IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO: 4576/2006

In the matter between:

E N	First Applicant
B M	Second Applicant
D M	Third Applicant
E J M	Fourth Applicant
L M 1	Fifth Applicant
M A Z	Sixth Applicant
MSM	Seventh Applicant
N D	Eighth Applicant
N S	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
MEMBER OF THE EXECUTIVE COUNCIL FOR HEALTH KWAZULU NATAL	Sixth Respondent

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APPLICANTS' HEADS OF ARGUMENT

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A. INTRODUCTION

1. This case is primarily about the failure of the Respondents to give effect to various constitutional rights of the First to Fifteenth Applicants to health care, in particular antiretroviral (ARV) treatment for HIV/AIDS. It is not in issue that the Applicants have these rights or that the Respondents bear corresponding obligations to respect, protect, promote and fulfil these rights.

2. These submissions will therefore focus on the lack of reasonable implementation of law and policy that requires that everyone, including prisoners, has access to medical treatment. Before addressing this issue, however, we will deal with the preliminary issues of urgency and *locus standi.*

3. As is evident from the Table of Contents, these heads of argument proceed in sections.

   (a) In section A, we make introductory comments.

   (b) In section B, we deal with issues of urgency and submit that this matter is inherently urgent.

   (c) In section C we deal with the Respondents' attack on the Sixteenth Applicant's *locus standi* and submit that it is without any legal foundation.

   (d) In section D we deal with the relevant constitutional rights of the Applicants, which place corresponding duties on the Respondents.

(e) In section E we discuss the relevant national laws and policies which also grant rights to ARV treatment to the Applicants with corresponding duties on the Respondents.

(f) In section F we demonstrate the lack of any reasonable implementation by the Respondents of their Constitutional, statutory and policy obligations. We conclude by submitting that the Respondents have acted unreasonably and irrationally and thus unlawfully in the circumstances.

(g) In section G we deal with the Respondents' somewhat alarming call for costs and demonstrate that such an Order is not warranted.

(h) In section H we deal with the appropriate relief to be granted in this application and submit that apart from the mandamus Orders sought in the Notice of Motion, a structural interdict is necessary and warranted in the circumstances to ensure that the Respondents comply with their obligations within reasonable time periods.

4. As was done in Govender's replying affidavit, the First to Fifteenth Applicants (with the exception of the Eighth Applicant) will hereinafter be referred to as "the Applicants". The Sixteenth Applicant will be referred to as the TAC.

B. URGENCY

5. The record shows that the Applicants are seriously ill.[1] ARV treatment is recommended (unless contra-indicated) for an HIV positive person once her CD4 count reaches 200 cell/ml, or she has an AIDS-defining illness. Here, all applicants have CD4 counts below 200. Eight Applicants have CD4 counts of below 100, and of these five Applicants have CD4 counts below 50.

6. The Applicants are already ill. The risk of severe illness and even death increases dramatically as the CD4 count drops. This is a matter of life and death, and in which urgency is imperative.[2]

7. The Applicants continue to suffer from a horrific range of painful opportunistic infections.[3] For example, the applicant with the highest CD4 count, the Fifteenth Applicant suffers from "shingles, body rash, penile sores, pus in both ears, haemorroids, painful body and night sweats".

8. The Applicants are incapable of accessing ARV treatment by virtue of their incarceration and the fact that each of them has AIDS means that

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1 Annexure "AMG19" to the Founding Affidavit, pages 108-109 is a Table reflecting the CD4 counts of the Applicants and the wide range of opportunistic infections the Applicants have.

2 In this regard, the scientific evidence of Dr Venter for the Applicants is undisputed on the papers. Founding Affidavit: "AMG18" at pages 97-103 read with the replying affidavit of Dr Venter ("A16") at pages 523-524.

3 Annexure "AMG19", pages 108-109.

they have reached the fourth stage in the progression of untreated HIV infection, which stage has been recorded by our Courts as:

> AIDS (Acquired Immune Deficiency Syndrome) stage - this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them.[4]

9. Further, as the Respondents are aware, on 3 May 2006, the presiding senior civil Judge, His Lordship Mr Justice Levinsohn, issued directions for the Registrar to accord this matter a preferential hearing and an Order was taken by consent between the parties that this matter be dealt with in terms of Rule 6(12) of the Uniform Rules of the High Court.

10. It is therefore abundantly clear that this case should be dealt with urgently, and that the Respondents, having consented to the order on 3 May 2006, have no grounds to contend otherwise. We submit further that on the facts it cannot be contended that this matter is not urgent.

C. LOCUS STANDI

11. In Sishuba's answering affidavit, the Respondents seek to contest the *locus standi* of the Applicants. The Respondents deny that the Applicants act in the public interest or that they have standing to act on behalf of all HIV positive prisoners who need to access ARV medicines.

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4 *Hoffman v South African Airways* 2001 (1) SA 1 (CC), at paragraph 12.

12. According to section 38 of the Constitution, the grounds for locus standi, in cases alleging infringement of a constitutional rights, include:

> "anyone acting in their own interest";
> "anyone acting as a member of, or, in the interest of, a group or class of persons";
> "anyone acting in the public interest"; and
> "an association acting in the interest of its members".

13. It is settled in our law that these *locus standi* requirements are meant be interpreted expansively by the courts in order to ensure that constitutional rights enjoy the full measure of protection to which they are entitled.[5]

14. In *Ferreira v Levin*, O' Regan J stated the following in respect of section 7(4) of the interim Constitution, which is similar in all material respects to the current requirements:

> Section 7(4) is a recognition too of the particular role played by the courts in a constitutional democracy. As the arm of government which is entrusted primarily with the interpretation and enforcement of constitutional rights, it carries a particular democratic responsibility to ensure that those rights are honoured in our society. This role requires that access to the courts in constitutional matters should not be precluded by rules of standing developed in a different

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5 *Ferreira v Levin* 1996 (2) SA 621 (CC) at para 165, per Chaskalson P. See also *Port Elizabeth Municipality v Prut NO* 1996 (3) SA 533 (E) at 325E-F; *Beukes v Krugersdorp Transitional Local Council* 1996 (3) SA 467 (W) at 474C-H; and *Rail Commuter Action Group and Others v Transnet Ltd t/a Metrorail and Others (No. 1)* 2003 (5) SA 518 (C), at 554-557.

> constitutional environment in which a different model of adjudication predominated. In particular, it is important that it is not only those with vested interests who should be afforded standing in constitutional challenges, where remedies may have a wide impact.[6]

15. It is also a well-established principle in our law that a case that alleges a violation of constitutional rights is by its nature in the public interest. In such cases the relief sought may often be forward-looking (rather than merely to address past wrongs) and affect a wide range of people who are not directly parties to the litigation.[7]

16. The Applicants in this case act in their own interest. They also act in the public interest in that the case involves a consideration of constitutional rights, and law and policy connected therewith. Further it involves a consideration of the duty of the Respondents in giving effect to these rights, law and policy.

