

The story of the *TAC* case

Jonathan Berger & Mark Heywood
Senior researcher & Executive Director

Overview of presentation

- + Jurisprudential background to the case
 - + *Soobramoney and Grootboom*
- + Political background to the case: Campaigning for access to PMTCT services
 - + Initial lobbying in 1997
 - + Formation of TAC in 1998
 - + Mbeki and Tshabalala-Msimang come into office
- + The case: *Minister of Health v Treatment Action Campaign*
- + Outcome and impact of the case:
 - + Immediate and practical impact
 - + Impact on broader HIV/AIDS policy
 - + Broader impact on access to health care services

Jurisprudential background to case

- + *Soobramoney*

- + Distinction drawn between state's section 27(2) and (3) duties
 - + Chronic care ≠ emergency medical care: ongoing state of affairs resulting from deterioration of renal function which is incurable
 - + Purpose of right to ensure that treatment is given in an emergency: person who suffers sudden catastrophe which requires immediate medical attention should not be refused available emergency services and should not be turned away from hospital which is able to provide the necessary medical treatment
- + Guidelines limiting access to services were reasonable

+ *Grootboom*

- + Leading case defining state's positive obligations in relation to s26 & s27 rights
- + Established principles to assess reasonableness of action
- + Applies to conceptualisation and implementation of plans

Campaigning for access to PMTCT services

- + Efficacy of ART (AZT) in MTCT discovered in 1994
- + Initial lobbying in 1997:
 - + Coalition of ALP, AIDS Consortium and PHRU at Wits
 - + Results of short-course AZT trials released in 1998
 - + Minister withdraws support for planned Gauteng “pilots”
- + Formation of TAC in late 1998
 - + Initial demands included PMTCT programme
 - + Agreed with government to work to reduce price of AZT

The problem of politics

- + Mbeki and Tshabalala-Msimang come into office
 - + AIDS denialism started to take hold in late 1999
 - + Minister in National Assembly (Nov. 1999)
 - + President in NCOP (Oct. 1999) and AIDS Conference (July 2000)
 - + MCC 'investigation' into AZT ... finds AZT safe and efficacious
 - + ... But AZT still not used

+ Meanwhile:

- + Results of HIVNET012 announced, July 1999
 - + South African confirmatory trials (SAINT)
- + Offer of 5-year free NVP for PMTC by manufacturer
- + April 2002: NVP registered by the MCC
- + Government finally agrees to limited “pilot projects” in 18 sites

The case: Minister of Health & Other v Treatment Action Campaign & Others

- + TAC threatens litigation for several years!
- + Long paper trail of correspondence, request and query
- + Very public campaign accompanying litigation
- + Stories of real lives entered into litigation

Policy under attack

- + Respondents: Minister of Health & 9 MECs
- + Challenge: Limiting supply of NVP to two “pilot sites” per province
 - + Regardless of capacity of facility
 - + Regardless of willingness of doctors to dispense
 - + Regardless of availability of nevirapine
- + Reasonableness of “programme” as a whole
 - + Questioned existence of plan to implement programme

History of the case

- + July 2001: Letter of demand
- + August 21, 2001: TAC files case in North Gauteng High Court
 - + TAC drops order against W Cape
 - + Government argues affordability, efficacy, safety and public health risk caused by resistance
- + November 26, 2001: case argued in court

History continued

- + December 14, 2001: judgment in favour of TAC
- + Government announces appeal; TAC seeks execution order based on irreparable harm; government appeals interim execution order to the Constitutional Court!
- + April 4, 2002: Constitutional Court ends series of interlocutory applications to block interim execution order
- + July 5, 2002: Court hands down judgment in favour of TAC

The Court's judgment: Minister of Health v TAC (2)

- + Essence of court ruling against government
 - + Government's plan was unreasonable and inflexible
- + Relief granted
 - + Supervisory order
 - + North Gauteng High Court had granted supervisory order
 - + Constitutional Court declined to grant similar order
 - + Recognised that a supervisory order may be an appropriate form of relief
 - + But no evidence that government would not comply in this case
 - + April 17, 2002 Cabinet commitment to universal programme influential

+ Mandamus

- + Where sufficient capacity exists (including testing and counselling facilities), NVP to be provided and administered
- + Build requisite capacity where it is insufficient

A case of many legal issues

- + Range of 'subsidiary' issues raised in the litigation:
 - + Access to information
 - + Power of national government over provinces
 - + Separation of powers
 - + Rule of law
 - + Interference by NDOH with statutory bodies, MCC & SAHRC
 - + Ethics and legal duty of government to act on evidence

Outcome and impact of the case:

- + During the case:
 - + Focus on government policy
 - + Introduction of programme at big hospitals
 - + Splitting the provinces
 - + Cabinet announcement April 2002 on ARV treatment

CLINIC

ZAPIRO
SOWETAN 13-13-02

NEVIRAPINE.
.. HERE'S MY
PRESCRIPTION.

COURT
ORDER



HEALTH MINISTER LIGHTS A
CANDLE FOR PEOPLE LIVING WITH AIDS



ZAPIRO
SOWETAN 13-13-02

- + Post judgment :
 - + Patchy implementation
 - + Political opposition in certain provinces remained:
 - + Filing of contempt of court application in Mpumalanga
 - + Coverage \pm 53% of all pregnant women with HIV in 2007
 - + 2003 – 2009: Struggle to update protocol in accordance with scientific developments
 - + Budgetary “challenges” undermining implementation of new protocol

Impact on broader HIV/AIDS policy

+ Provided legal basis for demands for ARV treatment plan

- + Nov. 19, 2003: Operational Plan adopted

- + Apr. 1, 2004: Operational Plan implemented

+ National Strategic Plan on HIV & AIDS and STIs 2007-2011

- + October 2010: 1,2m people on treatment

+ Broader impact

- + Impact on emerging socio-economic rights jurisprudence

**6th floor, Braamfontein Centre,
23 Jorissen Street,
Braamfontein,
Johannesburg,
SOUTH AFRICA**

+27 (0) 11 356 4100 (t)

+27 (0) 11 339 4311 (f)

**www.section27.org.za
info@section27.org.za**