

HIV and Access to Legal Services Conference, 17-18 February 2006

Keynote Address delivered by Chief Justice Pius Langa

Introduction

It is no secret that Sub Saharan Africa has borne the brunt of the HIV/AIDS epidemic during the last two decades. Though we are only 10% of the world's population it is claimed that we have over 60% of all people living with HIV/AIDS.¹ South Africa has been one of the countries worst hit by the epidemic, having one of the highest HIV prevalence and infection rates in the world. There has been much debate and disagreement about the exact numbers of people living with HIV/AIDS, infection rates and death rates. Though the statistics may be uncertain the devastating present and potential impact of the epidemic is not.

¹ The World Bank *HIV/AIDS in Africa-Regional Brief*
<<http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/AFRICAEXT/EXTAFRHEANUTPOP/EXTAFRREGTOPHIVAIDS/0,,contentMDK:20411613~menuPK:717155~pagePK:34004173~piPK:34003707~theSitePK:717148,00.html>> (accessed 15 February 2006).

We are also told that prevalence is highest amongst people between the ages of 15 and 49, the age group that is supposed to be the most economically productive in society and which is responsible for raising the future generation.² The consequences are affecting not just those who are living with HIV/AIDS but our whole society. There are increased numbers of destitute and orphaned children who face an uncertain future and the elderly who are burdened with the emotional and economic care of those who fall ill leading to a downward spiral of poverty and despair.

On the economic front, there is the potential, or even the reality of lower productivity due to constant illness and caring for the sick, skills shortages and increased expenditure on social services to name but a few.

This is a situation that challenges all sectors of our society. The question is **what contribution can we make, not only towards the eradication of the**

² Human Sciences Research Council *South African National HIV Prevalence, HIV Incidence, Behavior and Communication Survey 2005* < http://www.hsrc.ac.za/media/2005/11/20051130_1Factsheet2.html > (accessed on 15 February 2006).

epidemic, but also to improving the quality of life of people living with HIV/AIDS (PLHA) and the millions of those who are affected by it.

This question is what has brought us here today. As the focus of the conference is on access to justice I will limit my remarks to some aspects which circumscribe the role played by the law. I refer to stigma, discrimination and access to socio economic rights, most notably the right to health care and social security. I will first outline the challenges faced by PLHA concerning these areas and then briefly indicate what I consider to be the proper approach to alleviating these problems and the role to be played by civil society and the legal profession in particular.

But before I move on let me say, firstly, that despite the gloomy picture that I have referred to, there is no reason to believe that we as a nation do not have the capacity to win the fight against HIV/AIDS. We are a nation that has overcome many obstacles. We managed to defeat apartheid and in

defiance of the world's expectations we have built from its ashes an economically successful and politically stable constitutional order. The HIV/AIDS epidemic is not an insurmountable obstacle in our progress towards consolidating the successes that we have already enjoyed.

Secondly, in our new constitutional order we have recognized the fact that human rights are an entitlement, not privileges and those that are not able to access or vindicate their rights, including PLHA, must demand those rights without apology.

Stigma

The persistence of stigma against PLHA and those affected by HIV/AIDS is one of the areas in which society must exert more effort. Though a lot more can be done it must also be mentioned that many wonderful people have been working towards the eradication of stigma. These include those who have been open about their status and that of their loved ones as well as those who have ardently preached against stigma and all its negative

consequences. In the fight against stigma the value of education cannot be overemphasized and it is incumbent upon all of us to do our part in this regard.

We know that stigmatisation of people in society arises from ignorance and fear. The stigma attached to HIV/AIDS is no different. Despite the efforts that have been made both by government and civil society, ignorance about the manner in which HIV is transmitted still persists. Inadequate knowledge fuels the fear that HIV/AIDS can be transmitted through ordinary social interactions such as shaking hands.³ This in turn leads to the ostracism of PLHA and even their family members.

Aside from fear and ignorance stigmatization is also propelled by the fact that HIV/AIDS has wrongly acquired many negative associations. These all boil down to prejudice against those infected, resulting in people wanting to distance themselves from those affected with the virus.

³ F Viljoen (ed)

‘Righting Stigma: Exploring a rights based approach to addressing stigma’ (2005)31-32.

The social exclusion and maltreatment that is brought about by stigmatisation is a contributing factor in the unwillingness of people to disclose or even find out their status.

Discrimination

Stigmatisation is directly related to discrimination. Indeed the two cannot be separated as the former is a major cause of the latter. PLHA face discrimination in the work place, at schools, in community activities and in accessing health care to name but a few.

