IN THE HIGH COURT OF SOUTH AFRICA Reportable

DURBAN AND COAST LOCAL DIVISION

Case No 4576\06

In the matter between:

E N	1st Applicant
B M	2nd Applicant
D M	3rd Applicant
E J M	4th Applicant
L M 1	5th Applicant
M A Z	6th Applicant
M S M	7th Applicant
N D	8th Applicant
N S	9th Applicant
S E M	10th Applicant
T J X	11th Applicant
T S	12th Applicant
V P M	13th Applicant
Z P M	14th Applicant
L M 2	15th Applicant
TREATMENT ACTION CAMPAIGN	16th Applicant

and

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	1st Respondent
HEAD, WESTVILLE CORRECTIONAL CENTRE	2nd Respondent
MINISTER OF CORRECTIONAL SERVICES	3rd Respondent
AREA COMMISSIONER OF CORRECTIONAL SERVICES, KZN	4th Respondent
MINISTER OF HEALTH	5th Respondent
MEC FOR HEALTH, KZN	6th Respondent

J U D G M E N T

NICHOLSON J

1. On the 22nd June 2006 Pillay J in this Division granted on order in the following terms :-

> '(1) That the respondents are hereby ordered with immediate effect to remove the restrictions that prevent the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth and Fifteenth Applicants, and all other similarly situated prisoners at WESTVILLE CORRECTIONAL CENTRE, who meet the criteria as set out in the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa, from accessing Anti-Retroviral Treatment at an accredited public health facility.
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> (2) That the Respondents be and are hereby ordered with immediate effect to provide Anti-Retroviral Treatment in accordance with the aforesaid Operational Plan to the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, Twelfth and Fifteenth Applicants and all other similarly situated prisoners at WESTVILLE CORRECTIONAL CENTRE at an accredited public health facility.
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> (3) That the Respondents are hereby ordered on or before the 7th Day of July 2006 to serve on the Applicant's attorneys and lodge with the Registrar of this Court, an affidavit setting out the manner in which it will comply with paragraph 2 of this order.
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> (4) The Applicants may within five days of the delivery of the affidavit by the Respondent contemplated in paragraph 3 of this order, deliver a commentary thereon, under oath.
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> (5) The Respondents may within five days of the delivery of the commentary contemplated in paragraph 4 of this order, deliver a reply.
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> (6) Thereafter the matter may be enrolled for hearing in consultation with the Registrar of this Court.
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> (7) The Respondents are ordered to pay the costs of the Applicants jointly and severally.'

2. I will continue to refer to the sentenced prisoners and the Treatment Action Campaign as applicants and the Government of the Republic of South Africa and other parties as respondents.

3. The briefest background to this matter is that the applicants launched the proceedings on 10 April 2006. The respondents also sought Pillay J's recusal on the basis that his daughter is the applicants' corresponding attorney. He refused to recuse himself but granted leave to appeal against that refusal.

4. On 6 July 2006 the respondents applied for leave to appeal against the main judgment delivered on 22 June 2006.

5. On 20 July 2006 the application for leave to appeal and also an application for interim execution or implementation was heard in terms of rule 49(11) ('the rule 49(11) application and judgment'). Leave was granted to appeal, and an order was granted that the order of Court of 22 June 2006 was to be implemented pending the outcome of the appeal subject to the date in paragraph 3 of that order being amended to read 14 August 2006. The costs of the rule 49(11) order were reserved for decision by the Court hearing the appeal.

6. The date of 14 August 2006 being the deadline for furnishing an affidavit showing how respondents would comply with paragraph 2 of the order came and went without compliance by any respondent.

7. Instead of complying the respondents applied for leave to appeal against the rule 49(11) order on 15 August 2006. This will be referred to as 'the rule 49 (11) leave to appeal'.

8. The applicants then filed an application on 18 August 2006, the main thrust of which was a declaration that the rule 49(11) leave to appeal did not suspend the operation of the earlier rule 49(11) order. Allied to that was an order that the rule 49(11) order be carried out forthwith unless and until set aside on appeal. The date for the filing of the affidavit was to be 25 August 2006. This will be referred to as 'the second implementation application'.

