IN THE HIGH COURT OF SOUTH AFRICA DURBAN AND COAST LOCAL DIVISION

CASE NO.

In the matter between:

E N	First Applicant
ВМ	Second Applicant
D M	Third Applicant
EJM	Fourth Applicant
L M 1	Fifth Applicant
MAZ	Sixth Applicant
MSM	Seventh Applicant
N D	Eighth Applicant
NS	Ninth Applicant
S E M	Tenth Applicant
T J X	Eleventh Applicant
T S	Twelfth Applicant
V P M	Thirteenth Applicant
Z PM	Fourteenth Applicant
L M 2	Fifteenth Applicant
TREATMENT ACTION CAMPAIGN	Sixteenth Applicant

and

THE GOVERNMENT OF THE REPUBLIC OF

SOUTH AFRICA First Respondent

THE HEAD, WESTVILLE CORRECTIONAL

CENTRE Second Respondent

MINISTER OF CORRECTIONAL SERVICES Third Respondent

AREA COMMISSIONER OF

CORRECTIONAL SERVICES, KWAZULU NATAL Fourth Respondent

MINISTER OF HEALTH Fifth Respondent

MEC FOR HEALTH, KWAZULU NATAL Sixth Respondent

FOUNDING AFFIDAVIT

I, the undersigned

ANNELINE MICHELLE GOVENDER

do hereby state under oath:

1.

I am an adult female, currently employed as a researcher at the AIDS Law Project.

2.

The facts contained herein are true and correct and are within my knowledge unless the context indicates otherwise.

SUMMARY OF APPLICATION

3.

In summary, this application seeks urgent relief in the form of antiretroviral (ARV) treatment for the first to fifteenth Applicants who are being held in custody at the Westville Correctional Centre, each of whom meet the criteria

for treatment in terms of the national government's treatment plan for the treatment of people with HIV. These criteria are set out below.

4.

The Respondents have a duty to provide access to such treatment. Despite our engagement with the Department of Correctional Services (DCS) and its undertaking to work expeditiously to provide ARV treatment, the first to fifteenth Applicants are still waiting to begin treatment.

5.

DCS contends that prisoners without Identity Documents (IDs) cannot access ARV treatment. The requirement of IDs is not, in our opinion, a real obstacle. The Department of Health (DoH) has confirmed that the ID requirement is not strictly applied and they are willing to treat individuals even in the absence of IDs, in circumstances where application has been made for one. In the case of prisoners, the circumstances of incarceration should make putting them on ARV treatment easier because they are an identifiable population with prison numbers allocated per prisoner. Therefore, if the ID requirement is not strictly applied in other circumstances, the same flexibility should be applied where the individuals concerned form part of an identifiable population. In the case of the Applicants, we are, in any event, in the process of making application for IDs. Thus government should be ordered forthwith to enrol the Applicants in an ARV programme at an accredited public health facility.

6.

Orders will also be sought at the first hearing of this matter for the names of the first to fifteenth Applicants to be withheld from publication given that the application discloses sensitive, confidential and private medical information. The first to fifteenth Applicants' identities are already known by the second, third and fourth Respondents and will be made available to the Registrar and the remaining Respondents against an Order that the identities are not disclosed or publicised in any way by any one.

THE APPLICANTS

7.

I have been authorised by the AIDS Law Project to attend to all correspondence and meetings pertaining to the matter and to depose to this affidavit on behalf of the Applicants

8.

The Applicants have authorised the AIDS Law Project to act on their behalf in this matter. Annexed to this affidavit are the affidavits of each of the first to fifteenth Applicants marked "AMG 1" to "AMG 15", each of which has

confirmed the previous draft of this affidavit.

9.

As a result of obstruction by the DCS (as set out in paragraphs 80-83 below) in allowing us access to our clients we have not been able to bring the necessary amendments to this affidavit to their attention. These amendments were made to take into account recent events as well as correspondence between the AIDS Law Project and both the DoH and DCS (referred to from paragraph 76 onwards).

10.

Due to the urgency of this matter and to ensure availability of counsel at the hearing we believe that it is necessary to set this matter down without further delay.

11.

Supplementary affidavits from the first to fifteenth Applicants will be filed with this Honourable Court as soon as we are provided with an opportunity to consult with them.

The first to fifteenth Applicants are adult male prisoners at the Westville Correctional Centre who are HIV positive. The first to fourteenth Applicants have CD 4 cell counts of less than or equal to 200 cells/mm³, and are willing to undergo the necessary processes, including counselling to begin taking antiretroviral (ARV) treatment.

13.

The fifteenth Applicant is an adult male prisoner incarcerated at Westville Correctional Centre, whose CD 4 count is slightly above 200 cells/mm³, but who nonetheless meets the other criteria as set out in the National Department of Health's *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa,* which is referred to later in this application. The fifteenth Applicant is willing to undergo the necessary processes, including counselling to begin taking ARV treatment.

14.

A CD 4 cell count is a medical test that reflects the strength of the immune system.

15.