17. The TAC acts in the interests of its members, some of whom are HIV positive prisoners. They bring this application together with the Applicants who are directly affected, and have an interest in the relief sought insofar as it is consistent with its mission and function in terms of its Constitution.[8]

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6 *Ferreira* para 230.

7 *Ferreira* at para 229 per O'Regan J. *Ngxuza v Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) at 619C-D, per Froneman J.

8 The Constitution of the TAC is part of the record at pages 87-96.

18. The *locus standi* of the TAC has been confirmed and accepted by the Constitutional Court in similar matters relating to the need to stem and reverse the tide of HIV/AIDS.[9]

19. It is submitted that the Applicants have standing to act in the interest of a group or class of persons that may be affected by the relief sought in this case.

20. The 'class action' mechanism has been successfully invoked before our courts since its introduction into our law through the interim Constitution.[10] However, as yet there are no authoritative guidelines on the procedure to be invoked when seeking to employ this mechanism. Some guidance has been provided by *Beukes* and *Ngxuza*.[11] In *Beukes,* Cameron J (as he then was) was of the opinion that "no unnecessary restrictions should be placed on the application of s 7(4)(b)(iv) [of the interim Constitution], and that it should be read so as to avoid obstructions on its

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9 See for example *Minister of Health v TAC (No 2)* 2002 (5) SA 721 (CC).

10 *Beukes, Ngxuza* (E)*, Permanent Secretary, Department of Welfare v Ngxuza* 2001 (4) SA 1184 (SCA); *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) BCLR 569 (CC). In *Khosa*, Mokgoro J held that "it is appropriate for the Applicants to bring this matter in the interests of permanent residents and children who are in the care of permanent residents. They are indeed members of a group or class of people who would qualify for social assistance under the Act but for the fact that they are not South African citizens." At para 37.

11 *Ngxuza* (E), per Froneman J at 624 A- 625B. Here, the learned Justice disposes with a number of possible objections to 'class action' litigation.

invocation".[12] For this reason, the contention that the group or 'class' in that case was not adequately defined was rejected.[13]

21. In *Ngxuza* (E), Froneman J held that "a flexible approach is required" in the interpretation of section 38 of the Constitution. In that case he provided practical guidance, in the order, as to the notification of the class of the relief provided by the order, and the stipulations that should be contained in such notice.[14]

22. Froneman J's expansive interpretation of section 38 was upheld on appeal. In *Permanent Secretary, Department of Welfare v Ngxuza*, Cameron JA recognized the value of the class action mechanism, especially where the plaintiffs/applicants are poor and for whom the 'law is a scarce resource'.[15] His Lordship further held as follows:

> It is precisely because so many in our country are in a "poor position to seek legal redress", and because the technicalities of legal procedure, including joinder, may unduly complicate the attainment of justice, that both the

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12 *Beukes*, at 474H.

13 The case was brought by a ratepayer in Krugersdorp who alleged that the fact that he did not enjoy the benefit of 'flat rate' municipal charges was unfairly discriminatory. He claimed to be acting in the interest of other ratepayers similarly affected, and simply appended a list of names to his founding affidavit.

14 *Ngxuza*(E) at 630 E-H.

15 *Ngxuza* (SCA) at para 1.

> interim Constitution and the Constitution created the express entitlement that "anyone" asserting a right in the Bill of Rights could litigate "as a member of, or in the interest of, a group or class of persons.[16] (footnotes omitted)

23. In this case the group is limited to those prisoners at Westville Correctional Centre (WCC) who are HIV positive and who meet the requirements for beginning ARV treatment. On 26 January 2006, DCS advised the applicants that offenders in Medium B with a CD4 count less than 200 number 50.[17] It is not known how many in the entire WCC have AIDS, but this can easily be ascertained by the DCS. The group is therefore clearly defined. Those who may benefit from any order of this Court are also easily identifiable.

24. The Applicants in this case are members of a group that, as a result of physical and financial constraints, are not able easily to gain access to legal counsel, let alone the courts. We therefore submit that it is unreasonable to expect that each prisoner with a similar claim makes use of the legal process separately. This is especially so since there is no dispute that the Respondents are legally and constitutionally bound to provide adequate medical treatment to all prisoners who need it.

25. It would be unreasonable and unfair to other potential claimants at WCC to have to approach a court again for similar relief.

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16 *Ngxuza* (SCA), at para 6.

17 Annexure "AMG 35" to the Founding Affidavit, at page 159.

26. Were an order of this Honourable Court to give effect to those considerations, we submit that it should be extended to any other claimant in like factual circumstances.

D. THE RELEVANT CONSTITUTIONAL RIGHTS

27. Section 7(2) of the Constitution enjoins the State to "respect, protect, promote and fulfil the rights in the Bill of Rights."

28. Section 27 of the Constitution provides, in relevant part, as follows:

> (1) Everyone has a right to have access to –
>
> (a) health care services, including reproductive health care
>
> . . .
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

29. This is a right to which prisoners, despite their incarceration, are entitled.

30. Even prior to our constitutional dispensation, our courts have upheld the rights of prisoners. In *Whittaker v Roos and Bateman; Morant v Roos and Bateman*, Innes CJ stated:

> "True, the plaintiffs' freedom had been greatly impaired by the legal process of imprisonment; but they were entitled to demand respect for what remained. The fact that their liberty had been curtailed could afford no excuse for a

further illegal encroachment upon it."[18]

31. In *Minister of Justice v Hofmeyr,* Hoexter JA held, with reference to the Whittaker judgment:

> "The Innes *dictum* serves to negate the parsimonious and misconceived notion that upon his admission to a gaol a prisoner is stripped, as it were, of all his personal rights; and that thereafter, and for so long as his detention lasts, he is able to assert only those rights for which specific provision may be found in the legislation relating to prisons, whether in the form of statutes or regulations. . . in truth a prisoner retains all his personal rights save those abridged or proscribed by law. The root meaning of the Innes *dictum* is that the extent and content of a prisoner's rights are to be determined by reference not only to the relevant legislation, but also be reference to his inviolable common law rights."[19]

32. These statements are fortified by the Constitution and the entrenched Bill of Rights, which specifically protects the rights of arrested, detained and accused persons.[20] In particular, section 35(2)(e) of the Constitution

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18 1912 AD 92 at 122.

19 *Minister of Justice v Hofmeyr* 1993 (3) SA 131 (A) at 141 C-D. See also *Conjwayo v Minister of Justice, Legal and Parliamentary Affairs* 1992 (2) SA 56 (ZS) at 60J.

20 See *Minister of Correctional Services v Kwakwa* 2002 (4) SA 455 (SCA) at 469 I, where Navsa JA states that the *Hofmeyr* judgment "has been given fresh

provides:

> "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 provisions, at state expense, **of adequate accommodation, nutrition, reading material and medical treatment."** (Emphasis added.)