Several laws have been passed that can be used to combat discrimination on the basis of ones HIV status. The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUD) is the overarching legislation. Though it does not specifically mention discrimination based on HIV/AIDS status it

is clear that discrimination on that ground can be one of the most hurtful of all forms of unfair discrimination.

The Labour Relations Act and the Employment Equity Act both prohibit discrimination based on the HIV status of an employee. A code of good practice on aspects of HIV/AIDS and employment was also adopted in terms of the Employment Equity Act which deals comprehensively with the rights of HIV positive employees.

In the field of insurance the Medical Schemes Act prohibits the use of previous or current health status as a prerequisite for providing health insurance. Thus we are told that a person cannot be denied insurance solely on the basis of their HIV status.

Despite the existence of all the legislation mentioned above, discrimination on the basis of HIV status still persists in many areas. The inescapable

conclusion is that discrimination against PLHA cannot be eliminated while the stigma that attaches to HIV/AIDS still persists.

Socio economic rights

South Africa has one of the most economically inequitable societies in the world. This reality is exemplified by the fact that in a period which has been hailed for its economic growth and in which many business people have expressed optimism about the future, a large proportion of the population still lives below the poverty line. For many people the advent of HIV/AIDS has merely exacerbated living conditions that were already intolerable and made the attainment of their basic human rights an even more distant mirage.

The notion that HIV/AIDS and human rights are inextricably linked is most evident in the field of socio economic rights, most notably the rights to health and social security

The right to health

The right to health is a right which has been recognized in several international human rights instruments including the Universal Declaration on Human Rights, the International Covenant on Economic Social and Cultural rights, the African Charter on Human and Peoples' Rights and other regional human rights instruments. S27 of our Constitution states that everyone has the right to have access to health care services. Though the parameters of the right to health are not clearly defined the definition given to health by the WHO provides a good indication of what the right entails, this defines health as 'a state of complete mental, physical and social wellbeing and not merely the absence of disease'.⁴ Thus we speak of a health care system that must make the right to health a reality and should endeavor to provide patients with care in a manner that not only addresses their physical needs but also respects other related rights such as dignity and privacy

⁴ As quoted in R Sarraci *The World Health Organization needs to reconsider its definition of health* <<http://bmj.bmjournals.com/cgi/content/full/314/7091/1409>> (accessed on 16 February 2006).

The right to access health care, like all rights, consists of both positive and negative entitlements. The negative aspect of the right requires that one should not be actively prevented from accessing health care while the positive aspect requires a system of health care that provides equality of opportunity for every person to enjoy the highest possible attainable standard of health.⁵

In 1994 the government inherited a system of health care that had been badly skewed by the implementation of the apartheid agenda of segregation. It was inevitable that there should be shortages and shortfalls. The onset of the HIV/AIDS epidemic has revealed the systemic faults in a health care system that is called upon to meet tremendous challenges.

The government has launched various initiatives and passed a myriad of legislation that is aimed at solving this problem with varying degrees of

⁵ See General Comment 14 of the Committee on Economic Social and Cultural Rights at para 8.

success. The main problem appears to exist at the level of implementation and it is at this level that many people living with HIV/AIDS are facing daily challenges.⁶ One of these is the continued stigma and discrimination which they encounter at various levels, including, as has been claimed, at the points where they would expect help in vindicating their right to health care. There are complaints of neglect, being segregated into separate wards and having their status disclosed without permission. This in turn leads to reluctance to go to the public institutions and access the health care to which they are entitled.⁷ The Department of Health has adopted a National Patients Rights Charter which amongst other things indicates the right of all patients to be treated in a manner that is consistent with human dignity, courtesy and tolerance.⁸ It is up to civil society, through its various organs, to ensure that these measures work.

⁶ F Viljoen (n 3 above) 139.

⁷ F Viljoen (n 3 above) 141.

⁸ L Louw 'HIV/AIDS and human rights in South Africa' (2004) 25.

Another problematic area is the paucity of health care services in the rural areas.⁹ PLHA in rural areas often have to travel long distances to reach the nearest hospital or clinic and once they reach their destination may be faced with a shortage of the relevant medicines. Needless to say, opportunistic infections require prompt medical attention if they are to be prevented from causing severe damage and possibly leading to death. In many instances people in rural areas simply do not have access to health care facilities, workers or medicines.

The issue of treatment has been a hotly contested one and has already resulted in some litigation. Suffice to say that the provision of treatment which can prolong the life of PLHA is a goal towards which society must continue to strive for, despite whatever constraints there may be.

