Dickson Tapela v *The Attorney General:* Towards a right to health for prisoners in Botswana.

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ABSTRACT

On the 22nd August 2014 the High Court delivered yet another ground breaking judgment condemning the government's health policy that excluded non-citizen inmates from the Highly Active Anti-Retroviral Therapy (HAART). The government was ordered to enrol the Applicants *and other non-citizen inmates whose CD4 cell count has reached the threshold for HAART enrolment under the treatment guidelines on HAART. In this case note, the decision of the court will be interrogated, with regard to its strengths and weaknesses. In the first section the facts of the case will be set out. The second section will then deal with the ratio of the case. The case dealt with certain procedural points which are not directly relevant to the subject of the prisoner's right to health and these points will not be set out in this article. The third section will situate the court's approach and ratio within the broader international framework of prisoner's health right. In this section, the strengths and weaknesses of the case will be dealt with. The fourth section and last section the note concludes by observing the groundbreaking nature of this decision.*

1. THE FACTS

The First and Second Applicants in Dickson *Tapela and 2 others* v *The Attorney General and 2 others*[1] were Zimbabwean nationals who were serving prisoners at the Central Prison Gaborone, pursuant to convictions entered against them in 2007. They were both diagnosed with HIV whilst in prison. In order to determine whether or not they were to be enrolled on Highly Active Anti-Retroviral Therapy (HAART) to better manage their illness, their viral load and CD4 count had to be assessed. They were refused such assessment on grounds

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1 High Court Case Number MAHGH-000057-14 (Unreported).

that they were non-citizens. The policy in place that prevented non-citizen inmates was Presidential Directive Cab 5(b) of 2004. Notwithstanding its cardinal importance, this Directive was not produced before the court. Instead what was produced was a Savingram dated the 26th March 2004 whose relevant portions read thus:

> **"PROPOSED CHANGES TO PRESIDENTIAL DIRECTIVE CAB LS/C 2002 ON THE PAYMENT FOR MEDICAL SERVICES BY NON-CITIZENS**
> Addresses are hereby informed that the following have been approved through Presidential Directive Cab 5(b) of 2004…
> - Provision of free treatment to non-citizen prisoners suffering from ailments other than AIDS."

The import of the Cabinet Memo was that non-citizens wishing to receive medical services from the Botswana Government would have to pay for such services where they concerned infection with HIV. The First and Second Applicants then embarked on a campaign to seek assistance from the Third Applicant BONELA in funding their treatment.[2] It was not until 2010 that the BONELA came to their rescue by financing the assessment of their viral load. The assessment revealed that the Applicants were long overdue for HAART enrolment. Following the publication, by government, of the HIV/AIDS policy on 9th August 2013, the First and Second Applicants formally requested to be enrolled on the HAART program failing which they bring proceedings against the Government. This request was not acceded to with the result that the Applicants brought the current proceedings challenging the constitutionality of the refusal to provide them with the treatment. They contended that the refusal ran counter to the letter and spirit of the national policy on HIV/AIDS as well as the Respondent's duty to provide health care services to inmates.[3]

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2 The name of this non-governmental group is the Botswana Network on Ethics, Law on HIV/AIDS (BONELA). The Third Applicant is a non-governmental organisation advocating for the rights of people living with HIV/AIDS and other marginalised groups.

3 Interestingly the court made no detailed mention of this policy anywhere in the judgment.

The Applicants sought the following reliefs. They sought a declaratory against the Respondents that their refusal to include them in the anti-retroviral therapy roll out violated of their constitutional rights, in particular, the right to life as guaranteed by section 4 of the Constitution, the right not to be subjected to inhuman and degrading treatment under section 7 and the right to non-discrimination under section 3 and 15. They also sought, to the extent necessary, an order declaring Presidential Directive No. Cab 5(b) of 2004 unconstitutional, unlawful and invalid to the extent that it denies them and other non-citizen inmates access to and enrolment on HAART. And they finally sought an order compelling the second[4] and third[5] Respondents to provide them and other non-citizen inmates with HAART.