33. The right of a prisoner to ARV treatment was enforced in *Van Biljon v Minister of Correctional Services*.[21] At that time ARV treatment was not available in the public sector in South Africa. Despite this, Brand J found that, in light of the fact that the prisoners were kept in conditions that made them more susceptible to opportunistic infections than those HIV positive people outside of prison, the State is required to provide them with ARV treatment.[22]

34. The right of the Applicants to ARV treatment is not in dispute in this matter. There is therefore no need to deal with this in further detail save to contextualise the alarming and distressing illnesses that the Applicants' live with. In this regard, the Constitutional Court has held that:

> "The HIV/AIDS pandemic in South Africa has been described as **'an incomprehensible calamity'** and **'the most important**

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impetus by a number of our constitutional values such as dignity, equality and humanity."

21 1997 (4) SA 441 (C)

22 Id at para 54.

challenge facing South Africa since the birth of our new democracy' and government's fight against **'this scourge'** as **'a top priority'**. It 'has claimed millions of lives, inflicting pain and grief, causing fear and uncertainty, and threatening the economy'. These are not the words of alarmists but are taken from a Department of Health publication in 2000 and a ministerial foreword to an earlier departmental publication."[23](Emphasis added.)

E. THE RELEVANT LEGISLATION AND NATIONAL POLICIES

35. The right to medical treatment is given effect to in national legislation. Section 12 of the Correctional Services Act 111 of 1998 concerns the right to health care. It provides, in relevant part, as follows:

> "(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 encourages to undergo medical treatment necessary for the maintenance or recovery of his

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23 *Minister of Health v Treatment Action Campaign (No 2)* at para 1.

or her health . . "(Emphasis added).

36. Facilitating access to health care services for prisoners is a joint responsibility of the DCS and the Department of Health (DOH). Section 21(2)(b)(iv) of the National Health Act 61 of 2003, provides:

> "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."

37. Similarly, the *Operational Plan for Comprehensive HIV/AIDS Care, Management and Treatment for South Africa* (2003) (Operational Plan) makes direct reference to the provisions 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".[24]

38. The *DCS Comprehensive Programme on HIV/AIDS for Offenders* defines a comprehensive programme 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." The policy requires that prisoners, who meet the medical requirements for ARV treatment, are referred to accredited health facilities of the Department of Health.

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[24] At page 77.

39. These laws and policies are unambiguous in relation to the responsibilities of the relevant government departments to ensure access to health services, including ARV treatment.

E1. The Operational Plan (2003)

40. On 19 November 2003, the Cabinet of the Republic of South Africa adopted the Operational Plan, a comprehensive strategy for HIV/AIDS care, management and treatment that aims to accomplish two interrelated goals: to provide comprehensive care and treatment for people living with HIV/AIDS; and to facilitate the strengthening of the national health system in South Africa.

41. The Operational Plan recognises the critical role of ARV medicines in the treatment of people with HIV/AIDS, and provides for ARV medicines to be made progressively available at public health facilities for the treatment of poor people with HIV/AIDS who cannot afford ARV medicines that are readily available in the private health sector.

42. The Operational Plan acknowledges the need to commence ARV treatment when a patient's CD4 count falls below 200 or where a patient presents with certain particularly serious illnesses (defined as World Health Organization (WHO) stage IV illnesses), regardless of CD4 count. The Operational Plan acknowledges that the lower the CD4 count and the higher the viral load (a measure of the amount of virus in the blood), the higher the risk of AIDS and the more urgent need for treatment. (Operational Plan at pages 63 and 246)

43. In addition to the medical criteria, the Operational Plan also recognises

that before starting ARV treatment, patients should be "prepared and ready to take adherently". Simply put, the Operational Plan states that the decision to initiate a patient on ARV treatment must also be based on that person "being committed to adhering to treatment over the long term." (Operational Plan at 63)

44. In recognising that "[i]t is not possible for health care providers to reliably predict which individuals will ultimately be adherent to their treatment plan", the Operational Plan asserts the importance of providing "all patients with a comprehensive plan to support adherence that utilizes multiple strategies and all members of the health care team, as well as family and community." (Operational Plan at 74)

E2. National Antiretroviral Treatment Guideline (2004)

45. The National Antiretroviral Treatment Guideline (ART Guideline), published by the National Department of Health in 2004, provides further detail on the initiation of ARV treatment and is referred to in the answering affidavit. In dealing with patient selection criteria, it refers to "medical criteria" (a CD4 count of below 200 or a WHO stage 4 disease irrespective of CD4 count) on the one hand, and "psychosocial considerations" on the other. In respect of the latter, it expressly states that they are not "exclusion criteria".

46. The decision to initiate treatment is to be taken by a multidisciplinary team at the relevant ARV treatment centre.[25] This decision is to be taken within

[25] ART Guideline at pages 2-3.

2 to four weeks of starting treatment.[26] The only instance contemplated in the ART Guideline where treatment will not commence is when patients are found not to meet the readiness criteria.[27]

47. The ART Guideline lists the following six psychosocial considerations, which as stated previously are not exclusionary criteria:

- Demonstrated reliability, meaning the attendance at three or more scheduled visits to an HIV clinic;
- Disclosure of HIV status to at least one friend or family member, or joining an HIV/AIDS support group;
- Acceptance of HIV status, and insight into the consequences of HIV infection and the role of ARV treatment;
- Ability to attend the ARV treatment centre on a regular basis or access to services for maintaining the treatment chain;
- No active alcohol or other substance abuse; and
- No untreated active depression.[28]

48. In addition, the ART Guideline sets out the process for the initiation of ARV treatment, which must ordinarily be completed within two to four weeks. The process comprises two screening visits before a third ART commencement visit.

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26 ART Guideline at page 4.

27 ART Guideline at page 5: "Multi-disciplinary team discussion".

28 ART Guideline at page 3.

49. The first "screening" visit deals with the following issues:

- Confirmation of medical criteria;
- Treatment of acute opportunistic infections, if any;
- Completion of patient's information records;
- Patient meets the multidisciplinary team;
- Treatment counsellor or patient advocate discusses ARV treatment with the patient;
- Patient is given a 28 day supply of cotrimoxazole; and
- Patient is given a return date (for the second visit)

50. The second visit deals with the following issues:

- Clinical assessment of the patient;
- Information and education session;
- Cotrimoxazole pill count; and
- Adherence counselling for patient (and patient advocate, if available)

51. The third visit, at which the patient commences ARV treatment, deals with the following additional issues:

- Re-assessment of patient's readiness;
- Cotrimoxazole pill count;
- Further provision of information and adherence counselling;
- Provision of detailed description of the ARV drugs to be taken;
- Clarification of ARV dosing details; and
- Ensuring that instructions are clearly written (with a

permanent marker) on the pill container.

52. Between the first screening visit and the second visit, the treatment counsellor visits the patient at home to assess the following four matters:

- Home circumstances;
- Correctness of the contact details;
- Support structures, including disclosure; and
- Drug storage facilities, such as a refrigerator.