The barriers faced by PLHA in trying to make use of the health care system undermines their right of access to health care services and endangers their

⁹ F Viljoen (n 3 above) 140.

fundamental rights to life and dignity which cannot be ensured in the absence of the right to health.

The right to social security

The right to social security is closely linked to the right to health. Poverty and unemployment in South Africa have led to a situation where approximately 8 million people need to receive some form of social security. Many of these people depend on social grants for their day to day survival. The grants administered by the government include the child support grant, foster care grant, old age pension and disability grant.¹⁰

As in the case of the health care system, the HIV/AIDS epidemic has placed a serious strain on the social security system. The increased number of sick people who can no longer care for themselves and children orphaned by AIDS often have to be taken in by the elderly and extended family networks who then increasingly rely on grants to keep the entire family afloat.

¹⁰ H Marais ' Buckling: The impact of AIDS in South Africa 2005' (2005) 104.

The situation is exacerbated by the presence of double orphans, children who have lost both parents to AIDS and whom in many instances are left to fend for themselves without the benefit of any adult support.

PLHA experience various problems related to accessing social grants. One of these is the lengthy waiting period which it takes to process the application.¹¹ During that lengthy period people who may be in dire need and unable to afford basic goods such as food are required to fend for themselves. The waiting period constitutes a serious barrier to accessing the right to social security and urgently needs to be reviewed.

A human rights based approach to HIV/AIDS

The stigma, discrimination and barriers in accessing socio economic rights which are experienced by PLHA are all indicative of the human rights dimensions of the epidemic. If the epidemic is to be tackled in a manner which promotes and protects the fulfillment of the basic human rights of people infected and affected by it, then the approach that must be used by

¹¹ F Viljoen (n 3 above) 38.

all sectors of society who are actively engaged in fighting the epidemic is a human rights based approach.

The rights based approach to HIV/AIDS recognizes that violations of fundamental rights such as the right to non discrimination, the right to health, the right to food and water, the right to social security, the right to privacy and the rights of women are all contributing factors that exacerbates the spread of HIV/AIDS and its consequences. It therefore aims to deal with the problem at a multi sectoral level by ensuring that all rights are recognized and protected in all spheres of life.

The rights based approach asserts the entitlements of people affected by HIV/AIDS rather than their needs. The point of departure is therefore that PLHA and those affected by it are not charity cases which society can either deal with or ignore at its leisure, but that they are fundamentally entitled to receive the assistance that their condition requires.

Finally, the right based approach is people centered and sees people who are affected by HIV/AIDS not as mere recipients of assistance but active participants in determining their own fate. The rights based approach therefore aims at empowering people to take control of their situation rather than being victims of it and designing programmes of assistance that take into account the felt needs and desires of PLHA rather than their perceived needs.

Some would argue that the rights based approach is mere rhetoric but the potential shortcomings of the rights based approach do not negate its usefulness or the necessity of placing human rights at the center of an epidemic which primarily affects the physical, emotional, mental and social welfare of human beings.

The role of lawyers and civil society

Having outlined the human rights dimensions of the HIV/AIDS epidemic I return to the question I posed at the beginning, **‘what can we as civil society do to address the challenges faced by PLHA and those affected by it in asserting their fundamental human rights and living a life of dignity?’** In light of the theme of this conference ‘access to justice’ a more specific question would be **‘what role do legal practitioners have to play in all this?’**

The Basic Principles on the Role of Lawyers adopted by the 8th UN Conference on the Prevention of Crime and the Treatment of Offenders in 1990¹² and endorsed by the General Assembly¹³ states in its preamble that

‘adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or

¹² United Nations High Commissioner for Human Rights
<http://www.unhchr.ch/html/menu3/b/h_comp44.htm> (accessed on 15 February 2006).

¹³ General Assembly Resolution 45/166 of 18 December 1990.

civil and political, requires that all persons have effective access to legal services provided by an independent legal profession'

Principle number 4 further elaborates on the duties of the legal profession in this regard by stating that

Governments and professional associations of lawyers shall promote programmes to inform the public about their rights and duties under the law and the important role of lawyers in protecting their fundamental freedoms. Special attention should be given to assisting the poor and other disadvantaged persons so as to enable them to assert their rights and where necessary call upon the assistance of lawyers.

Though non binding, the Principles provide excellent guidance on what is to be expected of the legal profession with regard to those who are disadvantaged and downtrodden in society.