2. THE COURT'S DECISION

The High Court found for the Applicants on all the reliefs they sought. The court however did not interrogate the constitutional challenges individually but rather summed it up in one issue thus:

> "The crisp issue that arises for my determination... is whether or not this exclusion is reasonably justifiable in a democratic society and or in the public interest."[6]

The Respondents sought to seek shelter under section 15(4) (b) of the Constitution which protects any discriminatory law that makes provision with respect to persons who are non-citizens of Botswana. They termed it "positive discrimination" but the court was not convinced stating:

"The exclusion of non-citizen inmates from HAART therapy can only be justified if it is reasonably justifiable in a democratic society and in the public interest. The following statement by the Court of Appeal in *Unity Dow* v

4 The Second Respondent was the Permanent Secretary, Ministry of Health.
5 The Third Respondent was the Permanent Secretary, Ministry of Justice, Defence and Security.
6 *Dickson Tapela*, para 22.

Attorney General[7] holds good to this day.[8]

> "...Botswana is a member of the community of civilised states that has undertaken to abide by certain standards of conduct, and unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken."

> "...The non-treatment of non-citizen inmates poses a danger to the very citizen inmates the Respondents have tried so hard to protect. Upon contracting the opportunistic infections the cost of treatment, needless to say, will be escalated. **It can never be in the public interest nor can it ever be reasonably justifiable in a democratic society like ours, that the provision of life saving medication like HAART is withheld when the ultimate result that the group of people so deprived become more infectious to others or die in our hands**."[9] (My emphasis)

The court in reaching the above conclusion found that the denial of HAART to non-citizen inmates whose CD4 count has reached the threshold for enrolment to HAART would lead to an accelerated degeneration of their HIV to fully blown AIDS which will in turn lead to an earlier death. The court found this to be a violation of their right to life as enshrined in Section 4 of the Constitution.

> "The Respondents, by Applicant's admission are treating these but have withheld the more potent HAART from them while providing it to citizen inmates. HAART according to the Applicant's expert not only keeps HIV mutation in check but drastically reduces the recurrence of opportunistic infections in HIV positive people. The withholding of HAART from the Applicants will enable their HIV to replicate and thereby relegate to the terminal stage known as AIDS. To this end, HAART is not only a medical necessity but a life-saving therapy the withholding of which will take away a constitutionally guaranteed right to life. The Applicants, it must be noted have had their liberty curtailed

7 1992 BLR 119 at 154 D-E.
8 *Dickson Tapela*, para 34.
9 *Ibid*, para 41.

> pursuant to a sentence of a court of law. The residuum of their rights under the Constitution of Botswana, however, remains intact and so are their rights under the Prisons Act."[10]

The court underscored the fundamental importance of the provisions of the Prisons Act[11] to all matters affecting prisoners. The court found that the role of the medical officer in all matters affecting the health of prisoners, whether citizen or non-citizen, was of vital importance and should not be overlooked.

> "Section 56 of the Prisons Act... provides for the appointment of a medical officer responsible for every prison. Such medical officer is responsible for the health of **all** prisoners in the facility under his supervision and is expected to tender reports both to the officer in charge of the prison and to the Permanent Secretary in the Ministry of Health about 'circumstances connected with the prison or the treatment of prisoners which at any time appear to him to require consideration on health or medical grounds.
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> The Respondents have despite the cardinal importance of the medical officer's input not availed to the court any information about his findings on circumstances connected with the treatment of the Applicants and neither have they presented to the court any information that could, on a balance of probabilities, support their argument to the effect that the provision of HAART to non-citizen inmates will place an undue strain on their budget. Singularly lacking is also any information on the number of non-citizen inmates that require HAART enrolment and the costs associated with such enrolment. Also lacking is any information that could at the very least juxtapose the costs of providing HAART to that of treating recurrent opportunistic infections on non-citizen inmates..."[12]

The closest the Respondents came to justifying the exclusion of non-citizen inmates was simply to state that it was a financial burden and was of

10 *Ibid*, para 28.
11 Cap 21:03 Laws of Botswana.
12 *Dickson Tapela*, para 31 -32.

national interest without more. The court stated:

> "...the Directive was motivated by matter of national policy and national interest. Amongst those is lack of financial resources to which, by now, so much has been spoken. ARVs are an extremely expensive treatment to which the government of Botswana despite being subsides (sic) still needs the assistance of foreign aid in to acquire. Because of this financial constraint, as already mentioned the government is unable to adequately cater for the provision of this treatment to all its affected citizens. Currently the most serious conditions are being treated and when ideally the treatment should be afforded to all affected persons. To provide the same to foreign residents let alone those convicted of a criminal element would result in a perception of irresponsibility towards its citizens."[13]

It is quite sad to note that this was the best answer the Respondents could give to the issue. It was a clear reflection of the lack of appreciation, by Government, of its constitutional obligations to prisoners, especially non-citizen prisoners. The court found this explanation not only weak, but equally unacceptable.