The Sixteenth Applicant is the **TREATMENT ACTION CAMPAIGN** (TAC), a section 21 not-for-profit company and non-Governmental

organisation with legal capacity to sue and be sued, located at 34 Main Road, Muizenberg, Cape Town, Western Cape. I am duly authorised by a resolution of the TAC National Executive Committee to depose to this affidavit on its behalf. A copy of this resolution is attached ("AMG 16").

THE RESPONDENTS

16.

The First Respondent is the Government of the Republic of South Africa, which has an address for service in these proceedings as care of the State Attorney whose offices are situated at 3rd Floor Sangro House, 417 Smith Street, Durban.

17.

The First Respondent is cited as a nominal Respondent in the event that the remaining Respondents claim not to have any responsibility for the Orders sought. They are further cited because the government is in fact the umbrella body of the various national and provincial departments of government who are guided by the principles of co-operative government as set out in the Constitution and who therefore share the responsibility for ensuring that prisoners have access to health care services, including ARV treatment. It is therefore ultimately responsible for the failure of the different national and

provincial officials and departments to provide the required care to the first to fifteenth Applicants.

18.

The Second Respondent is the **HEAD OF WESTVILLE CORRECTIONAL CENTRE** (WCC) and is cited in his official capacity.

The Second Respondent is based at the WCC in Westville, Durban but his address for service in these proceedings is care of the State Attorney whose offices are situated at 3rd Floor Sangro House, 417 Smith Street, Durban. The present holder of this post is Mr B. L Nkomo.

19.

The Third Respondent is the **MINISTER OF CORRECTIONAL SERVICES** in the Government of the Republic of South Africa who:

- (a) is cited in his official capacity as a representative of the Government of the Republic of South Africa;
- (b) is the member of the national executive responsible for developing and implementing national policy with regard to correctional services; and
- (c) is the head of the National Department of Correctional Services (DCS) which is responsible for the implementation of policies.

20.

I understand that the Third Respondent is based at the Union Buildings in Pretoria but his address for service in these proceedings is care of the State Attorney, 3rd Floor Sangro House, 417 Smith Street, Durban. The present holder of this post is Mr Ngconde Balfour.

21.

The Fourth Respondent is the **AREA COMMISSIONER OF CORRECTIONAL SERVICES, KWAZULU NATAL** and the address for service in these proceedings is care of the State Attorney, 3rd Floor Sangro House, 417 Smith Street, Durban. The present holder of that post is Mr Z.K Monama.

22.

The Fifth Respondent is the **MINISTER OF HEALTH** in the Government of the Republic of South Africa who:

(a) Is cited in her official capacity as the Minister responsible for health in the country;

(b) Is the member of the national executive responsible for developing and implementing national policy with regard to health services; and

(c) Is the head of the National Department of Health (DoH) which is responsible for the implementation of the *Operational Plan on Comprehensive Care and Treatment for HIV and AIDS* (the Operational Plan).

23.

The present holder of this post is Dr Mantombazana Edmie Tshabalala-Msimang. The Fifth Respondent is based at Union Buildings in Pretoria but her address for service in these proceedings is care of the State Attorney at 3rd Floor Sangro House, 417 Smith Street, Durban.

24.

The Sixth Respondent is the **MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH, KWAZULU NATAL** and the address for service in these proceedings is care of the State Attorney at 3rd Floor Sangro House, 417 Smith Street, Durban. The present holder of this post is Ms Peggy Nkonyeni.

STANDING OF THE APPLICANTS

The first to fifteenth Applicants have standing in this matter because:

- (a) They act in their own interest;
- (b) They act as members of and in the interest of all prisoners with HIV/AIDS who need or will need to access ARV treatment whilst incarcerated at the Westville Correctional Centre and who are currently unable to access such treatment; and
- (c) They act in the public interest by securing the effective enforcement of the constitutional rights that are at issue in this matter, and in ensuring that the Government and its representatives urgently take all reasonable measures to implement their policies as well as the sections of the National Department of Health's *Operational Plan* relevant to prisoners.

26.

The Sixteenth Applicant has standing in this matter for the following reasons:

(a) It acts in its own interest, in order to achieve the purposes set out in its Constitution. (A copy of this Constitution is attached hereto marked "AMG 17");

- (b) It acts on behalf of prisoners with HIV/AIDS who need or will need to access ARV treatment whilst incarcerated at Correctional Centres, whether from the Correctional Centre Hospital itself, if accredited, or from an accredited public health facility, and who cannot act in their own name because of poverty, stigma, discrimination or a lack of knowledge of their HIV status;
- (c) It acts in the public interest by securing the effective enforcement of the constitutional rights that are at issue in this matter and in ensuring that the Government and it representatives take all reasonable measures to implement its policies as well as the sections of the Operational Plan relevant to prisoners, with urgency; and
- (d) It acts in the interests of its members, who include prisoners with HIV/AIDS and organisations that are themselves committed to achieving the purposes of this application.

27.

The first to fifteenth Applicants will, unless otherwise stated, hereafter be referred to as the "Applicants". The sixteenth Applicant will hereafter be referred to as "TAC".

