

An assessment of the realisation of inmates' right to adequate medical treatment since the adoption of the South African Constitution in 1996

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OPSOMMING

'n Ondersoek na die verwesenliking van gevangenes se reg tot voldoende mediese sorg in terme van die Suid Afrikaanse Grondwet, 1996

Suid Afrika se grondwetlike demokrasie waarborg onder andere gevangenes se reg tot voldoende mediese sorg. Sedert die inwerkingtreding van die Grondwet, het die staat en howe 'n kritieke rol gespeel ten einde te verseker dat die reg na behore gerealiseer word. Hierdie rol word duidelik geïllustreer deur die betrokke sake wat die reg direk of indirek oor die laaste twintig jaar afgedwing het, sowel as die maatreëls wat deur die staat aangeneem is. Daar word egter nie ten volle gevolg gegee aan hierdie reg nie, aangesien daar sommige struikelblokke is wat die vooruitgang belemmer wat die staat gemaak het om aan hierdie reg gevolg te gee, en tot 'n sekere mate sien die howe, by die interpretasie, die prosedure vir die uitleg van die Handves van Regte wat aan die Grondwet voldoen, oor die hoof.

1 Introduction

The South African Constitution is renowned for incorporating justiciable socio-economic rights including inmates' right to adequate medical treatment.¹ Like all socio-economic rights, the right of the inmates to adequate medical treatment imposes a positive obligation on the state to take measures to ensure that this right is realised. The Supreme Court of Appeal indirectly summarised this obligation in the case of *Minister of Correctional Services v Lee*:

A person who is imprisoned is delivered into the absolute power of the state and loses his or her autonomy. A civilised and humane society demands that when the state takes away the autonomy of an individual by imprisonment it must assume the obligation to see to the physical welfare of its prisoner. We are such a society and we recognise that obligation in various legal instruments ...²

1 The Constitution of the Republic 1996, hereinafter referred to as the Constitution.

2 2012 (3) SA 617 (SCA) par 36.

While the Constitutional Court is yet to interpret this right, other courts have directly or indirectly played a critical role in shaping inmates' right to adequate medical treatment since the Constitution came into operation. The state, too, has adopted various measures aimed at complying with the obligation of inmates' right to adequate medical treatment. It is for this reason that this article assesses the realisation of inmates' right to adequate medical treatment since the adoption of the South African Constitution in 1996. The first part sets out the right to adequate medical treatment. The second part analyses the measures that the state has effected in order to fulfil this right. The third part explores the jurisprudence of the courts on the realisation of this right. The fourth part investigates the impediments on the realisation of inmates' right to adequate medical treatment.

This article argues that the measures of the state aimed at fulfilling inmates' right to adequate medical treatment and the jurisprudence of the courts in shaping it contribute positively towards the realisation of this right since the coming into operation of the Constitution. However, this right is not fully realised because there are some impediments that derail the strides that the state has made towards the realisation of this right and to a certain extent, the interpretation of this right by the courts overlooks the constitutionally compliant procedure of interpreting the Bill of Rights.

2 Inmates' Right to Adequate Medical Treatment

Section 35(2)(e) of the Constitution guarantees inmates' right to adequate medical treatment. This section 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 provision, at state expense, of adequate ... medical treatment.' Therefore, just like other socio-economic rights, this right imposes a positive obligation on the state to fulfil it despite the competing demands for the resources of a state.³ However, unlike socio-economic rights in general, inmates' right to adequate medical treatment obliges the state to fulfil it immediately. The reason is that this right lacks internal limitation clauses such as 'progressive realisation' and 'available resources'. However, the case of *Van Biljon v Minister of Correctional Services* seems to have read in that state is obliged to provide inmates with adequate medical treatment if it is in a financial position to do so.⁴

In *N and Others v Government of Republic of South Africa and Others*, the court held that inmates' right to adequate medical treatment encompasses providing inmates with timeous medical treatment.⁵

3 Pieterse 'The potential of socio-economic rights litigation for the achievement of social justice: considering the example of access to medical care in South African prisons' 2006 *Journal of African Law* 122-123.

4 1997 4 SA 441 (C) par 49, 58.

5 2006 (6) SA 543.