9. The respondent filed a notice in terms of Rule 30(1) on 18 August 2006 to the effect that the second implementation order was an irregular step for a number of reasons. Firstly that no reasons were given which rendered the matter urgent. Secondly it constitutes an improper duplication of 49(11) proceedings. Thirdly the application is premature as the 49(11) leave to appeal has not been set down. Finally Pillay J

ought to have heard the matter and not myself. (This will be referred to as the rule 30 application.)

10. When the matter was heard in Court on 18 August 2006, Mr Moerane who appeared for the respondents with Miss Norman, did not object to me hearing the matter. Rule 49(11)(e) provides for an application for leave to appeal to be heard by another judge of the division of which the judge who granted the judgment was a member.

11. Pillay J in any event provided in his judgment for the adequacy of the affidavit to be determined by another judge. The applicants are given 10 days to remedy these defects. At the hearing Miss Gabriel who has appeared throughout, did not avail her clients of the time period and argued the application on the papers.

12. The third point also falls away as the parties have agreed that I should deal with the implementation leave to appeal.

13. All these applications were heard together on 23 August 2006. I might say at the outset that making the costs order part of the implementation was clearly made *per incuriam* and the order has to be varied to that extent. There is no reason why the respondents should pay the costs pending the appeal.

14. The attitude of the court to applications in terms of rule 49(11) has been clearly set out. In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 545C - G Corbett JA identified the considerations relevant to the grant of an application for leave to execute pending appeal in the following manner:

> 'The Court to which application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see Voet 49.7.3; Ruby's Cash Store (Pty) Ltd v Estate Marks and Another 1961 (2) SA 118 (T) at 127). This discretion is part and parcel of the inherent jurisdiction which the Court has to control its own judgments (cf Fismer v Thornton 1929 AD 17 at 19). In exercising this discretion the Court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, inter alia, to the following factors:
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> (1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
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> (2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
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> (3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted not with the bona fide intention of seeking to reverse the judgment but for some indirect purpose, eg, to gain time or harass the other party; and
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> (4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience, as the case may be.'

15. The authorities do not view with particular favour appeals from implementation orders. These have taken place - I gather - on extremely rare occasions. It is somewhat ironic and sad that both occasions relate to the government seeking to avoid the effect of court orders for the provision of ARVs. See *Minister of Health v Treatment Action Campaign (1)* 2002(5) SA 703 (CC). After dealing with the test for implementing a judgment as set out in the previous paragraph the Constitutional Court went on to deal with appeals from implementation orders at 709 – 710 paras [10],[11] and [12].

> '[10]… Before making an order to execute pending appeal, therefore, a Court will have regard to the possibility of irreparable harm and to the balance of convenience of the parties, as the Judge clearly did in this case. Having granted leave to execute, permitting an aggrieved litigant to appeal that execution order pending the final appeal would generally result not only in the piecemeal determination of the appeal, but would 'stultify the very order . . . made'.
>
> [11] Moreover, as has been indicated above, an order to execute pending appeal is an interlocutory order. As such, it is an order which may be varied by the Court which granted it in the light of changed circumstances. To the extent, therefore, that a litigant considers that new circumstances have arisen which would impact upon the Court's decision to order execution pending appeal, the litigant may approach that Court once again to seek a variation or, where appropriate, clarification of the order.
>
> [12] All these considerations make it plain that it will generally not be in the interests of justice for a litigant to be granted leave to appeal against an interim order of execution. Ordinarily, for an applicant to succeed in such an application, the applicant would have to show that irreparable harm would result if the interim appeal were not to be granted - a matter which would, by definition, have been considered by the Court below in deciding whether or not to grant the execution order. If irreparable harm cannot be shown, an application for leave to appeal will generally fail. If the

> applicant can show irreparable harm, that irreparable harm would have to be weighed against any irreparable harm that the respondent (in the application for leave to appeal) may suffer were the interim execution order to be overturned.' (Footnotes excluded).