URGENCY

The fact that the Respondents' have failed to meet their commitments to provide the Applicants with access to ARV treatment on an urgent basis affects the lives of the Applicants in the most egregious way. Therefore, this application is one of inherent urgency. Their lives and the lives of many other prisoners at Westville Correctional Centre are at stake. As will be explained below, the greater the delay in accessing ARV treatment, the greater the risk to the Applicants' health and lives. I therefore request the above Honourable Court to deal with this case as a matter of urgency.

THE NATIONAL GOVERNMENT'S CRITERIA TO BEGIN ARV TREATMENT

29.

As stated above, the Department of Health's *Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment in South Africa* (the Operational Plan) sets out the criteria upon which HIV positive people may begin ARV treatment.

30.

In terms of the Operational Plan, "[t]he indication for antiretroviral treatment

is based on [a] clinical assessment and CD 4 count ... The lower the CD 4 count, the higher the risk of AIDS and the more urgent the need for treatment" (at page 63). According to the Operational Plan the criteria for ARV initiation in adults is:

- (a) CD4 count of less than or equal to 200 cells/ mm³ and symptomatic, irrespective of stage, or
- (b) WHO stage IV AIDS defining illness, irrespective of CD4 count, and
- (c) The patient must be prepared and ready to take ARVs adherently (at page 63).

31.

These criteria are also reflected in the national adult HIV/AIDS Treatment Protocol as issued by the National Department of Health.

INFORMATION ABOUT THE APPLICANTS

32.

All the Applicants, with the exception of the fifteenth Applicant, have CD 4 counts of below 200 cells/mm³. I have been advised by Dr Venter, whose affidavit is attached hereto marked "AMG 18" that while the Fifteenth Applicant's CD 4 count is marginally above 200 cells/ml³, he should nevertheless be put on ARV treatment, given his particular circumstances, in

that his immune system has already been compromised and prison is a particularly high risk environment for exposure to contagious and life-threatening opportunistic infections.

33.

All the Applicants are exhibiting signs of HIV related opportunistic infections. Attached marked "AMG 19" is a table setting out, in summary, the deterioration in the CD 4 counts of the Applicants as well as the various opportunistic infections from which they continue to suffer.

34.

The medical records will be made available to this Court if necessary. These records were made available to the ALP by the WCC (again after much negotiation).

35.

I respectfully submit that the failure by the Respondents to provide the Applicants with access to ARV treatment on an urgent basis has resulted in the Applicants being infected with painful and severe opportunistic infections which will lead to premature, predictable and avoidable death. This conduct is in conflict with the Constitution, other laws and policy and is therefore

unlawful.

LEGAL BASIS FOR THIS APPLICATION

36.

The Constitution, laws and policies of the government are unambiguous: Prisoners, including the Applicants, have a right to access ARV treatment in terms of the following laws and policies:

A. <u>The Constitution</u>

37.

According to both sections 27 and 35, prisoners have the right to access health care services and medical treatment.

(a) Section 27(1) states:

"Everyone has the right of access to health care services..."

(b) Section 35(2)(e) states:

"Everyone who is detained, including every sentenced prisoner,

has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment"

B. <u>Correctional Services Act 111of 1998</u>

38.

Section 12 relates to health care. Its relevant parts state:

- "(1) The Department must provide, within its available resources, adequate health care services, based on the principles of primary health care, in order to allow every prisoner to lead a healthy life.
- (2) (a) Every prisoner has the right to adequate medical treatment...

. . .

(4) (a) Every prisoner should be encouraged to undergo medical treatment necessary for the maintenance or recovery of his or her health ...".

C. The Operational Plan

The Operational Plan, referred to earlier, makes direct reference to the provision of ARV treatment for prisoners. It states that the DCS must form "tight linkages" with accredited public health facilities "so that patients requiring evaluation for antiretroviral therapy can be appropriately assessed and started on ARVs by skilled clinicians" (at page 77).

D. The DCS Comprehensive Programme on HIV/AIDS for Offenders

40.

According to this document, a comprehensive programme is defined as "a holistic approach intended to meet identified prevention, care, support and treatment needs and the protection of human rights of offenders over a specific period of time through the rendering of pre-determined services according to set standards."

41.

In this vein, one of the treatment actions is to refer prisoners "who qualify to be on antiretroviral therapy to the accredited sites of the Department of Health."

E. National Health Act 61 of 2003

42.

Section 21(2)(b)(iv) of the National Health Act states:

"The Director-General [of Health]must, in accordance with national health policy, ... issue and promote adherence to norms and standards on health matters including ... health services for convicted persons and persons awaiting trial."

43.

These laws and policy show clearly that prisoners have the right to access ARV treatment. Indeed this right has been acknowledged by the DCS on their official website where it is stated that "offenders who qualify for antiretroviral therapy are currently referred to accredited public health facilities, where they undergo an antiretroviral therapy readiness programme... On completion of this programme, antiretroviral therapy is provided and the offender is encouraged to adhere to the treatment programme". (http://www.dcs.gov.za/Organisation/HIVAIDS.htm).

44.

It is therefore clear that the responsibility for providing ARV treatment to the Applicants and other prisoners who are similarly situated, lies with both the Department of Correctional Services and the Department of Health.

In light of the fact that some prisons are currently providing access to ARV treatment to its prisoners, the continuous violations of the rights of the Applicants is not only unacceptable, but seriously jeopardises their health and life.