According to Albertus and Pieterse, an obligation to fulfil inmates' right to adequate medical treatment includes providing them with palliative care,⁶ and treatment that complies with the conditions of detention that are consistent with human dignity respectively.⁷ Thus, inmates' right to adequate medical treatment entitles inmates to seek justification for the non-fulfilment of their health-related needs.⁸ However, inmates' medical treatment does not include 'optimal medical treatment' or 'best available medical treatment'.⁹

The right to adequate medical treatment, just like other rights, is not absolute. It can be reasonably and justifiably limited in an open and democratic society based on human dignity, equality and freedom.¹⁰ However, the limitation of this right also needs to pass a proportionality analysis that takes into account the nature of this right, the nature and extent of its limitation, the importance of the purpose of its limitation, the relationship between the limitation and purpose and the existence of less restrictive means to achieve that purpose.¹¹

Other rights that are related to inmates' right to adequate medical treatment include: the right to communicate with and be visited by detained person's chosen medical practitioner;¹² the right to access to health care services which obliges the state to fulfil it by progressively taking reasonable measures within the available resources;¹³ the right to human dignity guaranteed by section 10 of the Constitution; the right to conditions of detention consistent with human dignity in terms of section 35(2)(e) of the Constitution; the right not to be tortured, treated or punished in a cruel, inhuman and degrading;¹⁴ children's right to basic health care which obliges the state to provide children including those who are inmates with immediate and effective access necessary for their survival;¹⁵ the right not to be refused emergency medical treatment which empowers inmates to demand available and necessary

6 Albertus 'Palliative care for terminally ill inmates: Does the State have a legal obligation?' 2012 *SACJ* 67-68.

7 *Supra* n 4 at 122-123. These obligations could also be traced from section 7 of the Constitution which obliges the state to, among other things, fulfil constitutional rights.

8 *Idem* at p 129.

9 *Supra* n 5 at par 49.

10 S 36 of the Constitution.

11 *Ibid*; *Dawood and Another v Minister of Home Affairs and Others*; *Shalabi and Another v Minister of Home Affairs and Others*; *Thomas and Another v Minister of Home Affairs and Others* 2000 3 SA 936 (C) par 40, emphasis added.

12 S 35(2)(f)(iv) of the Constitution.

13 S 27(1) and (2) of the Constitution; *N and Others v Government of Republic of South Africa and Others (No 1)* *supra* n 5 at par 17.

14 S 12 of the Constitution.

15 S 28(1)(c) of the Constitution; Liebenberg *Socio- Economic rights Adjudication Under a Transformative Constitution* (2010) 233-234, emphasis added; Friedman, Pantazis & Skelton 'Children's Rights' in Woolman *S et al* (2nd ed) *Constitutional Law of South Africa* (2006) 47-6.

emergency medical treatment;¹⁶ and the right to equality which is guaranteed by section 9 of the Constitution and which entitles inmates to demand not to be arbitrarily or irrationally excluded from programmes conferring health related benefits.¹⁷

3 Measures that the State Adopted to Fulfil Inmates' Right to Adequate Medical Treatment

There are various measures that the state adopted to fulfil inmates' right to adequate medical treatment since the Constitution came into operation. Those measures include the passing of legislation, the making of regulations and the adoption of policy, all of which draw inspiration from international norms. Pursuant to Rules 24-35 of the Nelson Mandela Rules which oblige states to provide inmates with health care,¹⁸ South Africa enacted the Correctional Services Act.¹⁹ Section 12 of the Act obliges the state to provide inmates with adequate health care which includes: providing inmates and mentally ill remand detainees with medical treatment;²⁰ providing pregnant remand detainees with access to pre-, intra- and post-natal services;²¹ transferring mentally ill inmates to a designated health establishment;²² sterilising inmates and performing abortion for medical reasons;²³ keeping inmates in a place with adequate ventilation, separate beds and bedding which provides adequate warmth for the climatic conditions and complies with hygienic requirements.²⁴

The obligation of the state to provide inmates with adequate health care could also be deduced from the relevant provisions of other legislation. Sections 2(a)(ii) and 21(2)(b)(vi) of the National Health Act requires the state to establish a national health system which seeks to achieve an equitable, the best possible health services and health care services for inmates and remand detainees, respectively.²⁵ The Preamble of the Prevention and Combating of Torture of Persons Act prohibits physical and mental torture that includes denying inmates

16 S 27 (3) of the Constitution; *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) par 20, emphasis added.

17 Pieterse *Can Rights Cure? The impact of human rights litigation on South Africa's health system* (2014) 19, emphasis added; Liebenberg *supra* n 16 at 133, emphasis added.