53. During the period between the first and second visits, the multidisciplinary team is required to meet and assess the patient's readiness to initiate ARV treatment. At the second visit, those who are not ready for ARV treatment should be referred back to their local clinic with written reasons why ARV treatment has been deferred.

54. It is evident from the ART Guideline that the multidisciplinary team may not refuse treatment save in the limited instance where a patient does not meet the treatment readiness criteria, for example, when the CD 4 count is substantially greater than the baseline 200cells/mm^3. That is the only discretion granted to the multidisciplinary treatment team save for different treatment regimens which might be considered more appropriate in particular instances.[29]

55. In the result, the ART Guideline provides for two counselling visits (with

[29] For example, when a patient has previously been exposed to ART. ART Guideline at page 7. Even in this instance, however, "appropriate treatment" must be continued.

one home visit in between) whereas the Respondents appear to be uncertain whether three or four counselling sessions are required before treatment may commence.[30] The additional counselling session is certainly not required in the ART Guideline.

E3. Providing ARV treatment To Prisoners

56. The Operational Plan does not deal with ARV treatment for prisoners in any detail. Acknowledging that the number of prisoners living with HIV/AIDS (out of a total prison population of approximately 180 000) is unknown, the Operational Plan simply provides as follows:

> "In order to offer HIV and AIDS care and treatment, tight linkages with the public health system will be needed, so that patients requiring evaluation for antiretroviral therapy can be appropriately assessed and started on ARVs by skilled clinicians. The health care team will refer prisoners back to Correctional Services for ongoing primary care follow-up for HIV, with referrals for specialized care in public facilities according to national treatment guidelines."[31]

57. The ARV treatment guideline provides even less assistance, being completely silent on the matter. It does not, for example, deal with the relevance and/or application of psychosocial criteria (relevant to the initiation of ARV treatment) in a prison context. Nor does it address the

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30 Answering Affidavit: Sishuba, at paragraphs 8(a) and 8(d), pages 360-361.

31 Operational Plan, page 77.

process for the initiation of ARV treatment, in particular the time period between the first and second visits during which the ordinary patient is visited at home by the treatment counsellor for an assessment.

58. There is nothing in the Operational Plan or the ARV treatment guideline to suggest that the latter should be applied in prisons without adaptation. If anything, the context suggests the possibility for abbreviated time periods, given that home visits will not be possible. In addition, certain psychosocial considerations are not of concern in relation to prisoners. For example, prisoners' attendance at HIV clinics is largely dependant on the co-operation of correctional services officials. Similarly, their ability to attend the ARV treatment centre on a regular basis is also dependant on state assistance.

59. Further, the circumstances of this case make it plain that the ordinary process, if indeed followed to the letter, would simply result in unnecessary delay at a time when the Applicants' lives are in serious danger. In this matter, the Applicants have clearly accepted their HIV status and their need for ARV treatment, and have approached this Honourable Court for an order compelling the authorities to take all reasonable steps to ensure that they are able to access ARV treatment. In such circumstances, there does not appear to be any need formalistically to apply processes that were clearly designed with a different context in mind.

60. However, even if the Respondents were strictly to apply the requirement of three ARV treatment centre visits, there is nothing in the Operational Plan, the ARV treatment guideline or Sishuba's answering affidavit to suggest – or indeed justify – that this process need take any longer than two weeks. The Respondents merely assert that the initiation of ARV treatment can only follow four weeks after the first screening visit, which

they refer to as a patient starting on the "ART programme"[32] when neither the Operational Plan nor the ART Guideline draw any such distinction. What is evident from the ART Guideline is that the counselling sessions are part of ARV treatment and not a separate ART "programme" on its own.

F. THE LACK OF REASONABLE IMPLEMENTATION OF CONSTITUTIONAL, STATUTORY AND POLICY OBLIGATIONS BY THE RESPONDENTS

61. The Constitutional Court has unequivocally stated that the implementation of law and policy by the government and the fulfillment of legal duties must be reasonable.[33]

62. In the context of the right to housing, the Constitutional Court stated that mere legislation is not sufficient in order to comply with constitutional obligations. Yacoob J stated:

> "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

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32 Answering Affidavit: Sishuba, paragraphs 8(d)-(e), pages 361-362.

33 *Government of RSA v Grootboom* 2001 (1) SA 46 (CC) at para 42; *TAC (No. 2)* at para 38; *Metrorail* (CC) at paras 15 and 60.

> implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations."[34] (Emphasis added.)

63. The inquiry into whether conduct is reasonable in the circumstances is the determination of reasonableness entails an application of legal principles to a particular factual context:

> "At least one dispute was characterised as a dispute of fact both by the SCA and the Respondents' counsel, which in fact concerns questions of law, not fact. This is the question of the reasonableness of the first, second and third Respondents' conduct. Quite clearly the conduct itself constitutes a question of fact, and where there are genuine disputes as to what that conduct was, the Respondents' version must be accepted. The question of whether that conduct once established was reasonable in the circumstances, is not a question of fact, but one of the application of legal principles to a set of established facts which this Court must determine. Unlike the question of whether a particular issue has been established beyond a reasonable doubt, which turns only on an evaluation of evidence and its cogency, the question of whether conduct is reasonable in the context of a legal duty, requires the application of legal principles to a set of established facts."[35]

It is therefore within the competence of the courts, and indeed incumbent

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34 *Grootboom* at para 42.

35 *Metrorail* (CC) at para 60.

upon the courts, to make such a determination, with due deference to governmental organs who have a measure of leeway in implementing their obligations.

64. We submit that the Respondents' implementation of the laws and policies discussed above is unreasonable in three respects:

(a) It is inflexible;

(b) It has been characterised by unjustified and unexplained delay; and

(c) Some of the steps taken by the Respondents after the institution of these proceedings, in particular the manner in which the appointments were set up, are irrational.

F1. Summary of Facts that are Relevant to a Reasonableness Analysis

(a) Progress Made After ALP Letter Of 28 October

65. Government was slow to respond to the Applicants' first request, through the AIDS Law Project (ALP), to resolve the problem regarding a lack of access to ARV treatment at WCC. That request, sent on 28 October 2005 to the Second Respondent (and copied to the Third, Fourth and Fifth Respondents), was initially ignored. (Para 57, founding affidavit).

66. Other than experiencing difficulties in arranging a second consultation with the Applicants, the first having occurred before the ALP sent the 28

October 2005 letter, the first response received from anyone in government was a fax from the state attorney in KwaZulu-Natal more than five weeks later (on 6 December 2005).

67. The response from the state attorney followed the ALP's direct approach to him on 5 December 2005. At that point, all other attempts to evoke a response from anyone in government had been unsuccessful. The state attorney's intervention led to a meeting on 15 December 2005 between DCS and WCC on the one side and the ALP and the TAC on the other. (Paras 58 – 62, founding affidavit).