THE IMPORTANCE OF ARV TREATMENT FOR PEOPLE LIVING WITH HIV/AIDS

46.

I refer in this regard to the affidavit of Dr Francois Venter, attached hereto marked "AMG 18", who sets out the importance of starting ARV treatment timeously and the dangers of starting treatment late. In summary, Dr Venter states the following:

a. Human Immunodeficiency Virus (HIV) results in Acquired Immune Deficiency Syndrome (AIDS) which is an invariably fatal condition marked by the development of a largely predictable set of opportunistic illnesses that lead over time to a deterioration of the immune function and the premature death

of people.

- b. ARV medicines target either a particular step in the life cycle of HIV or its interaction with host cells. It slows down the progression of HIV and thereby keeps patients alive, productive and with reduced pain and discomfort.
- c. It is important to note that patients whose CD4 counts drop below 200 cells/ml³ or those with an AIDS defining illness will die within a few years unless they use ARV medicines. The risk of opportunistic illnesses also dramatically increases once the CD4 count falls below 200 cells/ml³.
- d. The correct, timely and appropriate use of ARV treatment will result in the improvement of the clinical condition, quality and quantity of life in the majority of people living with AIDS. It also helps to reduce and/or eliminate opportunistic infections.
- e. According to broad international and local scientific consensus people with HIV who have demonstrated the requisite commitment to taking ARV medicines, should commence ARV treatment if their CD4 count is below 200 cells/ml³ and/or they have a very low CD4 count and/or they have already contracted a World Health Organisation (WHO) defined stage IV illness. AIDS defining illnesses and significant HIV-related symptoms

are defined in the WHO guidelines, using the internationally accepted WHO staging systems. The Department of Health's ARV Treatment Guidelines concur with the WHO staging systems.

- f. Patients who fail to commence treatment when it is medically indicated are at increased risk of illness and death. If treatment is delayed there is an increased risk of side effects when ARV medicines are prescribed and used.
- g. If the commencement of ARV treatment is delayed, there is also a serious risk of immune reconstitution syndrome. This is an inflammatory response that occurs as the immune system begins to recover. This syndrome causes severe illness and occasionally death. The risk of it occurring increases dramatically once the CD4 count drops below 100 cells/ml³.
- h. People who have low CD4 counts (<200 cells/ml³) have been shown to be at very high risk of severe illness and death, even if they do not have symptoms. This risk dramatically increases as the CD4 count drops further. People in WHO stage IV are by definition severely ill and require immediate assessment for ARV treatment. Delaying treatment in these two groups poses a huge risk of additional morbidity and mortality, additional drug toxicity, and the prospect of incomplete recovery of the

immune system due to irreversible damage by the virus in the advanced stages of the disease.

THE HISTORY OF AIDS LAW PROJECT'S ENGAGEMENT WITH GOVERNMENT IN THIS MATTER

A. <u>Introduction:</u>

47.

The AIDS Law Project (ALP), acting on behalf of the Applicants, alerted government to these issues at WCC on 28 October 2005.

48.

Despite numerous interactions between the ALP, DCS and DOH, more than five months have passed since this first letter was written without relief for the Applicants.

49.

The interactions and sequence of events, as set out below, indicates the patterns of delay and lack of co-operation from government.

Government only responded after the ALP persisted by making direct contact with the State Attorney of KwaZulu-Natal and requested his assistance to contact the relevant people in government.

51.

After this, a meeting between officials of DCS, the ALP and TAC was promptly arranged. At the meeting, the ALP reminded the officials that this was a matter of extreme urgency as the Applicants were all sick, with one being in hospital at that time. The officials acknowledged the urgency of the situation and promised that they would take action expeditiously in order to put the Applicants and all other similarly situated prisoners at Westville Correctional Centre on ARV treatment. To date, the Applicants are still not on treatment and their health status continue to worsen.

52.

We have become particularly concerned about the delay on the part of the DCS in addressing the problem of ID books for prisoners. As is described below, this is a major obstacle to the Applicants and other prisoners accessing ARV treatment because they do not possess ID books. We suggested to the DCS that because each prisoner is allocated a prison number making them an easily identifiable population, prison numbers should suffice as a form of identification. This argument is strengthened by the DoH averment that ID

book requirements are not strictly applied.

53.

As the interactions and correspondence will show, the ALP has attempted in every way to avert litigation, giving government every opportunity to respond positively.

54.

However, in the face of the deterioration in the health of the Applicants, we have no option but to seek urgent legal redress on behalf of our clients.

B. <u>Interactions with DCS</u>

55.

The AIDS Law Project (ALP) was contacted by the South African Prisoners Organisation for Human Rights (SAPOHR) in September 2005. SAPOHR informed the ALP of the lack of access to ARV treatment at WCC and asked that the ALP assists prisoners who sought access to ARVs.

56.

The ALP, through correspondent attorneys in Durban, contacted WCC and

arranged to meet the prisoners in October 2005. At this meeting the ALP confirmed that prisoners were not getting access to ARV treatment.

57.