18 *The Nelson Mandela Rules*, resolution adopted by the General Assembly on 17 December, 2015, seventieth session, A/70/490.

19 111 of 1998, hereinafter referred to as the Act.

20 S 49 D (1) of the Correctional Matters Amendment Act 5 of 2011.

21 Reg 26 D of the Correctional Services Regulations Published in *GG 35277 GN R 323 2012-04-25*.

22 *Idem* reg 6.

23 Reg 7(9) of the Correctional Services Regulations Published in *GG 26626 2004-07-30*.

24 S 7(1) of the Act.

25 61 of 2003.

access to health care services, food or water.²⁶ Sections 3(b)(iii) and 6(6) (e) of the Mental Health Care Act ensure that inmates have access to mental health care, treatment and rehabilitation services and psychiatric hospitals that admit, care for, treat and rehabilitate them.²⁷ Section 6 of the Judicial Matters Amendment Act obliges the Heads of correctional centres to apply to court for the release of an accused on warning if he or she is unable to pay the amount of bail and he or she is subjected to overcrowding that poses a threat to, among other things, his or her physical health.²⁸

In compliance with Rule 30 of the *Nelson Mandela Rules*²⁹ and Principle 24 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* which oblige states to examine the health of the inmates upon their admission,³⁰ South Africa adopted a number of instruments. Those instruments encompass sections 6(5) and 45 of the Act; Regulations 2(3) and 3 of the Correctional Services Regulations;³¹ clauses 4, 6 and 15 of the Standing Correctional Orders,³² which impose an obligation on the state to conduct inmates' health status examination upon their admission and to isolate those inmates who have communicable or contagious diseases.

Pursuant to the World Health Organisation (WHO) Consolidated Guidelines on the use of Antiretroviral Drug for Treating and Preventing HIV Infection;³³ the United Nations (UN) International Guidelines on HIV/AIDS and Human Rights Consolidated Version;³⁴ and WHO, the United Nation Office on Drugs and Crimes and United Nations Programme on HIV and AIDS interventions to Address HIV in Prisons,³⁵ South Africa initiated various measures to deal with the treatment of HIV in the correctional centres. Those measures encompass: the various National Strategic Plans for HIV and AIDS, TB and STIs which partly seek to

26 13 of 2013, emphasis added.

27 17 of 2002.

28 42 of 2001.

29 *Supra* n 19.

30 *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by General Assembly Resolution 43/173, 76th plenary meeting, 9 December 1988.

31 Correctional Services Regulations 2004 *supra* n 24 as amended by reg 3 of the Correctional Services Regulations 2012 *supra* n 22.

32 Extracted from the Constitutional Court case of *Lee v Minister of Correctional Services* 2013 (2) SA 144 (CC) par 61.

33 WHO, *Consolidated Guidelines on the Use of Antiretroviral Drugs for Treating and Preventing HIV Infection – Recommendations for a Public Health Approach* (2016).

34 *UN International Guidelines on HIV/AIDS and Human Rights on HIV/AIDS* 2006 available from http://www.ohchr.org/Documents/Publications/HIV_AIDSGuidelinesen.pdf (accessed 2017-06-07).

35 WHO, *United Nation Office on Drugs and Crimes and United Nations Programme on HIV and AIDS – interventions to Address HIV in Prisons: 2007* available from <http://www.unodc.org/?documents/hiv-aids/EVIDENCE?%20FOR%20ACTION%202007%20?sexual%20transmission.pdf> (accessed 2014-05-10).

facilitate the provision of HIV treatment;³⁶ the implementation of a new evidence-based policy of offering HIV treatment to all people living with HIV as soon as possible after HIV-positive diagnosis in 2016;³⁷ the launch of the Central Chronic Medication Dispensing and Distribution Programme (CCMDDP) at Westville correctional centre by the Kwa Zulu-Natal Department of Health³⁸ and the collaboration between the Department of Correctional Services (DCS) and other relevant stakeholders such as the Aurum Institute, the TB/HIV Care Association and the Right to Care in the fight against HIV/AIDS and TB in the correctional centres.³⁹