68. At the 15 December 2005 meeting, discussion focused on the challenges faced by DCS to ensure that prisoners are able to access ARV treatment, with both DCS and WCC agreeing to the following undertakings:

(a) DCS agreed to draft a plan of action for ensuring access to ARV treatment for prisoners at WCC and to share the contents of this plan with the Applicants;

(b) WCC agreed to facilitate the processing of IDs for prisoners at WCC, and would prioritise those in need of ARV treatment; and

(c) DCS agreed to facilitate a meeting with the national Department of Health to address the obstacles to ensuring prisoners' access to ARV treatment, especially in KZN. (Para 64, founding affidavit).

(b) Progress Made After Meeting Of 15 December 2005

69. After numerous unsuccessful attempts by the ALP to contact DCS representatives in the first half of January 2006, the first indication of any

progress was Gounden's letter dated 20 January 2005. In that letter, written by Gounden in her capacity as chairperson of the 15 December 2005 meeting, the ALP was advised that she was generally unable to ascertain progress, King Edward Hospital (KEH) would provide ARV treatment to the prisoners, and appointments for them were being set up. (Paras 66 – 69, founding affidavit; para 38, answering affidavit).

70. The ALP requested further information, particularly regarding the dates of the appointments. (Para 70, founding affidavit) Those dates were finally disclosed in the answering affidavit filed almost four months later. (Para 14, answering affidavit)

71. After Gounden's letter of 20 January 2005, it would take a further two months, a final letter of demand and a hunger strike by members of the HIV/AIDS Support Group before any real progress could be ascertained. But before sending the letter of demand to Third Respondent on 17 March 2005, DCS had only:

(a) Compiled and forwarded draft minutes of the 15 December 2005 meeting (which were corrected by the ALP but never finalised by DCS);
(b) "Initiated" arrangements with the Department of Home Affairs regarding ID applications, without resolving the R35 application fee concern; and
(c) Taken ten prisoners to KEH. (Paras 68 – 74, founding affidavit; paras 9(a), 39(c), answering affidavit).

72. At the 16 March 2005 legal consultation with the Applicants, the day before the letter of demand was sent, the ALP was advised by the Applicants that four of them had been taken to KEH (as they had IDs), but that only two of them (the Fourth and Thirteenth Applicants) had started

pre-treatment counselling. One of the other two, the Eighth Applicant, was scheduled for pre-treatment counselling on that day, but was in fact not taken. (Para 89, founding affidavit)

73. The Seventh Applicant was taken to KEH for an appointment on 22 February 2005, but could not begin the ART programme, as he did not have his CD4 count result in an appropriate form. (Para 14(g)(iv), answering affidavit; para 38(d), replying affidavit)

74. Because of the slowness in response and progress, the ALP sought the intervention of others in government, including the Minister of Correctional Services (the Third Respondent) and the Minister of Health (the Fifth Respondent). It was only after the Third Respondent had failed to respond to two letters (dated 13 February and 8 March 2005 respectively) that the third, the letter of demand, was sent on 17 March 2005. (Paras 75, 90 – 92, founding affidavit)

(c) Progress Made After Letter Of Demand Of 17 March 2006

75. A DCS official, Mr Mhlongo, assisted some prisoners to make ID applications by contributing towards the costs of the applications out of his own pocket. At this point, the fee requirement had yet to be waived. (Para 44(b), answering affidavit)

76. In her telephonic response of 24 March 2006, Gounden suggested a further meeting between the ALP and DCS. She also confirmed that DCS policy did not allow for the payment in respect of ID applications. Upon request, Gounden sent a written record of the conversation on 27 March 2006, in which she reiterated that the ID issue remained an obstacle. She also

stated that DCS had arranged with the Department of Home Affairs to process ID applicantions once funding had been arranged. She suggested that the ALP should cover the costs of the Applicants' ID applications. (Para 76, founding affidavit)

77. On the same day (27 March 2005), members of the HIV/AIDS Support Group at WCC went on a hunger strike. They met with DCS officials two days later. DCS requested a further two months to sort matters out. It appears that the executive committee of the support group agreed to this timeframe, on condition that it was kept abreast of progress. This did not happen. Further, the two-month period will already have lapsed at the hearing of this matter. (Para 77, founding affidavit)

78. In addition to responding in writing to Gounden's letter of 27 March 2006, the ALP also tried (unsuccessfully) to meet with DCS again. DCS promised to send the ALP a document setting out the steps that it was taking. No such document was ever sent. (Paras 78, 81, founding affidavit)

79. On 4 April 2006, the ALP received an undated response from the KZN Department of Health to an earlier letter that had been sent almost two months before to the national Department of Health (on 7 February 2006). The letter alerting the Fifth Respondent to the pending initiation of legal proceedings (dated 17 March 2005) appears to have precipitated this response. In its letter, the KZN Department of Health confirmed, *inter alia*, that it is providing services to prisoners and that the ID "requirement" is "not strictly applied". It also claimed that it was not aware that it was denying access to ARV treatment for any prisoner. (Paras 93, 94, founding affidavit)

(d) Progress Made After Filing The Application

80. It is not clear when many of the steps taken after the filing of this application were indeed taken, as they are merely referred to – in the absence of any reference to dates – in Sishuba's affidavit. These steps include:

(a) The Fourth Applicant being initiated on ARV treatment (para 9(g), answering affidavit);

(b) An agreement reached by DCS and the Department of Health that prison numbers are to be used (as an "interim measure") for starting on the ART programme, provided application for an ID has been made (paras 15, 48, answering affidavit); and

(d) Confirmation that "steps" had been taken to treat prisoners' opportunistic infections and/or diseases. (Para 16(a), answering affidavit)

81. Almost seven months after receipt of the initial letter from the ALP (28 October 2005) regarding the Applicants' access to ARV treatment, the Respondents disclosed the dates upon which appointments for the Applicants at KEH were scheduled. It is unclear when the following appointments were made:

(a) Appointments to begin a "ART programme" were made for the following 12 Applicants: First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth, Fourteenth and Fifteenth

(Para 14, answering affidavit; paras 32 – 46, replying affidavit); and

(b) A further appointment was made for the Thirteenth Applicant. (Para 14(m)(iii), answering affidavit)

82. The Seventh Applicant was not taken for his scheduled appointment at KEH on 18 May 2005. (Para 38(a), replying affidavit)

83. In addition, the following occurred sometime after the initiations of legal proceedings in this matter:

(a) A further CD4 test for the Fifteenth Applicant was completed. (Para 14(o)(iii), answering affidavit); and

(b) In respect of the Applicants, the R35 ID application fee was waived. (Para 25(b), replying affidavit)

84. At a meeting of representatives of the ALP, the TAC, DCS and the DOH, which took place a week before this matter first came before this Honourable Court, the ALP and the TAC were advised:

(a) Of the DCS decision regarding the interim measure using prison numbers instead of IDs, pending applications for such documents;

(b) That steps would be taken to ensure that WCC is accredited to provide ARV treatment itself; and