On 28 October 2005, the ALP wrote to the Second Respondent and copied a number of other parties, including the Third, Fourth and Fifth Respondents, seeking information about the steps being taken to ensure that prisoners who need access to ARV treatment would be given this access and enquiring when this access would be made available. No response was received. A copy of the letter is attached hereto marked "AMG 20".

58.

Thereafter, the ALP tried to arrange a subsequent consultation with our clients. However attempts to arrange the consultation were met with much resistance from the WCC. The Second Respondent stated that he could not allow a consultation without the approval of the Fourth Respondent. We thereafter had to correspond directly with the Fourth Respondent, who insisted that he would not allow a consultation unless he was told the purpose of the meeting. While we made it clear that this information was privileged, we pointed out that our letter of 28 October 2005 was indicative of the content of our consultation. The Fourth Respondent thereafter said he wanted to get legal advice before allowing this consultation. After we pointed out that a legal consultation was a constitutional right, the ALP was eventually able to arrange

a consultation on 22 November 2005. I attach letters between the ALP and the Fourth Respondent which explain the difficulties in this regard dated 15, 16, 17 and 18 November 2005, marked "AMG 21", "AMG 22", "AMG 23", "AMG 24" and "AMG 25".

59.

After the consultation between the ALP and the Applicants, recognising the need to act urgently, the ALP sent a letter of demand to the Second Respondent asking him to explain whether and when access to ARV treatment would be provided to our clients. The ALP requested urgent access to our clients' medical records and asked for a response by no later than 2 December 2005. No response was received. Attached is a copy of this letter, dated 24 November 2005 marked "AMG 26".

60.

In an attempt to avoid litigation, the ALP contacted the State Attorney in KwaZulu Natal, Mr Krish Govender and told him of our difficulties in getting a response from WCC. We received a response on the same day. Both letters are attached marked "AMG 27" and "AMG 28" respectively.

61.

On 7 December 2005, the ALP contacted the Head of Legal Services of DCS,

Mr M M Ndaba and a meeting was arranged for 15 December 2005. Attached is the letter in this regard marked "AMG 29".

62.

On 15 December 2005, a meeting was arranged between officials of the DCS, including representatives of the DCS Legal Services Department, officials from WCC, representatives of TAC and representatives of the AIDS Law Project (ALP), being the attorneys for the Applicants.

63.

At the meeting those present were informed by DCS that while certain accredited public health facilities such as King Edward VIII hospital and Addington Hospital had refused to treat the prisoners, the officials from WCC were in negotiations with McCord Hospital to provide this treatment. It was mentioned that staff at McCords had concerns about the safety of the general public, but that this would be resolved at their next meeting.

64.

The meeting was constructive and the DCS acknowledged that they were obliged to make ARV treatment available to prisoners who met the criteria of the Operational Plan. The DCS and WCC agreed to certain undertakings, which included:

- (a) That the DCS would devise a plan of action in relation to ensuring access to ARV treatment in WCC, and share the contents of this plan with the Applicants;
- (b) That the WCC would facilitate the processing of identity documents for prisoners, with prioritisation of those in need of ARV treatment;
- (c) That the DCS would facilitate a meeting between senior officials of the DCS and the DOH, including Dr David Kalombo, in order to address the obstacles to accessing ARV treatment in Correctional Centres, especially in KwaZulu-Natal.

65.

The DCS and WCC acknowledged the urgency of the above undertakings and assured us that the intervening holidays would not be a hindrance to the implementation of the commitments. To date, none of the aforementioned commitments have yet been met, despite every effort by the ALP to contact the various officials who were present at the meeting.

66.

On 11 January 2006, after numerous unsuccessful attempts to contact members of the DCS, the ALP sent a letter to Mr Ndaba, setting out our

concerns that we had still not heard from the DCS in respect of the commitments made at the meeting. The ALP placed on record the commitments undertaken by the DCS at this meeting and requested that these commitments be met. A copy of this letter is attached hereto marked "AMG 30".

67.

On 17 January 2006, after receiving no response to our letter, dated 11 January 2006, the ALP sent a letter demanding a response by 20 January 2006, stating that in the absence of a response ALP would institute legal action on behalf of the Applicants. A copy of this letter is attached hereto marked "AMG 31".

68.

On 19 January 2006, I received a telephone call from Mr Mhlongo, of WCC, who was present at the meeting in December 2005 and was tasked with the job of making ARV treatment available to prisoners. He undertook to contact the Director of Legal Services in KwaZulu Natal and ask him to provide us with the undertakings of the aforementioned meetings. A letter setting out this conversation is attached hereto, marked "AMG 32".

On 20 January 2006, the ALP received a letter from Adv. V Gounden, who chaired the December 2005 meeting. The letter basically said that she was unable to ascertain the progress in the matter as the person who was responsible for setting up the meeting of officials at the DCS and DOH was unavailable. She pointed out further that King Edward Hospital would now be providing ARV treatment for those prisoners who meet the criteria and appointments were being set up for this purpose. I attach this letter, marked "AMG 33".

70.

On the same day, the ALP responded by asking for further information about the Applicants and when it was proposed that they would receive treatment. A copy of this letter is attached, marked "AMG 34".

71.