The CCMDDP seeks to ensure better coordination and dispensing of chronic medications for HIV, diabetes, asthma, and cancer and the eradication of the stigma associated with HIV by packaging ARVs similarly to other chronic medication.⁴⁰ This step is a great improvement by the state and the DCS as the criticism for the failure to provide inmates with timeous HIV treatment a decade ago was attributed to the lack of coordination between the Department of Health and the DCS.⁴¹ The collaboration between the DCS and other relevant stakeholders needs to be commended for ensuring that high percentages of inmates were on antiretroviral therapy (ART) and were cured of TB in the periods 2014/2015 and 2015/2016.⁴²

In accordance with Principles 1 and 6 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁴³ and Rule 13 of the Nelson Mandela Rules,⁴⁴ which prohibit overcrowding which might have a detrimental effect on the health of the inmates, South Africa has adopted quite a number of measures. Those measures include section 7(1) of the Act; clause 2 of Chapter 2 of the Correctional Services Standing Orders;⁴⁵ the White

36 See e.g., *HIV & AIDS and STI Strategic Plan for South Africa 2012-2016*, available on <http://sanac.org.za/2017/10/24/download-the-full-version-of-the-national-strategic-plan-for-hiv-tb-and-stis-2017-2022/> (accessed on 2017-11-01).

37 UNAIDS Press Release, *South Africa takes bold step to provide HIV treatment for all 2016* Available from http://www.unaids.org/en/resources/press-centre/pressreleaseandstatementarchive/2016/may/20160513_UTT (accessed 2017-06-14).

38 Enews, *ARV treatment rollout in KZN prisons*, 2016 available from <http://www.enca.com/south-africa/arv-treatment-rollout-in-kzn-prisons> (accessed 2016-12-17).

39 *DCS Annual Report 2014/2015* available from <http://www.dcs.gov.za/Annual/?%20Reports/%%20%202014-2015.pdf> (accessed 2017-07-01); *DCS Annual Report 2015/2016* available from <http://www.dcs.gov.za/docs/2016%20doc/?DCS%20Annual%20Report?%202015-16.pdf> (accessed 2017-07-01).

40 Enews n 39.

41 Hassim 2006 *International Journal of Prison Health* 165-168.

42 *Supra* n 40 at p 56, 66.

43 *Supra* n 31.

44 *Supra* n 19.

45 Extracted from *supra* n 33 at par 9.

Paper on Remand Detention Management in South Africa⁴⁶ and the DCS Strategic Plans.⁴⁷

In compliance with Rule 22 of the Nelson Mandela Rules, which obliges states to provide inmates with well prepared food of nutritional value that is good for their health and drinking water, South Africa adopted the following crucial measures: section 7 of Correctional Services Amendment Act which obliges the state to ensure that meals are served at intervals of not less than four and a half hours and not more than six and a half hours and that the interval between the evening meal and breakfast is not more than fourteen hours;⁴⁸ section 8(6) of the Act and section 9 of the Correctional Matters Amendment Act which requires the state to provide inmates with clean drinking water and permits remand detainees to be given food and drinks brought from outside the correctional centre, respectively;⁴⁹ section 8(3) of the Act which compels the state, where reasonably practicable, to provide inmates with a diet that takes into account religious requirements and cultural preferences;⁵⁰ and Regulation 26D of the Correctional Services Regulations which obliges the state to provide pregnant or lactating remand detainees with food taking into account cultural or religious beliefs.⁵¹

4 Inmates' Right to Adequate Medical Treatment as Interpreted by the Courts

4.1 *Van Biljon v Minister of Correctional Services*

This case concerned four HIV positive inmates who had (CD4) counts of less than 500/ml. Out of the four, only two had a medical prescription for anti-viral therapy. However, they all argued that the state's failure to provide them with the anti-viral drug (AZT) violated their right to adequate medical treatment. The legal question, therefore, was whether the inmates whose CD4 counts were less than 500/ml were entitled to receive the anti-viral treatment at the expense of the state. Having gone

46 *White Paper on Remand Detention Management in South Africa* 2014 54-55 available from <http://www.dcs.gov.za/docs/landing/white%20Paper%20on%20Remand%20Detention%20Management%20in%20South%20Africa.pdf> (accessed 2017-06-05).

47 See DCS Strategic Plans, available from http://www.dcs.gov.za/?page_id=667 (accessed 2017-06-07).

48 32 of 2001.

49 5 of 2011.

50 The court enforced this provision in the case of *Huang v The Head of Grootvlei* 2003 JDR O658

(O). In this case, the court found that the state's failure to allow the Chinese inmates to receive raw food and prepare it in accordance with their Eastern tradition, as required by section 8(3) of the Act, which had not yet commenced at the time, violated their rights incorporated in section 35(2)(e) of the Constitution.