> "This statement speaks volumes. Firstly the Respondents decry government's lack of financial resources and secondly, they raise a moral argument to the effect that the Applicants are convicted criminals who should not, in any case, benefit from their crime by the provisions of HAART at the expense of the very people whom they wronged. This latter argument however loses sight of the fact that incarceration and deprivation of liberty is all that is subtracted from the constitutional rights of these people. Punishment in the form of imprisonment equalises all inmates regardless of their status and place of origin.
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> It is impermissible for the Respondents to indirectly extend the limits of punishment by withholding certain services to which inmates are lawfully entitled on account of their status as 'convicted non-citizen inmates'. The position espoused by the Respondents also casts doubts

13 Paragraph 25 Respondents' Answering Affidavit.

on the *bona fides* of their claim that it is rather through lack of resources that they are unable to provide HAART to non-citizen inmates."[14]

On the strengths of all the above reasoning, the court found for the Applicants and made the following orders,

a. The decision of the 2nd Respondent (or anyone acting under his authority) to refuse to provide the 1st and 2nd Applicants with access to and/or enrolment on HAART is hereby set aside and declared invalid.
b. The refusal is violative of their constitutional right in section 3, 4, 7 and 15.
c. The refusal is in breach of a duty owed to them by the Respondents, to be provided with basic health care services.
d. The savingram to the extent that it seeks to exclude the Applicants from HAART enrolment is irrational and invalid.
e. The Respondents are to enrol the Applicants and other non-citizen inmates whose CD4 count has reached the threshold for HAART enrolment under the treatment guidelines on HAART
f. Respondents to bear costs.

3. SITUATING THE DECISION WITHIN THE BROADER FRAMEWORK OF THE RIGHT TO HEALTH FOR NON-CITIZEN INMATES

The right to health is now internationally recognised and entrenched.[15] The right falls within the species of the generation of rights that have now come to be known as socio-economic rights. The International Covenant on Economic,

14 *Dickson Tapela*, para 33 – 34.

15 See Article 25.1, Universal Declaration of Human Rights; Article 12 International Covenant on Economic, Social and Cultural Rights; Article 5(e)(iv) International Covenant on the Elimination of all Forms of Racial Discrimination; Articles 11.1(f) and 12 of the Convention on the Elimination of all Forms of Discrimination against Women; Article 24 of the Convention on the Rights of the Child; Article 11 of the Revised European Social Charter; Article 16 of the African Charter on Human and Peoples' Rights and Article 10 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.

Social and Cultural Rights (the ICESCR) deals comprehensively with all socio-economic rights and guarantees the right to health in Article 12.

Socio-economic rights by their nature place considerable constraint on the resources of any State and that is why in terms of obligations, a State is obliged to progressively guarantee them only to the extent of their available resources.[16] In explaining Article 2(1) and the nature of State Party's obligation, General Comment 3 provides as follows:

> "1. Article 2 is of particular importance to a full understanding of the Covenant and must be seen as having a dynamic relationship with all of the other provisions of the Covenant. It describes the nature of the general obligations undertaken by States parties to the Covenant. Those obligations include both what may be termed (following the work of the International Law Commission) obligations of conduct and obligations of result....
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> 2. The other is the undertaking in article 2 (1) "to take steps", which in itself, is not qualified or limited by other considerations. The full meaning of the phrase can also be gauged by noting some of the different language versions. In English the undertaking is "to take steps'", in French it is "to act" or *"s'engage a agir"* and in Spanish it is "to adopt measures" or "*a adoptar medidas*"). Thus while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time after the Covenant's entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant."

It is therefore not sufficient for a State to simply make a bald assertion

16 Article 2(1) of the Covenant provides that "Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

that it does not have the available resources. It must show what steps it has taken taking into account its available resources. And this is why, in General Comment 9, States are enjoined to use all means available at its disposal to give effect to the ICESCR. Further that the Covenant norms must be recognised in appropriate ways within the domestic legal order, appropriate means of redress, or remedies, must be available to any aggrieved individual or group, and appropriate means of ensuring governmental accountability must be put in place.[17]

And here the court rightly found the government's assertions to be bald, not warranting any consideration by the court. As the court rightly found, the Government did not even attempt to provide statistics of the non-citizens sought to be excluded.