On 23 January 2006 the ALP received a letter from Mr Mhlongo attaching the minutes of the December meeting, and a letter sent by Mr K Kumalo who is the DCS Regional Co-Ordinator of Health Care to Miss Mandisa Dlamini, who, from the letter, appears to be responsible for the regional Antiretrovial Treatment Programme on the provision of ARV treatment to prisoners. Mr Mhlongo's letter addressed some of the commitments that the DCS had agreed to. In particular, the following was pointed out:

- (a) There were 50 prisoners who were presently housed in the Medium B facility at WCC who had CD 4 counts of less than 200 cell/mm³ and the number of prisoners who had died of an AIDS related condition in this facility in 2005 numbered 78.
- (b) The negotiations with McCord Hospital had fallen through and they were no longer willing to provide ARV treatment to prisoners.

 However, a meeting with King Edward hospital was successful and the latter is now willing to provide treatment on appointment.
- (c) Arrangements had been "initiated" with the Department of Home

 Affairs for the provision of identity books to prisoners.
- (d) This letter, together with the minutes of the meeting and Mr Kumalo's letter is attached hereto, marked "AMG 35".

72.

The ALP responded to these letters on 25 January 2006. In particular, we asked for more information on appointments for the Applicants at King Edward Hospital, and the arrangements for identity documents. We also responded to the minutes of the meeting which, we believed, was not completely accurate. A copy of this letter, to which we have not had a response, is attached hereto, marked "AMG 36".

On 27 January 2006, I called Adv Gounden to get an update on whether they had secured a meeting between the DCS and the Department of Health. Adv Gounden informed me that her superior Mr Wilson had been notified of the undertakings and had agreed to prioritise those undertakings. Unfortunately, she said that Mr Wilson subsequently went to the United States and would only be back in March 2006. Adv Gounden then contacted Ms Anita Moodley whom I was advised has the same rank as Mr Wilson and asked her to intervene and organise the meeting. According to Adv Gounden, Ms Moodley agreed to look into the matter but wanted some direction from Mr Kumalo and Ms Dlamini, both of whom were present at the December 2005 meeting.

74.

On 7 February 2006, I received a call from Ms Anita Moodley who confirmed that 10 prisoners from WCC had appointments at King Edward VIII Hospital from 20 February to 7 March 2006. She did not have any further information about the progress made in respect of getting identity documents for those prisoners in need of ARV treatment. In her view identity documents were essential to accessing treatment through the Operational Plan. Ms Moodley said that she believed that getting the prison hospital accredited for ARV rollout would be a solution to the problems experienced at WCC and that they were still trying to arrange this.

On 13 February 2006, the ALP wrote to the Third Respondent describing the situation at WCC and requested an urgent meeting with him to discuss the role of the National Department in providing access to ARV treatment to prisoners living with HIV/AIDS. A copy of this letter is attached hereto, marked "AMG 37". As we received no response to this letter, we again wrote to the Third Respondent advising him that we were proceeding to court on an urgent basis asking for appropriate relief for our clients. A copy of this letter, dated 8 March 2006, is attached hereto, marked "AMG 38". On 17 March 2006, we again wrote to the Third Respondent, copying the Second and Fourth Respondent as well, advising him of our intention to proceed to court. A copy of this letter is attached, marked "AMG 39".

76.

On 24 March 2006, our Attorney, Ms Anneke Meerkotter received a telephone call from Adv Gounden. Adv Gounden acknowledged receipt of our letter threatening legal action. We assume she is referring to the letter dated 17 March 2006, referred to in paragraph 65 above. She said that a DCS policy existed which stipulated that ID books for prisoners would not be funded by DCS. She believed that the ALP should pay for ID books for our clients. Adv Gounden further suggested that the ALP request a meeting with DCS in order to resolve these issues. Ms Meerkotter requested that this conversation be recorded in writing. On 27 March 2006, we received this letter from Adv

Gounden, attached hereto marked "40". In the letter she said that she found the statement made in our letter that "the matter had not been taken any further than when we met in December" untrue and unjust. She again said that ID books remain an obstacle to providing access to ARV treatment and that DCS had arranged with the Department of Home Affairs to process the application for replacement of ID books but only once funding had been obtained. She said that DCS could not pay for ID books but suggested that the ALP assist its clients in this regard.

77.

On 27 March 2006, members of the HIV/AIDS Support Group at WCC embarked on a hunger strike in order to highlight their concerns about the conditions in prison, including access to ARV treatment, to the attention of the officials at DCS. I have been advised by members of the Support Group that DCS officials met with them on 29 March 2006 and undertook to address the various issues, including securing funding for the provision of ID books. The DCS requested a period of two months within which to put the relevant structures in place. This was agreed to by the executive committee of the Support Group. We have been unable to confirm whether this was agreed to by the Applicants as our requests for a legal consultations have once again been met with resistance from the DCS. I refer to our difficulties in getting access to our clients later.

On 29 March 2006, I called Adv Gounden and requested a meeting with DCS, as she had suggested earlier. Adv Gounden agreed that she was available on 31 March 2006 but wanted to speak to other officials and said that she would revert to me in this regard.

79.

