

## Minister of Health and Others vs. Treatment Action Campaign and Others 2002 (5) SA 721 (CC), 2002 10 BCLR 1033

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*Enforceability of ESC rights is a very rare trend in the world. However, in the case of Minister of Health v. Treatment Action Campaign (TAC) the Constitutional Court of South Africa had ordered the government to nationalize the pilot site to prevent mother-to-child transmission of HIV (PMTCT) program in the public health sector, and the failure of it is the violation of the right to health. Following the reasoning of South Africa v. Grootboom<sup>1</sup> the case, the court formally rejecting “minimum core obligation” analysis developed in international law<sup>2</sup>, and instead applying a test of “reasonableness,” well entrenched in Anglo jurisprudence, to evaluate government action or lack thereof<sup>3</sup>. In this case comment, the author mainly focuses on the analysis of the TAC case with special reference to the enforceability of economic, social and cultural rights through reducing the MTCT of AIDS/HIV positive women and children. It also examined the reasonableness test of the TAC case and constitutional obligations of the South African government.*

### Introduction

The enforceability of economic, social and cultural rights (ESCR) has been the issue of momentous jurisprudential and political debate around the world. Therefore the recent judicial development has proved that the ESC rights have either explicitly or implicitly enforceable by the court of law. In this case, the Constitutional Court of South Africa has played an important role in the enforcement of ESC rights. The AIDS, which causes a lot of threat of human lives is a rapidly growing epidemic in the contemporary world especially in the Sub-Saharan region due to lack of unfeeling and lack of knowledge of the South Africa people and absence of proper initiative taken by the government in due time to prevent this fatal disease. The epidemic in South Africa has already affected more than one million people; most of them are residing in a rural area.<sup>4</sup>

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<sup>1</sup> *South Africa v. Grootboom* [2001] (1) SA 46, paras. 53-54.

<sup>2</sup> A Belani, ‘The South African Constitutional: A “Reasonable” Choice?’, working paper no. 7, Center for Human Rights and Global Justice, New York.

<sup>3</sup> Ibid.

<sup>4</sup> Speech by Prince Mangosuthu Buthelezi, MP, Maphophoma Farmers Day, 2005 available

In a recent report, it has been shown that the children are also in a great threat for AIDS virus through their mother transmission and “more than 150 children are born with HIV every day, who live short and miserable lives.<sup>5</sup>” The child was infected of HIV through mother to child transmissions (MTCT).

The women and children are mostly sufferers of AIDS/HIV higher than the men in this region. Still, now most of the people do not have any direct access to health care service and treatment for the prevention of this virus<sup>6</sup> due to their poverty and high prices of the drug. They are effectively denied to access “a simple, cheap and potentially life-saving medical intervention.”<sup>7</sup> The government should have taken initiative to improve the condition of AIDS/HIV positive women and children providing the easy access to health care services and decreasing the prices of HIV/AIDS drugs but it is unapproachable to the disadvantaged people to accommodate the HIV drugs.

As a result, the consequences are less than four percent people on antiretroviral treatment (ARV), out of an estimated 30 million HIV-positive people in Africa.<sup>8</sup> The South Africa government has a fundamental obligation to provide reasonable health care services to their citizen by adopting appropriate measures to prevent the fatal disease of AIDS.

The Treatment Action Campaign (referred to as TAC) was the third case in South Africa brought before the court for seeking remedies for violation of ESC rights relating to the right to health care services. Until the TAC case was filed there was no remarkable judicial development for implementing the ESC rights and did not impose any obligations on the state for the realization of ESC rights especially right to health care, but the court has the opportunity to consider the content and scope of the right to health.<sup>9</sup> In this case comment, the author mainly focuses on the analysis of the TAC case with special reference to the enforceability of economic, social and cultural rights relating to the public health sector to reduce the MTCT of AIDS/HIV positive women and children. It also examined the reasonableness test of the TAC case and constitutional obligations of the South African government.

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at <http://www.ifp.org.za/Speeches/030605sp.htm>, accessed on 15 March 2015.

<sup>5</sup> Treatment Action Campaign, ‘Newsletter’, *Treatment Action Campaign Official Website* available at [http://www.tac.org.za/newsletter/news\\_2001.htm](http://www.tac.org.za/newsletter/news_2001.htm), accessed on 22 March 2015.

<sup>6</sup> Kasia Malinowska Sepruch & Sarah Gallagher, *War on Drugs HIV/AIDS and Human Rights*, International Debate Education Association, 2004.

<sup>7</sup> Minister of Health and Others vs. Treatment Action Campaign and Others, (TAC Case), [2002] (5) SA 721 (CC) para 73.