(c) Final assessments and the accreditation of two other prisons was on the cards. (Para 48, answering affidavit)

85. At that meeting, DCS undertook to commit – in writing – to a timeframe according to which the Applicants would be placed on ARV treatment. This was not done. (Para 81(a), replying affidavit)

86. Following the meeting, the ALP, DCS and the DOH tried to settle the matter before it first came before this Honourable Court on 3 May 2005. These attempts proved unsuccessful. (Para 81(b), replying affidavit)

F2. The Legal Principles Applicable to the Reasonableness Test

87. In M*etrorail*, O' Regan J set out the factors that may be considered in a reasonableness test. These are not meant to be exhaustive. The Honourable Justice held:

> "Factors that would ordinarily be relevant would include the nature of the duty, the social and economic context in which it arises, the range of factors that are relevant to the performance of the duty, the extent to which the duty is closely related to the core activities of the duty-bearer – the closer they are, the greater the obligation on the duty-bearer, and **the extent of any threat to fundamental rights should the duty not be met as well as the intensity of any harm that may result. The more grave is the threat to fundamental rights, the greater is the responsibility on the duty-bearer**. Thus, an obligation to take measures to discourage pickpocketing may not be as intense as an obligation to take measures to provide protection against serious threats to life and limb. A final consideration will be the relevant human and financial resource constraints that may hamper the organ of state in

meeting its obligation. This last criterion will require careful consideration when raised. In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."[36] (Emphasis added.)

88. In the light of the jurisprudence set out above, the factors for assessing reasonableness that are applicable to the facts of this case are:

(a) Whether policies and their manner of implementation is flexible;[37]
(b) Whether there is co-ordination between different spheres of government, allocating appropriate responsibilities to each; [38]
(c) Whether there has been undue delay in implementation;[39]

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36 *Metrorail* (CC) at para 88.

37 *Grootboom* at 41, TAC 68

38 *Grootboom* at 39-40.

39 *Member of the Executive Council: Welfare v Kate* [2006] SCA 46 (RSA) at para 10. The Court in *Kate* pointed out that there was no explanation for the delay. Section 237 of the Constitution requires as follows: 'All constitutional obligations must be performed diligently and without delay.'

(d) The social and economic context in which the duty on the state arises;[40]

(e) The extent to which the duty is closely related to the duty-bearer;[41]

(f) The extent of any threat to fundamental rights should the duty not be met, including the intensity of the harm that may result;[42] and

(g) The relevant human and financial resource constraints.[43]

F3. Application of the Legal Principles to the Factual Circumstances

89. We deal with each of the factors set out in the previous paragraph sequentially in this section.

(a) Lack of flexibility of the policy and its implementation

90. We submit that national policy, which deals with the general population, cannot apply strictly in a prison context; and that the rigid implementation of that policy in the prison context is unreasonable.

91. It would also appear that the Respondents believe that ART Guideline are

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[40] *Metrorail* (CC), para 88.

[41] *Metrorail* (CC), para 88.

[42] *Metrorail* (CC), para 88.

[43] *Metrorail* (CC), para 88.

the sole focus for treatment of the prisoners when it was manifestly drafted with the general public in mind.

92. There is simply no evidence that the Respondents have applied themselves to an appropriate policy and implementation plan other than that recorded in the ART Guideline.

93. This is notwithstanding that the Applicants are in urgent need of ARV treatment and want to have such treatment. Their special circumstances have simply not been considered or if they have been considered have simply been ignored.

(b) Co-ordination between government departments

94. The *Grootboom* judgment requires that policies and programmes "must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available."

95. The principles of co-operative governance are set out in section 41 of the Constitution. It requires "all spheres of government and all organs of state within each sphere" to, inter alia, "provide effective, transparent, accountable and coherent government for the Republic as a whole" and to "be loyal to the Constitution, the Republic and its people".

96. The record reflects that there has been insufficient co-ordination between

the DOH and the DCS.[44]

(c) Delay in implementation

97. Section 237 of the Constitution states plainly: 'All constitutional obligations must be performed diligently and without delay.'

98. In *Kate*, the Court stated:

> "[W]hat is expected of an administration that has justifiable reasons for what appears to be unacceptable delay in carrying out its functions are full and frank explanations that will enable a court to assess their adequacy when determining whether the administration has acted reasonably. In the case that is now before us there has been no explanation at all for the delay.[45]
>
> and
>
> "The realisation of substantive rights is usually dependant upon an administrative process. Rights that protect that process, like those that are embodied in s 33(1) and s 237 of the Constitution and in PAJA, are essentially ancillary to the realisation of those substantive rights. For without protection being given to the process the substantive rights are capable of being denied. Where, as in this case, the realisation of the substantive right to social

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44 "AMG35" to the founding affidavit (pages 159-168) contains a letter dated 20 December 2005 from the DCS to the Regional Commissioner detailing the difficulties in seeking assistance from DOH accredited ARV treatment sites.

45 At para 10.

> assistance is dependant upon lawful and procedurally fair administrative action, and the diligent and prompt performance by the state of its constitutional obligations, the failure to meet those process obligations denies to the beneficiary his or her substantive right to social assistance.[46]

99. As the summary of substantial facts in section F1 herein demonstrates, the Respondents have been wholly remiss in the implementation of their duties in securing timeous ARV treatment for the Applicants.

100. Although the DCS stated in its letter dated 23 January 2006[47] that there are 50 offenders in Medium B alone with CD4 counts below 200 (and that 78 offenders died the previous year from AIDS-related conditions), the answering affidavit fails to deal with the steps, if any, that have been taken for the remaining offenders who qualify for ARV treatment. The answering affidavit is deliberately silent on the treatment of this class of people and the only permissible inference in the circumstances is that nothing has happened as regards them and their treatment.

101. Most disturbingly, the Respondents still refuse to commit to the provision of ARV treatment claiming that this is not their decision to make but a decision of a multi-disciplinary team. At best they say that the Applicants have been given appoints for an "ART programme." This distinction is not drawn in the ART Guideline.

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46 At para 22.

47 Annexure "AMG35" to the founding affidavit at page 159.

102. In any event, we submit that the laws and policies demonstrate that the duty to ensure appropriate ARV treatment for the Applicants and others who are similarly situated vests jointly in the DCS and DOH and it cannot assist any of the Respondents to deny that they have any power over ARV treatment and that only a "multidisciplinary team" can make this decision.

103. In any event, we demonstrated earlier that the multidisciplinary team at treatment sites has no discretion to refuse ARV treatment when a patient qualifies for treatment.

104. It bears noting that section 195 of the Constitution delineates the basic values and principles that govern public administration. These include:

> "public administration must be accountable";
> "people's needs must be responded to"; and
> "transparency must be fostered by providing the public with timely, accessible and accurate information".