On 30 March 2006, we responded to Adv Gounden's letter of 27 March 2006. In this letter, we set out the reasons why we believed that since the December meeting the matter had not been taken any further. We further pointed out our concern around the funding of replacement ID books only, as this meant that those prisoners who had never applied for an ID book, were being excluded. We further pointed out that while the ALP might be willing to pay for the IDs of our clients, this did not address the issue of other HIV positive prisoners who were not our clients. A copy of this letter is attached hereto, marked "AMG 41".

80.

On the same day, we wrote to the Second Respondent requesting an urgent legal consultation with our clients. A copy of this letter is attached hereto, marked "AMG 42". On 31 March, I called the Second Respondent as I had not heard from him. He said that he could not authorise the consultation without a directive from Mr Ndaba, the Head of Legal Services for DCS in KwaZulu

Natal. He suggested that I contact Mr Ndaba directly. I therefore sent a fax to Mr Ndaba attaching the letter sent to Mr Nkomo. Attached hereto, marked "AMG 43" is this letter to Mr Ndaba.

81.

On 31 March 2006, I again called Adv Gounden to ascertain whether we were in fact meeting on this day. Adv Gounden informed me the meeting would not be taking place on that day. She said however that DCS had resolved at a management meeting that the ALP would be included in all further interactions regarding access to ARV treatment. A document to this effect would be drafted and sent to us detailing the steps that DCS intended taking. I attach a copy of the letter sent to Adv Gounden that set out the details of this conversation, marked "AMG 44".

82.

As I did not hear from Mr Ndaba regarding our request for a legal consultation I tried calling him again but was unsuccessful in my attempts. I eventually got through to him on 4 April 2006. At this time he said he wanted to take instruction from the DCS head office. I called him back an hour later and he then said that officials at head office requested that we meet with them first before meeting with our clients. I pointed out that we needed to take instructions from our clients with regard to the hunger strike and the agreements reached thereafter. I stated that a meeting between us might prove

difficult if we had not received proper instructions. Mr Ndaba said that he would ask Adv Gounden to contact me directly with a decision. I attach a letter in this regard dated 5 April 2006, marked "AMG 45". On 6 April 2006, we sent a final letter to Mr Ndaba requesting a response to our request for a legal consultation. I attach a copy of this letter, marked "AMG 46".

83.

On the same say, after sending the above letter, we found a letter, dated 5 April 2006, from Adv Gounden that had somehow been misplaced in our offices. The letter asked that we set out our request in writing, stating the purpose of our visit. The letter further stated that sufficient notice of the meeting must be given and if urgent, why we deem it to be urgent. Attached is a copy of this letter, marked "AMG 47". On 7 April 2006, we responded to this letter. We pointed out that we had sent a written request to the Head of WCC, which was then sent to Mr Ndaba. We further stated that while our consultations were privileged, the DCS was aware of our interest in the matter. We placed on record that we believed that these delays were a deliberate attempt to frustrate our progress in the matter. I attach a copy of this letter, marked "AMG 48".

We believe that this response clearly reflects a reluctance on the part of DCS to allow us access to our clients.

C. Interactions with DCS requesting a medical consultation

During the period of interactions with the DCS in February 2006, we believed that if we were proceeding to court, our clients needed to have new CD 4 count tests done that confirmed the deterioration in their immune function. We therefore asked Dr Terence Moodley to assist in doing the tests. On 15 February 2006, we contacted the Fourth Respondent and requested a medical consultation. A copy of this letter is attached hereto, marked "AMG 49".

85.

We did not receive a response and therefore wrote again to the Fourth Respondent pointing out that our clients had a right to be examined by a private medical practitioner and again requesting an urgent medical consultation. A copy of this letter, dated 21 February 2006, is attached, marked "AMG 50". Again, we had no response.

86.

On 22 February 2006, we contacted Mr Mhlongo and asked him to assist in arranging this medical visit. The visit was thereafter arranged for 1 March 2006.

Mr Mhlongo obtained the consent of all but one of our clients to have the medical tests done. According to Mr Mhlongo, this client was advised by doctors at King Edward Hospital that he was no longer eligible for ARV treatment given the deterioration in his health. I attach correspondence in this regard dated 2 and 3 March 2006, and marked "AMG 51", "AMG 52", "AMG 53" and "AMG 54".

88.

A summary of the results of the tests done by Dr Moodley is annexed and referred to above, marked "AMG 19".

89.

At a legal consultation held with the Applicants on 16 March 2006, we were able to establish that four of them have been taken to King Edward Hospital to be started on an ARV treatment programme. This is because these four have their ID books in their possession. However, I have been advised that of this four, only two have begun pre-treatment counselling, these being the Fourth and Thirteenth Applicants. The Eighth Applicant was scheduled for his first pre-treatment counselling session on the day of our consultation, but was not taken. The Second Applicant was taken for his medical appointment but was not scheduled for pre-treatment counselling. The reason for this was not

explained to him and he is still not sure why he has not been started on counselling. Therefore, at this point, none of the Applicants have started ARV treatment.

D. Interactions with DoH

90.

On 7 February 2006, the ALP wrote to Dr David Kalombo who is the Project Manager for the HIV and AIDS Programme at the Department of Health. In this letter we drew to his attention the obstacles created by the DOH that prevented the DCS from providing access to ARV treatment. A copy of this letter is attached hereto, marked "AMG 55".