<sup>8</sup> See UN Office for the Coordination of Humanitarian Affairs, ‘AFRICA: Worldwide appeal for free AIDS Treatment’, available at <http://www.irinnews.org/report.asp?ReportID=44659>, accessed on 31 March 2015.

<sup>9</sup> Soobramoney v. Ministry of Health, (1) SA765 (CC), 1998.

## The Fact of the Case

The TAC case was related to the right to health and overall implications of economic, social and cultural rights in South Africa. This case was brought by Dr. Haroon Saloojee and the Children Rights Centre on behalf of Treatment Action Campaign challenging the government policy that introduced in 2001 to prevent the mother to child transmission of HIV/AIDS of pregnant women to use the antiretroviral drug called nevirapine only with permitting a limited number of pilot sites.

As a result, approximately 10%, people could be benefited from that policy but the rest of the AIDS/HIV positive pregnant women and infants were deprived of their basic right to health care services which is guaranteed in their Constitution. Regrettably, the Policy also prevented the doctors who are practicing outside the pilot sites from prescribing this drug for their patients to prevent the MTCT of HIV positive women and children.

The limited pilot sites and restraining the doctors to prescribe the drug in the public health sector will violate the right to health care service of the HIV/AIDS affected people at large in the country. The Treatment Action Campaign (hereinafter referred to as TAC)<sup>10</sup> raised the question of the reasonableness of the government's policy and demanded to adopt a comprehensive policy for preventing the MTCT that make applicable to all people including the child and of HIV positive women outside of the sites. The applicants reasoned that government has an obligation to protect the right to health guaranteed under its Constitution in this sense the government policy has invoked the section 27(right of everyone to have access to health care services) and section 28(1)(c) right of the child to basic health care services and social services.

The government argued that it will take time to frame a comprehensive policy and implement it to all section of people because of the efficacy of the drug is questionable now and lack of capacity to administer the drug nationally. They also raised the issue of separation of power and claimed that the relief sought by TAC has violated the principles of separation of power. Then the TAC filed a petition against the government to the High Court of Pretoria. After hearing both the parties the High Court pronounced its judgment in favors of TAC, then the government appealed to the Constitutional Court.

## Point of Issue to be Determined

The Constitutional Court of South Africa has taken into consideration two key

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<sup>10</sup> TAC was established on 10 December 1998 as a Voluntary Organization working for HIV/AIDS affected people, TAC website [www.tac.org.za](http://www.tac.org.za), accessed on 15 March 2015.

issues while trying the case in the appellate stage. The first issue was to what extent the government action is justified to refuse the implementation of the policy to make available Nevirapine in all public health sectors outside the pilot sites where it is medically designated. The second issue was whether the government was legally bound to take reasonable measures to implement the policy in all public health sectors within its availability of resources to achieve the realization of the right to health care services.

### **Analysis of the Judgment**

The Constitutional Court of South Africa has pronounced the judgment after taking into the consideration of section 27 and 28 and 38 of the Constitution of South Africa. The Court analysis the section 27 whether a right to the minimum core of the right to health has conferred or not and the Constitutional Court found that right to health is not “self-standing and independent positive right enforceable irrespective of the lack of resources mention in section 27(2).<sup>11</sup>” However “the right to health must be read together as defining the scope of the positive rights that everyone has.<sup>12</sup>”

My opinion regarding the Court’s order was justiciable and reasonable in sense that government did not provide equal opportunity for health care to available the Nevirapine to all HIV positive women and their children for that reason a large number of AIDS-affected people were deprived of their basic rights which are enshrined in section 27 under the Bill of Rights in the Constitution of South Africa. The government should allow all the HIV positive women and their children to come under the government policy for accessible health care services for the getting benefit of Navirapine.

The Court further stated that sections 27(1) and (2) of the Constitution, which require the government to adopt a comprehensive plan for the progressive realization of the right to health of pregnant women and to their newborn children to eliminate the MTCT of HIV within its available resources. However, the state has a constitutional duty to take positive measures for ensuring the right to health cares to its citizens progressively.<sup>13</sup>

The Constitutional Court did not accept the minimum core approach as provided in section 27 because there is no vagueness in the content of this ESC rights. Right to health is a basic and constitutional right of South African people. The Constitutional Court held that government has violated the section 27 and 28 of the Constitution not making the drug available in public health sector and not

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<sup>11</sup> Constitution of Republic of South Africa, 1996 art 39.

<sup>12</sup> *TAC case* (n 7) p.39.

<sup>13</sup> *Ibid.*

taking any comprehensive plan for eliminating the MTCT of HIV, the argument of government is lame and was unreasonable, but the main factor was the unwillingness to make the drug available to the public.

