malela (social worker and counsellor to NM, SM and LH) and Jonathan Berger (ALP senior researcher) study the Constitutional Court's judgment in *NM and Others v Smith and Others*.

9. NSP at pages 37 to 38 (footnotes omitted)