16. The respondents must therefore show irreparable harm, which must be juxtaposed against that of the applicants.

17. The facts impacting on the irreparable harm now facing applicants are set out in the affidavit of Sindiwe Blose a Treatment Project Co-ordinator In the KwaZulu-Natal branch of the TAC. She says the following:

> '23. In a visit with prisoners at Westville Correctional Centre on 15 August 2006, I was informed that the seventh applicant in the main application has died. He died on 6 August 2006 at King Edward Hospital. This was a tragic and unnecessary death.
>
> 24. The record in the main application shows that at least the second and fourth respondents were aware that the seventh applicant had a CD 4 count of 87 cells\ml as far back as November 2004. By the date of the launch of the main application, all of the respondents were aware of this.
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> 25. As all the respondents are aware, the Operational Plan requires that an HIV positive person should be assessed for ARV treatment when, *inter alia*, his\her CD 4 count reaches 200 cells\ml. By 2004 the seventh applicant's immune system was suffering serious destruction.
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> 26. This is further evidenced by the record which shows that the seventh applicant suffered from painful opportunistic infections such as "bleeding piles, painful rash on both ears, fungal infections, TB, body rash, general itchiness, oral thrush, penile sores, moth sores, septic sores on knees, painful feet". (Page 108 if record in main application).

27. The record also shows that, due to bureaucratic bungling, the seventh applicant missed medical appointments, and that despite clear indications that he should be assessed for ARV treatment, this did not happen until legal proceedings were instituted against the respondents. (page 261, 350 and 351 of record in main application).

28. During my visit to the prison I also learnt that there are a number of prisoners, at least 48, who are very sick with HIV\AIDS. Most of them have CD 4 counts of below 100 cells\ml, and of these 18 have CD counts of 50 cells\ml or below. A list of these prisoners and their CD 4 counts is annexed hereto as "SB1".

29. The purpose of the order granted by the Court on 22 June is for the responsible state organs to state, on oath, what steps they are taking to ensure that these and similarly situated prisoners receive access to ARV treatment.

30. The effect of the suspension of the order of 22 June is that the health and lives of more prisoners will be placed at risk.

31. The respondents should not be allowed to abuse the process of the Courts by defeating the very purpose of the order that was granted on 25 July 2006. Given the course of conduct of respondents thus far, I submit that the true significance of the application for leave to appeal against that order is that the respondents are seeking to prevent the applicants from exercising their common law and statutory right to interim execution, as well as their constitutional right to adequate medical treatment.

32. While the respondents attempt to out-manoeuvre the Courts and delay the exercise of the prisoners' right to adequate medical treatment, the prisoners are dying. The case is as simple, and tragic, as that.'

18. The annexure SB 1 referred to above contains the initials of 48 prisoners all but two of which have CD 4 counts below 200. I might interpolate that for eight of the prisoners no count is given at all.

19. An answering affidavit has been put up by Jabulile Sishuba Chief Deputy Commissioner: Development and Care of the National Department of Correctional Services in Pretoria. She raises points *in limine* similar to those in the rule 30 irregular proceeding notice and then deals with the merits.

20. As far as the seventh applicant is concerned she states that at the time he died he was taking ARV drugs, he had TB and renal impairment which was being attended to and he is not in any event an applicant according to the notice of motion. Any failure to honour an appointment at one hospital was quickly remedied.

21. Sarel Francois Marais has scrutinized the list SB 1 and has compiled information about the prisoners on the list. Such fall into the following categories:

    a. All HIV prisoners are on the Wellness programme which educates them about healthy and positive living.
    b. Some are HIV negative or have been released.
    c. Some prisoners are on AR Treatment programme.
    d. Some have complaints that prevent ARV treatment.
    e. Those with counts above 200 are not on ARV treatment for understandable reasons.

22. The main thrust of the answering affidavits is that the respondents have been and are providing and will continue to provide adequate medical treatment, including Anti-Retroviral Treatment, to the applicants and other inmates of WCC in accordance with the Operational Plan and the Guidelines at accredited health facilities.