The debate on the justiciability of socio economic rights is one that has long been settled in South Africa. All rights in the bill of rights including socio economic rights are justiciable. The gap between the protection of rights offered by the Constitution as well as a myriad of legislation, and the reality experienced by PLHA on a day to day basis is one of enforcement. The legal profession will be instrumental in assisting people affected by HIV/AIDS to assert their rights.

In order for the legal profession to adequately perform its role in society it must adjust itself in a manner which is consistent with current realities. In other words it must actively promote access to justice by making legal services more readily available whether this is through doing *pro bono* work, taking on public interest litigation or thinking of new and innovative ways to make legal services accessible to people in rural and poverty stricken areas.

The legal profession can play a role in seeing to it that existing legislation is interpreted in such a way that it conforms to the aspirations and temper of a society founded on human dignity, equality and the achievements of human rights.

The well known adage ‘the long arm of the law’ evokes a picture of the law as all knowing, all seeing and capable of reaching every corner of society. In reality the law is limited in its uses and application. There could be shortcomings in its implementation. It may state, as indeed it does, that discrimination and stigmatisation of PLHA is impermissible. Merely going to court to enforce these rights cannot, in itself change the attitudes and perceptions of people. Nor can the law always succeed in addressing the social needs of people or step into the gaps which the government, due to budgetary and other constraints cannot. Good laws and a good Constitution are indispensable and they go a long way. They cannot, however be the complete solution. Nor can the Courts, the judiciary and the legal profession, by themselves, be the complete solution. We make gains, but

there can never be a substitute for a vibrant civil society operating in all sectors ranging from education to health care. The gains which the law may achieve need to be enhanced and followed through with strategies that only a vigilant civil society can engage in, to ensure that those who are infected and affected can protect their hard won rights.

Conclusion

If the scourge of HIV/AIDS is to be eliminated, it is imperative that the legal profession join hands with the rest of civil society so that each may play its part. Only then can the rights and fundamental dignity of every PLHA be ensured.

There is no doubt that the issue of access to legal services is extremely important.

Litigation is, more often than not, a lengthy process. What is more, litigating in order to enforce a constitutional right may be a costly matter. It is this aspect of access to courts that always proves to be the most difficult

to overcome where the litigant is ill and poverty-stricken, as is often the case with many affected people in this country. We do have valuable institutions of civil society. Unfortunately, they are not sufficient and nor are the resources. Nor is there a guarantee that the next time there is a need for legal representation, it would be readily available.

That is why it is necessary to engage in a thorough ventilation of issues and an identification of where we fall short, as a society and as members of the legal community,

During the course of this conference your attention will be drawn to many factual as well as legal implications HIV positive persons have to deal with on a daily basis. Although I am at pains to point out that legal interventions have a limited scope, legal practitioners and the Courts certainly can help.

In the much contested *TAC*¹⁴ case, the Constitutional Court confirmed that the right of access to medical care, as part of socio-economic rights, is justiciable. In this context, the Constitutional Court has stated that (in paragraph 36) -

The state is obliged to take reasonable measures progressively to eliminate or reduce the large areas of severe deprivation that afflict our society. The courts will guarantee that the democratic processes are protected so as to ensure accountability, responsiveness and openness, as the Constitution requires in section 1. As the Bill of Rights indicates, [the function of the courts] in respect of socio-economic rights is directed towards ensuring that legislative and other measures taken by the state are reasonable...”

In the *Grootboom*¹⁵ judgment [paragraph 39], the Court stated that –

¹⁴ *Minister of Health and Others v Treatment Action Campaign and others* 2002 (5) SA 717 (CC).

¹⁵ *Grootboom and others v Government of the Republic of South Africa and others* 2001(1) SA 46 (CC).

“the rights conferred by sections 26(1) and 27(1) are to have access to the services that the state is obliged to provide in terms of sections 26(2) and 27(2).”

It is one thing to articulate the right, as we lawyers quite often do. It is quite another thing to take by the hand those who need to access the right, that is, the weak and the poor, the ill and those suffering from societal deprivation by reason of discrimination and stigmatisation. I accordingly plead for a collective effort by all branches of society. We need to acknowledge that we live in the grossly unequal society that the Constitutional Court described in the *Grootboom* and the *Soobramoney*¹⁶ cases. That is a society that calls for extraordinary measures to defeat an exceptionally devastating situation. I look upon not just individual members of the legal community - they do have a distinctive role to play - but also their institutions; the organized profession in their professional capacity, to make a concerted effort to assist

¹⁶ *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC).

those who cannot afford, to have access to their rights as articulated in the
Constitution.

I thank you for your attention.