105. What is evident from the answering affidavit filed by the Respondents is that there is simply no explanation at all for the delay in implementing ARV treatment for the Applicants who have all along wanted and are entitled to it. That silence is deafening, more especially because the range of opportunistic infections amongst the Applicants reduces their quality of life on a daily basis and the already low CD4 counts means that their lives are at risk.

(d) <u>The extent to which the duty is closely related to the duty-bearer</u>

106. The Applicants are in prison. They are unable to access the public health

system as any other person with AIDS would do. The Applicants are completely dependent on the Respondents for their treatment and the Operational Plan recognises the need for close links between DCS and DOH.

107. This, we submit places the duty to ensure timeous provision of ARV treatment to prisoners who qualify for such treatment squarely on the shoulders of the Respondents, in unison.

108. We demonstrated previously that it does not help the Respondents to hide behind a "multidisciplinary team" when KEH forms a part of the public health system under the control of Fifth and Sixth Respondents.

(e) The extent of any threat to fundamental rights should the duty not be met, including the intensity of the harm that may result

109. The evidence of Dr. Venter is undisputed on the papers save for the cursory comments that "there was no urgent need to act"[48], "I deny that the Applicants are seriously ill"[49] and "I do not intend to deal with each paragraph of Dr Venter's affidavit as he is to a large extent not disputing what is contained in the Operational Plan and he did not examine any of the Applicants."[50]

110. The fact of the matter is that the Respondents are unable to dispute Dr

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48 Answering Affidavit: Sishuba, paragraph 35(a), page 388.

49 Answering Affidavit: Sishuba, paragraph 45(a), page 400.

50 Answering Affidavit: Sishuba, paragraph 47(a), page 402.

Venter's evidence. They cannot dispute because it accords with government policy on this critical issue.

111. Dr Venter's evidence demonstrates that unless ARV treatment commences on an expedited level, the risk of severe illness and death increases dramatically as the CD4 count drops further:

> "8. As stated in my previous affidavit, people living with HIV/AIDS who have low CD4 counts (less than 200 cells/ml) have been shown to be at very high risk of sever illness and death, even when they are asymptomatic. Such people are by definition severely ill and require immediate assessment for ARV treatment. The risk of severe illness and death increases dramatically as the CD4 count drops further.
>
> 9. I verily believe that the circumstances of this case require that counselling be expedited so that the Applicants can be assessed for ARV treatment readiness at a much earlier stage than would be the case if the ordinary procedure, as set out in paragraphs 8(a) to 8(j) of Sishuba's affidavit, are indeed followed. This is because, in my opinion:
>
> a. The Applicants have already demonstrated a willingness to begin taking ARV treatment;
> b. They are presently members of an HIV/AIDS support group; and
> c. Their CD4 counts clearly demonstrate their ill health.
>
> 10. The First Applicant is a case in point. He has a CD4 count

> of 4, an indication of an extremely compromised immune system. According to paragraph 14(a) of Sishuba's affidavit, he will only be starting the ART Programme on 27 June 2006. In terms of the ordinary procedure, as set out in paragraphs 8(a) to 8(j) of Sishuba's affidavit, he will therefore only start ARV treatment at the end of July 2006 at the very earliest. In my opinion, this further two month delay places the First Applicant's health and life at significant risk."[51]

112. We submit that the extent of the risk is manifest and the corresponding duties to provide ARV treatment immediately assumes growing proportion in these circumstances.

(f) Social and economic context

113. That South Africa faces a public health crisis of alarming proportions has been accepted and definitively recorded by the Constitutional Court. We quoted earlier the extract on this from *Minister of Health v Treatment Action Campaign (No 2)*.

114. In addition, we submit that the Court may take judicial notice of the fact that the spread of HIV infections in our already overcrowded prisons means that the Applicants and others in their situation find themselves in an extremely compromised position.

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[51] Replying Affidavit: Venter, Annexure "A16" to Replying Affidavit: Govender at pages 523-524.

115. In *Stanfield v Minister of Correction Services* the Court in 2004 took note of the fact that "[t]he facts set forth in the most recent annual report of the Judicial Inspectorate of Prisons ... indicate a shocking state of affairs. Despite the **huge increase in the prevalence of HIV/AIDS and other terminal diseases in our prisons,** only the tiniest percentage of prisoners suffering from such diseases were released on medical grounds during 2002."[52] (Emphasis added.)

116. We submit that the urgent need for the Respondents to comply with their duties in this context and to do so quickly given their delays up to now cannot be disputed.

(g) Resources

117. The Respondents have not demonstrated that human and/or financial resource constraints are the reason for slow implementation of the legislative and policy framework.[53]

118. The Respondents have not placed any evidence before this Court to suggest that they do not have the resources to implement their duties

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[52] *Stanfield v Minister of Correctional Services* 2004 (4) SA 43 (C), at paragraph 128.

[53] Although they try to raise this as an argument at paragraph 36(a), page 389 ("The KEH and Addington Hospital were at the time experiencing budgetary constraints." However, this is belied by the letter attached to "AMG35" at page 161-162 when the Regional Commissioner was advised on 20 December 2005 that hospitals did not want to treat offenders from Westville Correctional Centre. This is confirmed in "JES5" to the answering affidavit at page 416 in which McCord's Hospital records that "the security risk to the hospital is unacceptable."

without delay.

119. In *Khosa*, the Constitutional Court made it clear that relevant and precise evidence should be placed before the Court in order to support an argument regarding lack of available resources.[54] In that case it was concluded that the evidence proffered by the State regarding the burden that would be placed on the state should social grants be extended to permanent residents (and not just citizens) was speculative, and could not be accepted.[55]

F4. The Respondents have Acted Unreasonably, Irrationally and Unlawfully

120. In the light of the above analysis we submit that the conduct of the Respondents in implementing the legislative and policy framework was and remains unreasonable.

121. It is to be noted that the Respondents will still not commit to the provision of ARV treatment. They must accordingly be Ordered to do so by this Court.

122. In this regard, we submit that the remarks of Jordaan J and Patel J in *S v Mabutho*[56] are instructive:

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54 *Khosa*, at paras 17-19, and 62.

55 At para 62.

56 2005 (1) SACR 485 (W), at 489-490.

> "Finally, the appellant as a convicted person serving a prison sentence has an effective constitutional right by virtue of s 27(1)(a) of the Constitution ... namely the right to have access to health care services and in terms of ss (3) of s 27 she may not be refused emergency medical treatment if and when she requires such treatment during her period of incarceration. However, it is not difficult to envisage a situations that for some reason the Correctional Services may neglect to accord a prisoner access to health care and emergency medical treatment. Then in a predicament the prisoner has adequate resource to invoke his or her constitutional right. In doing so the doors of the Court are always wide open to a prisoner where a State organ fails or neglects to provide essential health care and emergency medical treatment."

123. We submit that the Applicants were thus fully justified in approaching this Court for the medical treatment to which they are entitled and which, owing to the unreasonableness of the Respondents, they have yet to receive.