23. Jonathan Berger has filed a reply in which he challenges certain of the facts set out in the answering affidavit. Seventh applicant only started ARV's on 12 July 2006 and was not given the 'best medical attention available throughout' as deposed to by the respondents as he had very serious AIDS symptoms as long ago as 12 April 2006. The respondents treatment was therefore too little and too late.

24. On 18 August 2006 the Aids Law Project requested access to the listed prisoners for the purposes of medical consultation. Letters are annexed which reveal why no access was given. Allegations are made that the medical team was threatened with dogs and batons. The respondents' version is that there is a shortage of consulting rooms, that the prisoners have been convicted of serious crimes and proper security is required. In addition other inmates will be neglected if staff are seconded to these duties. If ARVs are prescribed suitable indemnities will have to be in place to cater for injury or harm.

25. Berger queries whether the respondents have provided the information about all similarly situated prisoners as envisaged in the relief granted by Pillay J. The only information relates to applicants cited in the various applications and those additional prisoners mentioned on annexure SB 1.

26. It seems to me that the order of Pillay J has still not been complied with. Mr Moerane submitted that affidavits filed in opposition to the second implementation order were such compliance but I do not agree. They do not purport to be - in that they are not filed in fulfillment of the order - nor does their substance show them to be anything but a response to the application, as would normally take place.

27. The affidavit had to be filed by 14 August 2006 and it was not. It does not seem to me to be any answer to file an appeal against the 49(11) order. The notice of appeal would only have stayed the effect of the order if it was filed *before* the date by which the order had to be obeyed. That the period for an appeal had not expired is not the point. The respondents were aware of the difficulty in appealing against a 49(11) order from their earlier experience at the hands of the Constitutional Court. Even to date no affidavit has been filed.

28. The affidavit had to deal with all 'other similarly situated prisoners at WESTVILLE CORRECTIONAL CENTRE …'. In other words they had to extract the details of all similarly situated prisoners from their records and explain how they had complied with the order with respect to them. Given the nature of the court order it was not for the applicants to search and find the 'similarly situated prisoners' – they are after all in the custody of the prison and access is not always easy – but for the respondents to provide the Court with their details and the plan for their treatment.

29. The respondents are in contempt of the order of Pillay J. Unfortunately there is at present precious little that can be done about that given the dicta in a number of judgments, including *Jayiya v Member of Executive Council for Welfare, Eastern Cape* 2004 2 SA 611 SCA, *York Timbers v Minister of Water Affairs* 2003 (4) SA (T) p 499 et seq and *Kate v Member of Executive Council for Welfare, Eastern Cape* 2005 1 SA 141 (EC) at 155 E.

30. In the last mentioned case Froneman J said the following in the context of the State not paying old persons their pensions:

> '[21] Section 165(5) of the Constitution provides that an order or decision issued by a court binds all persons to whom and all organs of State to which it applies. The State and its organs have no powers outside that granted to it by the Constitution or by legislation complying with the

> Constitution. The courts are bound to apply the Constitution and the law impartially and without fear, favour or prejudice under s 165(2) of the Constitution. So on what possible legal basis may any State organ refuse to implement a court order and expect the courts to recognise its legal right to do so? There seems to be none, except the provisions of s 3 of the State Liability Act. But such a provision (which places the State effectively above the law) would on the face of it be unconstitutional. It is this conundrum that cases such as Mjeni and East London Transitional Local Council sought to address. This they sought to do by interpreting s 3 of the State Liability Act and the common law in its new Constitutional context, as required by the Constitution. It is, by now, settled law that legislation must be interpreted, if it can reasonably be so done, to comply with the Constitution. If that is not possible the legislation in question must be remedied by reading words into the legislation to make it constitutional, if that can properly be done, or it must be declared constitutionally invalid under the provisions of s 172 of the Constitution.'