91.

We received no response to this letter and therefore on 8 March 2006, we wrote to Dr Kalombo again advising him of our intention to proceed to court on an urgent basis for appropriate relief. This letter, marked "AMG 56" is attached hereto.

92.

On 17 March 2006, we wrote to the Fifth Respondent bringing to her attention

our intention to proceed to court on an urgent basis, given that they had not responded to our letters. A copy of this letter is attached hereto, marked "AMG 57".

93.

On 22 March 2006 the Provincial Ministry of Health sent us a letter acknowledging receipt of our letter dated 17 March 2006. We were advised that the matter was receiving the attention of the General Manager – Public Health Services, Ms N Phillips. I attach a copy of this letter, marked "AMG 58".

94.

On 4 April 2006, we received an undated letter from Ms Phillips who was responding to the letter addressed to Dr Kalombo which we assume to be the one dated 7 February 2006, referred to in paragraph 64 above. Ms Phillips pointed out accreditation of public facilities is a national competence, meaning that national, and not provincial, government handles the matter. Furthermore, until such time that prisons receive accreditation, the Department of Health is providing services to prisoners. Again we assume that "services" include access to ARV treatment. The letter also states that they are not aware of any denial of access to treatment for prisoners by the Department of Health. Of importance, Ms Phillips stated that the requirement of an identity document

for access to treatment is not strictly applied. We attach a copy of this letter, marked "AMG 59".

THE REQUIREMENT OF ID BOOKS

95.

As stated earlier, we were advised by the members of the DCS and WCC who attended the meeting with us in December 2005 that one of the biggest obstacles for prisoners accessing ARV treatment at an accredited public health facility was the DoH requirement of ID books for people receiving ARV treatment at public health facilities.

96.

On 1 February 2006, I spoke to Mr Mhlongo who advised me that only about eleven prisoners, who met the criteria to be put on ARV treatment, had ID books and therefore, WCC could only arrange appointments for these people. As regards arranging ID books for other prisoners, he had little information except that the Department of Home Affairs had been contacted in this regard.

97.

On 14 February 2006, the ALP wrote to the regional office of the Department of Home Affairs in Durban requesting temporary ID's for our clients in order

to allow them to access treatment. I attach this letter, marked "AMG 60". We have not had a response to this request.

98.

In February 2006, I received a telephone call from Mr Mhlongo asking whether we had the details of any prisoner organisations which would be willing to fund the processing of ID books for HIV positive prisoners at a cost of R35 per person. I said that I could not think of any prisoner organisation other than SAPOHR. I further said that DCS should be funding this if prisoners could not pay for themselves because (a) being incarcerated meant that they could not work and pay for ID books themselves and (b) DCS did have a legal obligation to provide medical treatment. This meant taking whatever steps were necessary to provide this treatment. Mr Mhlongo said that he would look into the possibility of DCS funding.

99.

On 17 March 2006 I was advised by members of the HIV/AIDS Support Group that Mr Mhlongo had met with the prisoners and advised them that the Department of Home Affairs would be visiting the prison on 20 March to have photographs taken and fill in application forms for ID books. They were further told that only those with money to pay for these ID books (being the amount of R35) would get them as DCS would not be paying for them.

On 20 March 2006, I was again contacted by a member of the HIV/AIDS Support Group who advised me that the Department of Home Affairs had visited the prison and had ID book applications done. According to him, fifteen prisoners, none of whom were applicants in this matter, made application. These applications were paid for by Mr Mhlongo. It was unclear who funded these applications and if they were funded by the DCS, how the particular prisoners were chosen. On the same day, I wrote to Mr Mhlongo querying this. I attach the letter, marked "AMG 61".

101.

On 27 March 2006, I received a telephone call from Mr Mhlongo in response to this letter. Mr Mhlongo said that the DCS had a policy that it would not pay for ID books for prisoners. He further said that he had personally funded the ID book applications for 15 prisoners. The identity numbers of these prisoners had already been confirmed by the Department of Home Affairs. I asked Mr Mhlongo to send this to me in writing, which he duly did on 4 April 2006. A copy of this letter is attached, marked "AMG 62".

102.

I believe that it is clear from what has been set out in the paragraphs above that the Applicants Attorneys have made every effort to resolve the issue with the DCS, WCC and DoH without resorting to litigation. At this stage, given the deterioration in the health of the first to fifteenth Applicants and other similarly situated prisoners, our only option is to ask this Honourable Court to intervene and order the WCC to meet its commitments.

RELIEF

103.

I submit that the Applicants have no other option in these circumstances other than approaching this Court.

104.

I submit that given the history of the negotiations and communications with governmental officials in this matter, shortened notice periods are warranted, particularly in the light of the very critical facts that the Applicants are seriously ill and in grave danger with each passing day without ARV treatment.

105.

I respectfully seek the Orders sought in the Notice of Motion.

	ANNE	ANNELINE MICHELLE GOVENDER					
SIGNED AND AFFIRMED I	BEFORE	ME I	N THE	PRE	SCRII	BED	
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