51 *Supra* n 22.

through the constitutional rights of the inmates, the court found in favour of the two inmates who had a prescription for anti-viral therapy.

The reasoning of the court for this finding was partly based on the following factors: the state did not argue that it could not afford to provide inmates with their prescribed treatment;⁵² the right to adequate medical treatment cannot be determined by what is provided for people outside and inmates' standard of medical treatment 'cannot be determined by the lowest common denominator of the poorest prisoner on the basis that, he or she cannot afford better treatment outside';⁵³ and that inmates' right to adequate medical treatment does not include 'optimal medical treatment' or 'best available medical treatment'.⁵⁴

Consequently, the court ordered the state to provide those inmates who had a prescription for anti-viral therapy with AZT.⁵⁵ However, it did not order the state to provide the other two inmates who did not have a prescription for AZT with such treatment as such an order would be dictating to the doctors when they had to prescribe AZT.⁵⁶

This judgment emphasises the importance of providing inmates with prescribed HIV treatment if the state can afford it.⁵⁷ It also compares well with the African Commission cases of *Odafe and Others v Attorney-General and Others*⁵⁸ and *Media Rights Agenda v Nigeria*.⁵⁹ In both cases, the African Commission found that the failure of the state to provide HIV positive inmates with treatment violated inmates' right not to be treated in an inhuman and degrading manner and their right to health. However, the discontentment with this judgment is that the court placed the issue of the affordability of the treatment within the ambit of the inmates' right to adequate medical treatment.⁶⁰ The criticism that the affordability of treatment should serve as a limitation of this right in terms of section 36 of the Constitution is correct.⁶¹

4 2 *N and Others v Government of Republic of South Africa and Others (No 1)*

In this case, fifteen HIV positive inmates launched an application on 12 of April 2006 challenging the delays in the arrangement of appointments for their prescribed HIV treatment. The basis of the application was that the delays resulted in them not receiving antiretrovirals (ARVs) or not

52 *Supra* n 5 at par 58.

53 *Idem* at par 53.

54 *Ibid.*

55 *Idem* at par 61.

56 *Idem* at par 34.

57 *Supra* n 4 at 20.

58 *Odafe and Others v Attorney-General and Others* 2004 AHRLR 205 (NgHC 2004) par 33.

59 *Media Rights Agenda v Nigeria* 2000 AHRLR 200 (ACHPR 1998) parr 90, 92.

60 Mdumbe 'Socio-economic Rights: Van Biljon versus Soobramoney' 1998 *SAPL* 460; *supra* n 16 at 12; *supra* n 18 at 110.

61 *Ibid.*

receiving them in time in contravention of their rights to adequate medical treatment and healthcare services. This assertion was based on the following grounds: they sent the Westville Correctional Center (WCC) a letter dated 28 October 2005 in which they sought to be informed about the steps that the WCC was taking in order to provide them with ARVs immediately; they had a meeting with the WCC on 15 December 2005 in which a resolution was taken that the WCC would furnish them with the progress report on such steps; the WCC failed to provide them with such a report; their appointments for HIV treatment were scheduled between March and June 2006; King Edward Hospital (KEH) could only see four offenders in one week, and as a result it would take three weeks for thirteen of them to get their first counselling session and almost a year for fifty other inmates who were similarly affected to be on treatment;⁶² and that the National Department of Health's Operational Plan for Comprehensive HIV and AIDS Care, Management and Treatment for South Africa (Operational Plan) only made use of KEH and excluded access to other designated sites such as R K Khan, Wentworth Hospital, Clairwood Hospital, Prince Mshiyeni Hospital, Addington Hospital and Osindweni Hospital.⁶³

The court found that the measures of the state were inadequate on the ground that there was a delay in the inmates' appointments for HIV treatment and the Operational Plan only made use of KEH. It also found that the measures of the state were unreasonable on the basis that: the Operational Plan was inflexible, characterised by unjustified and unexplained delay;⁶⁴ some of the steps taken by the state (particularly the manner in which the appointments were set up) were irrational, and section 237 of the Constitution obliges the state to perform its constitutional obligations diligently and without delay.⁶⁵ Consequently, the court concluded that the state fell short of its constitutional and legislative obligations to the inmates⁶⁶ and ordered the state to provide all HIV positive inmates with ARVs at an accredited public health facility within two weeks, and to remove the restrictions that prevented inmates who met the criteria as set out in the Operational Plan from accessing ARVs at an accredited public health facility.⁶⁷

This judgment, just like the judgment for the case of *Van Biljon*, stresses the importance of providing HIV positive inmates with HIV/AIDS treatment prescribed for them. In addition, it emphasises the need for the timeous provision of HIV treatment to the inmates. The emphasis on timeous medical treatment to inmates makes this judgment compatible

62 *Supra* n 6 at par 27.