31. In *Schierhout v Minister of Justice* 1926 AD 99 Innes CJ considered the provisions of the Crown Liabilities Act 1 of 1910 and the enforcement of orders made pursuant to that Act. He said (at 110 - 11):

> 'The second question must now be considered namely, whether there is anything to prevent this Court or the magistrate's court from awarding to the plaintiff the salary claimed in his summons. The Minister of Justice represents the Crown, so that regard must be had to the provisions of the Crown Liabilities Act, 1910. It enacts (s 2) that claims against the Crown, whether arising out of the contracts or the torts of its servants, shall be cognisable in any competent Court, just as they would have been had they arisen against a subject. But it is stipulated (s 4) that no execution or attachment or process in the nature thereof shall be issued against the defendant or respondent in any such action or proceedings; the nominal defendant may, however, pay any sum of money awarded to the plaintiff out of the Consolidated Revenue Fund, or out of the Railway & Harbour Fund, as the case may be. Now, the effect of those provisions was considered by this Court in Minister of Finance v Barberton Municipality 1914 AD 335 where it was held that a claim for a declaration of rights, or for an interdict against His

> Majesty in the Government of the Union, is cognisable in any competent Court of the Union. The policy of the Act, it was pointed out, was to allow the jurisdiction of the Courts to be exercised against the Crown, not only in respect of claims of sounding in money, but also in cases where relief was sought by way of declaration or mandatory order. *But the Legislature was content to rely upon the moral obligation which the decree of a Court was bound to exert. No process of any kind was to be exercised as against Crown representatives or Crown property.'* (Emphasis added).

32. The effect of the above highlighted passage is that unless and until section 3 of the State Liability Act is declared unconstitutional, there is no legal mechanism such as incarceration to enforce the court decrees. Should that situation continue then the effect of a court order would be what the law calls a *brutum fulmen*, in other words - a useless thunderbolt. Perhaps this is what Sophocles had in mind more than two thousand years ago when he warned in his play Antigone that his heroine had gone 'to the uttermost limit of daring, and stumbled against Law enthroned. Authority cannot afford to connive at disobedience.'

33. If the refusal to comply does not result from instructions from the first respondent, the Government of the Republic of South Africa, then the remaining respondents must be disciplined, either administratively or in an employment context, for their delinquency. If the Government of the Republic of South Africa has given such an instruction then we face a grave constitutional crisis involving a serious threat to the doctrine of

the separation of powers. Should that continue the members of the judiciary will have to consider whether their oath of office requires them to continue on the bench.

34. Mr Moerane submitted that the respondents would never neglect or refuse to comply with a court order. For this reason I am minded to give them another chance to comply with a deadline to provide the affidavit required by Pillay J. One should bear in mind that, even though I do not believe there has been proper compliance with his order, there has been progress.

35. Mr Moerane argued that Pillay J should have recused himself from the 49(11) application as he had given leave against his refusal to recuse himself in the main application. The reasoning was that once Pillay J felt there were reasonable prospects of success on appeal on his recusal application he ought not to have continued with the implementation application.

36. The leading case on the question of recusal when family members appear before their parents is *President of the Republic of South Africa and others v SARFU and others* 1999 (4) SA 147 (CC) at page 190 where the full court held:

> '[84] The final allegation relating to a personal relationship concerned the addition of Mr Matthew Chaskalson, the elder son of Chaskalson P, to the legal team representing the appellants in this appeal. Mr Chaskalson has built a successful practice as a constitutional law expert at the Johannesburg Bar and is the co-author of one of the leading works on the subject. He has appeared as counsel in numerous cases in this Court. We would also mention that it has been accepted practice in our courts for many decades that close family members appear before each other and it has never before been suggested that it was inappropriate. Where a Court consists of a number of Judges, there is even less ground for objection. Mr Chaskalson was introduced as the second junior counsel in the appeal but had already appeared as the third counsel in the condonation application. His name appeared on the record when argument was lodged in the latter application and no objection was raised to this at the time or in the correspondence which preceded the recusal application. It was not suggested that this in itself was a reason for Chaskalson P to recuse himself. The first and only reference to Mr Chaskalson is in the founding affidavit of the fourth respondent where reliance is placed on his brief in this matter in support of the alleged relationship between the families of Chaskalson P and the President. That is clearly without substance and it is not without significance that this complaint was not referred to by the fourth respondent's counsel in his argument.'