124. We submit further, that even on a lower threshold of mere rationality, the conduct of the Respondents does not pass constitutional muster.

125. In arranging for the appointments of the Applicants, the Respondents do not appear to have prioritized those whose health needs are most urgent.

126. Thus, we have a situation where, for example, the First Applicant who has

a CD4 count of 4 will only be starting the ART programme on 27 June 2006. In terms of the ordinary procedure as set out in Sishuba's affidavit he will therefore only start ARV treatment at the end of July at the very earliest.

127. As Dr Venter points out, this further two month delay places the First Applicant's life and health at significant risk.

128. We submit that this Court is entitled to intervene in these circumstances to ensure that the Applicants and those who are similarly situated are protected through the timeous provision of ARV treatment. We make the further submission that the Respondents have acted unlawfully in the circumstances.

G. COSTS

129. It is a well-established principle in our law that a litigant who is legitimately asserting a constitutional right, especially against the government, should not be discouraged from doing so because of the fear of adverse costs orders.[57]

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[57] *Ex Parte Gauteng Legislature: In Re Gauteng School Education* Bill 1996 (4) BCLR 537 at para 36; *Oranje Vrystaatse Vereniging vir Staatsondersteunde Skole v Premier of the Free State* 1998 (3) SA 691 (CC) at para 4; *Motsepe v Commissioner for Inland Revenue* 1997 (2) SA 898 (CC) at para 30; *Campus Law Clinic (University of KZN Durban) v Standard Bank of South Africa and The Minister of Justice and Constitutional Development* CCT 01/06, decided 31 March 2006 at para 28.

130. In *Oranje Vrystaatse* case, Goldstone J said:

> "As this Court has made plain on a number of occasions, litigants should not be discouraged from enforcing their constitutional rights by having to run the risk of having to pay the costs of their governmental adversaries.[58]

131. Although this principle has been articulated by the Constitutional Court it has been applied by the lower courts in matters that raise constitutional issues. In the *IDASA* case, the Cape High Court stated as follows:

> "The guiding principle in this regard appears to be that the question of costs in constitutional and public interest litigation remains a discretionary matter. However, parties who litigate to test the constitutionality of law or conduct usually seek to ventilate important issues relating to constitutional principle. Such persons should not be discouraged from doing so by running the risk of having to pay the costs of their adversaries, if the court takes a view which is different from the view taken by the petitioner."[59]

132. In any event, in this case the record plainly shows that the Applicants and the TAC attempted, on numerous occasions, to avert litigation. It was as a result of the unresponsiveness from the Respondents that the Applicants and the TAC were forced to initiate these proceedings.

H. RELIEF

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58 At para 4.

59 *IDASA v African National Congress* 2005 (5) SA 39 (C) at para 60.

133. When this application was first instituted, none of the Applicants was receiving ARV treatment.

134. Only after this application was instituted were the Applicants (save for the Fourth Applicant) suddenly granted appointments to enter an "ART Programme."

135. We demonstrated previously that there is no separate concept of an ART Programme in the ART Guideline and that counselling forms an essential component of ARV treatment.

136. The Respondents still refuse to commit to the provision of ARV treatment and contend, incorrectly, that they cannot do so.

137. We have demonstrated that the time frames within which the Respondents intend treating the Applicants are wholly excessive and dangerous in the circumstances of these Applicants.

138. The Respondents have not dealt at all with the manner in which they will treat other offenders who qualify for treatment and the only inference is that those offenders have not yet received appointments to commence counselling as part of ARV treatment.

139. We submit that this is an appropriate case for this Court to issue a "structural interdict" as is contemplated in paragraph 5 of the Notice of Motion to compel the Respondents to commit to expedited time frames within which they will ensure that the Applicants receive ARV treatment and within which they will ensure that other similarly situated offenders receive ARV treatment. (In this regard, we note that paragraph 5 of the Notice of Motion contains a typographical error and the reference to

paragraph 2 therein ought to be a reference to paragraph 4. An appropriate amendment will be sought at the hearing of this matter.)

140. It is a well established principle of our law that structural interdicts may be resorted to in appropriate cases. In *City of Cape Town v Rudolph and Others*[60] the Cape High Court summarised the approach of our Courts to structural interdicts as follows:

> " In *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) (1998 (3) BCLR 257) at [96], the Constitutional Court recognised that in an appropriate case, the order should be a mandamus to eliminate the breach, with an order to report back to the Court in question. The Court will then be in a position to give such further ancillary orders or directions as may be necessary to ensure the proper execution of its order.
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> In *Minister of Health and Others v Treatment Action Campaign and Others* (No 2) 2002 (5) SA 721 (CC) (2002 (10) BCLR 1033) the Constitutional Court stated, en banc, that:
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> > 'The order made by the High Court included a structural interdict requiring the appellants to revise their policy and to submit the revised policy to the Court to enable it to satisfy itself that the policy was consistent with the Constitution. . . . In appropriate cases they [the courts] should exercise such a power if it is necessary to secure compliance with a court order. That may be because of a

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[60] 2004 (5) SA 39 (C), at page 88; *August v Electoral Commission* 1999 (3) SA 1 (CC) at para 42

> failure to heed declaratory orders or other relief granted by a Court in a particular case. We do not consider, however, that orders should be made in those terms unless this is necessary.'
>
> I do not believe that a declaration, standing on its own, will suffice. There has already been such a declaration, made by the Constitutional Court. It has not induced applicant to comply with its constitutional obligations. Something more is therefore necessary.
>
> The circumstances and, in particular, the attitude of denial expressed by applicant in failing to recognise the plight of Respondents as also its failure to have heeded the order in Grootboom makes this an appropriate situation in which an order, which is sometimes referred to as a structural interdict, is 'necessary', 'appropriate' and 'just and equitable'.
>
> In regard to the time to be allowed for applicant to comply with the order which will be issued in the form of a structural interdict, applicant sought a period of approximately six months for its initial report. Respondents contended that three months should suffice. Regard being had to the time that has already passed I consider period of four months to be reasonable and adequate for the preparation of the report."

141. Having regard to the history of this matter, the inexplicable delays in implementing the Operational Plan and in securing ARV treatment for the Applicants we submit that this is an appropriate case in which to Order the Respondents to deliver an affidavit committing to reasonable and expedited time frames for the provision of ARV treatment to the

Applicants and to address the treatment of the other offenders who qualify for ARV treatment, including the steps which will be taken in regard to them and the periods within which these will occur.

142. We submit that a period of one week, from the date of the Order of this Honourable Court, would be appropriate in the circumstances, provided that the counselling appointments scheduled for the Applicants continue in the interim.

143. We submit that an appropriate period for the Applicants and the TAC to respond to that further affidavit, in the event that the steps proposed by the Respondents are unreasonable, would be three days. Should this be necessary, we submit that the Applicants and the TAC should be granted an expedited hearing before this Honourable Court.

144. We submit that the Applicants and the TAC are entitled to the relief they seek.

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26 May 2006