Interestingly developing countries such as Botswana are granted a concession when it comes to guaranteeing the rights in the Covenant to non-nationals.

> "Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals."[18]

This begs the question whether or not the government was not right all along to insist on a different policy when it involved non-citizen inmates? Or perhaps the nature and extent of the obligations shift somewhat when the issue revolves around the right of prisoners, particularly their right to health? These are some of the issues the court ought to have interrogated in depth in this decision failed to do so.

Even more glaring is the absence of mention of the International Covenant on Economic, Social and Cultural Rights nor indeed the socio-economic nature of the right to health of prisoners. And this is notwithstanding that the court had regard to two international decisions from the United States

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17 General Comment 9 on the Domestic Application of the Covenant, para 2.

18 Article 2(3) ICESCR.

of America[19] and South Africa[20] that talked directly to the right to health of prisoners. This could perhaps be for two reasons. In the first place the Botswana has not ratified the International Covenant on Economic, Social and Cultural Rights. Secondly, nowhere in the Constitution is there any mention of any of the socio-economic rights let alone the right to health. For this reason, the distinction of the species of rights known as socio-economic rights is often times ignored.

The right to health specifically of prisoners is something of a developing area of the law. Even in the ICESCR, there is no explicit mention of prisoners in the article guaranteeing the right to health. One could argue that since the Covenant does not make explicit mention of prisoners, it could well be that the terms of the above Article 2(3) would not extend to cover issues affecting prisoner rights as it appears not to have been within the contemplation of the framers of the Covenant at the time of writing the Covenant. This argument may however fail in the face of Article 2(2) of the Covenant which in the end part thereof mentions "other status" which logically would embrace the status of imprisonment.

The better argument would be that whatever policy adopted by the Government to exclude non-nationals, it should not be such to frustrate the rights guaranteed them under the Covenant and further should be such that is reasonably justifiable in a democratic society. This will be in consonance with Article 4 of the Covenant which provides that

> "The State Parties to the present Covenant recognise that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society."

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19 This was the case of *Estell* v *Gamble* 429 US 97.

20 This was the case of *B and Other* v *Minister of Correctional Services and Others* (H.Ct Cape of GoodHope Provincial Division) 1997 (6) BCLR 789.

So that based on this, the court was correct to hold that the exclusion imposed by the Government in this case was not reasonably justifiable in a democratic society and could therefore not be sheltered under the Section 15(4)(b) of the Constitution. The author is inclined to share the court's sentiments that upon imprisonment all prisoners become equal regardless of whatever status they had before imprisonment or wherever they came from pre imprisonment.

One more weakness of this decision is the absence of mention of other equally important ground breaking decisions from the past that have made the leap from civil and political rights to recognising socio-economic rights.[21] It may have been desirable for the court to trace the leaps made towards protecting fundamental rights. This would have given the decision more force and would also have served to show what direction the judiciary is taking the country in their constitutionally entrenched task of giving effect to the rights guaranteed therein.[22]

The main strength of this decision lies in the fact that notwithstanding its failure to fully situate the violations complained of within the sphere of socio-economic rights and to make reference to other local decisions, it nonetheless did not shy away from guaranteeing the rights through the available civil and political rights in the Constitution. In particular, by refusing to let the Respondents frustrate the claim by procedurally technical points, the court makes a statement about the fundamental nature of human rights.

In the final analysis the decision is a breath of fresh air and welcome addition to the already commendable collection of human rights jurisprudence on issues affecting minority rights that our courts seem to have thus far.

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21 Such as the water right case, *Mosetlhanyane and Another* v *The Attorney-General* Court of Appeal Civil Appeal No CACLB-074-10 (Unreported).

22 In terms of Section 18(1) of the Constitution of Botswana, "Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 3 to 16 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him or her, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress".

4. CONCLUSION

The decision is an authoritative statement on the health rights of prisoners, albeit in an indirect fashion. Although the final findings of the court are commendable, the reasoning of the court is however too sparse and does not fully interrogate the competing interests and issues arising around such a contentious issue as the health right of non-citizen inmates.

The court in Dickson Tapela made very important findings and sent across a very strong message. This is that that "punishment in the form of imprisonment equalises all inmates regardless of their status and place of origin". A Government cannot therefore be permitted to discriminate amongst prisoners.