The Constitutional Court of South Africa has given a momentous decision in TAC case, which may be considered a great victory of the African people for enforcing their ESR rights. It also upholds the government's obligation to take appropriate measures concerning the realization of ESC rights and the court has given the power to enforce these rights. The researcher found out that the South African people went ahead one step for ensuring their ESC by this decision.

While declaring the judgment the Constitutional Court did not argue for any other possibilities for the violation of domestic or international obligations and also international covenants by the domestic courts, but emphasizes on the Constitutional obligations of the government to protect respect, promote and fulfill all rights provided in the Bill of Rights<sup>14</sup>

The researcher does agree with the decision of the Constitutional Court, the main reasons are that in a country like Africa it is very essential to provide adequate health facilities to prevent the fatal disease like AIDS of pregnant women and their children who are more vulnerable in the society. I do believe this remarkable decision will help the affected people to take reasonable medical care through government policy.

The Court ordered the government to make a plan for an effective and inclusive national programme to prevent MTCT.<sup>15</sup>The Court also emphasized that it will not be precluded the government in future from adopting any comprehensive policy for the realization of ESC rights, which made in complying with the provisions of Constitution and also the requirements of Court order.<sup>16</sup>

Finally, The Constitutional Court has reversed the order of the High Court and gave direction to the Ministers of Health to submit reports to the court outlining their progress to comply with the requirement of the court decision.

### **Test of Reasonableness**

The Constitution of South Africa provides for everyone has the right to access health care services etc. The government can adopt policy, programme or plan for ensuring the health care services to their citizen complying with the provisions of the Constitution. But in this case, the government's policy was

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<sup>14</sup> Ibid, s 7(2).

<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

unreasonable because of confining the anti-retroviral drug only for two research sites per province and not to make the drug available to all persons who are HIV positive in all hospitals and clinics outside the pilot sites. In this case, the precedent of the Grootboom case is also applied for the reasonable test. In TAC case the Court declared the institutional ineptitude to decide the minimum core and it also rejected the ground of budgeting process by claiming that outcome is merely incidental to determining reasonableness “the courts are not institutionally equipped to make the wide-ranging factual and political inquiries necessary for determining what the minimum-core standards... should be, nor for deciding how public revenues should most effectively be spent.... determinations of reasonableness may, in fact, have budgetary implications, but are not in themselves directed at rearranging budgets.<sup>17</sup>” The Court basically focused on the reasonableness of the measures to determine whether the government was complying with the constitutional obligations to implement the policy equally for their citizen.<sup>18</sup> In this regard, the Court expressed that “society must seek to ensure that the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom, and equality. To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they attempt to realize. Those whose needs are the most urgent and whose ability to enjoy all rights therefore, is most in peril, are capable of achieving a statistical advance in the realization of the right.<sup>19</sup>”

The Court also referred the section 27 (2) which adopted in Grootboom case earlier and found that “Government had failed to devise and implement-with its available resources- a comprehensive and coordinated programme to realize progressively, the rights of pregnant women and their new-born children to have access to health services in order to combat the transmission of HIV from mothers to their children.<sup>20</sup>”

The Court also held that the government should act immediately to provide the anti-retroviral drug to all public hospitals and clinics where it is medically indicated. The Court also instructed the government to develop the policy in future equally applicable for the prevention of mother to child transmission of HIV.<sup>21</sup> This is a landmark decision and establishes a good model for South Africa to enforce the ESC rights and the role of Court is praiseworthy for enforcing and granting effective and systematic remedies to ESC rights violations.<sup>22</sup>

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<sup>17</sup> Ibid pp. 37-38.

<sup>18</sup> *South Africa v. Grootboom* (n 1).

<sup>19</sup> *TAC case*, (n 7) p.68; *Grootboom case* (n 1) p.44.

<sup>20</sup> *TAC case* para 67.

<sup>21</sup> Verma Shivani, ‘Justifiability of Economic, Social and Cultural Rights’, The International Council of Human Rights Policy Review Meeting, Geneva, 15 March 2005.

<sup>22</sup> Ibid.

## **Conclusion**

The TAC case has considered an outstanding decision for recognizing the justifiability of the ESC rights in South Africa. The Constitution of South Africa has contained provisions to protect the reproductive of health care including the right to health and child nutrition. In this case, the Court declared the government policy not to ensure health facilities for every citizen was unconstitutional and unreasonable. The Constitutional Court invalidate the High Court decision and gave a number of mandatory orders to the government to take action ‘without delay’ to eliminate the restriction for using the Nevirapine to public health sector “where this is medically indicated”. The Court further ordered to take reasonable measures to provide training of the counselors to facilitate and accelerate the use of Navirapine in the public health sector to reduce the risk of MTCT of HIV positive women and their children. Therefore, the Court has made any decision in the issue of formula milk, which may be used as alternative breastfeeding for lack of sufficient evidence to support the order.