37. Mr Moerane sought to distinguish the position of advocates from that of attorneys. He pointed out that advocates are briefed by attorneys who have direct contact with the client. Advocates are entitled to every confidence from the client and are an integral part of the legal team. I am not convinced that the distinction is justified in modern times, given the right of certain attorneys with sufficient experience and seniority, to appear in the High Court.

38. I am bound by the Constitutional Court and the consequence of this is that I cannot grant leave in the 49(11) order because Pillay J failed to recuse himself.

39. Although the question of urgency was raised in the rule 30 notice it was not repeated in the respondents answering affidavits in the points *in limine.* It was also not argued by Mr Moerane. The whole procedure is patently urgent as any delay will inevitably prejudice the health of the applicants.

40. The point was raised that the second implementation order constitutes an improper duplication of 49(11) proceedings. Had there been proper compliance with Pillay J's order for the filing of the affidavit I would have had more sympathy for this argument. Given the Court's inability to enforce its orders as set out above it is necessary to set a fresh date by which the affidavit should be filed and hope that the moral pressure referred to by the old Appellate Division and Mr Moerane's assurance will result in compliance.

41. Thirdly the point was taken that the application is premature as the 49(11) leave to appeal has not been set down. In the event the 49(11) leave was heard at the same time.

42. In the result, I do not believe that the present respondents are suffering irreparable harm which compares with that of the applicants. We have been given the most terse and laconic information about the treatment of the similarly situated prisoners. No date is provided from when the treatment commenced nor has a complete list been supplied of all those in the prison with CD4 counts below 200 or who qualify for other reasons for the receipt of ARVs.

43. Mr Moerane submitted that an order is not required as the prisoners are all being properly looked after. Given the long history of neglect set out in the judgment of Pillay J and the responses by the respondents in the present applications, it seems to be desirable that an order be made. No claim has been made by the respondents that the resources are not available nor have insuperable practical difficulties been suggested. The harm to the respondents is what Botha J called 'organisational inconvenience.'

44. I have thought long and hard on the question of costs. Initially I pondered whether I ought to grant all costs in these two applications to the applicants. It is correct that the respondents have secured a variation of the rule 49(11) order to the extent that the reference to costs has been deleted. I am not certain in my own mind that the applicants would not have consented to such a variation had a letter

been written to that effect. Be that as it may, I am conscious that the whole subject will be revisited when the main appeal and the appeal against Pillay J's failure to recuse himself is heard. That forum will be able to determine all questions of costs with the benefit of full argument on the appeals. I have decided to reserve the question of costs of these two applications.

45. In the result I make the following orders:

a. The application for leave to appeal against the order in terms of rule 49(11) granted by Pillay J on 25 July 2006 is refused.

b. An order is granted varying such order to the effect that paragraph B 1 is amended by the addition of the following 'save for the order relating to costs.'

c. The costs will be reserved for the court hearing the main appeal and the appeal from the refusal of Pillay J from recusing himself.

46. On the second implementation order I am inclined to grant the following order:

a. The First to Thirteenth Applicants are granted leave to be described in these proceedings only by their initials

b. The names of the First to Thirteenth Applicants are to be provided to the Registrar of this Court, to be retained in a safe place and are not to remain in the Court file; and

c. The names of the First to Thirteenth Applicants are not to be disclosed or publicized in any manner or form by the Registrar, the Respondents or any other person or entity.

d. The order of Pillay J of 22 June 2006 in the main application, as well as the order of Pillay J on 25 July 2006 (interim execution order), save for the order relating to costs, is to be implemented forthwith, unless and until a court sets aside those orders on appeal.

e. The reference to 14 August 2006 in the order dated 25 July 2006 is extended to 8 September 2006.

f. The costs are reserved for decision by the Court hearing the main appeal and the appeal against the refusal of Pillay J to recuse himself.

Date of hearing : 23rd August 2006

Date of judgment : 28th August 2006

Counsel for the Applicants : A Gabriel (instructed by the Aids Law Project c/o PNH Attorneys)

Counsel for the Respondents : M Moerane SC with T S Norman (instructed by State Attorney (KZN)