63 *Ibid.*

64 *Idem* at par 30.

65 *Idem* at par 31.

66 *Ibid.*

67 *Idem* at pars 33-35.

with international norms such as the Human Rights Committee's Concluding Observations: Mongolia,⁶⁸ Recommendation 37 for implementation of Guideline 6 of the UN International Guidelines on HIV/AIDS and Human Rights on HIV/AIDS.⁶⁹ Such emphasis on timeous medical treatment also makes this judgement to be in line with the regional standard such as the European Court cases of *Lorgov v Bulgaria*⁷⁰ and *Melnik v Ukraine*⁷¹ which endorse timeous provision of HIV treatment for inmates.

According to Hassim, the lack of internal limitation clause of inmates' right to adequate medical treatment could be interpreted to mean that the state cannot raise an argument that it lacks resources to fulfil its obligations.⁷² However, this judgment fails to 'engage in a normative interpretation of section 35(2)(e) and its interrelationship with section 27 in relation to detained persons'.⁷³ This failure could be attributed to the interpretation of inmates' right to adequate medical treatment in the same manner in which the courts interpret socio-economic rights in general. Instead of fleshing out the scope of inmates' right to adequate medical treatment, the court paid attention to determining whether the state's measures are adequate and reasonable for the purposes of sections 35(2)(e) and 27 of the Constitution. This approach deprives the state an opportunity to channel its resources in accordance with the scope of the right to adequate medical treatment.⁷⁴ Therefore, it goes against the nature of inmates' right to adequate medical treatment. Unlike other socio-economic rights, inmates' right to adequate medical treatment does not have an internal limitation clause which serves as the content of socio-economic rights during their interpretation.⁷⁵ It will, therefore, be very interesting to see how the Constitutional Court will interpret inmates' right to adequate medical in the future.

68 Human Rights Committee's Concluding Observations: Mongolia (2000) UN Doc A/55/40 Vol. I 49 at par 332.

69 *UN International Guidelines on HIV/AIDS and Human Rights on HIV/AIDS* 2006 at n 35.

70 Application No. 40653/98, judgment of 11 March 2004. In this case, the European Court found the right not to be subjected in a cruel, inhuman or degrading treatment to have been violated by the delay in providing adequate medical assistance in an emergency situation.

71 Application no. 72286/01, judgement of 28 March 2006. In this case, the European Court found the violation of Article 3 of the European Convention on Human Rights as a result of the failure of the state to provide an inmate suffering from tuberculosis with adequate and timely treatment.

72 Hassim 'The 5 star prison hotel? Right of access to ARV treatment for HIV positive prisoners in South Africa' 2006 *International Journal of Prison Health* 160.

73 Liebenberg 2010 n 16 at 264-265.

74 Iles 'Limiting socio-economic rights: beyond the internal limitations clauses' 2004 *SAJHR* 455, emphasis added.

75 *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) par 46. However, this approach was not without criticism: Bilchitz in an article entitled, 'Towards a reasonable approach to the minimum core: Laying the foundations for future socio-economic rights jurisprudence' 2003 *SAJHR* 6, argued that the court's sidestepping the need to give content

4 3 *Lee v Minister of Correctional Services*

Mr Lee (an inmate) instituted a delictual claim against the state on the basis that the employees of the Minister of Correctional Services failed to ensure that he did not contract tuberculosis (TB) while serving his sentence at an overcrowded Pollsmoore correctional centre. He averred that the negligence of the employee of Minister of Correctional Services was unlawful in that it amounted to the violation of his rights to freedom and security of the person, to be detained under conditions consistent with human dignity, and to be provided with adequate accommodation, nutrition and medical treatment at the expense of the state. Therefore, the legal question was whether the state was liable for damages.

The Constitutional Court (CC) found the state liable for damages and remitted the case to the Western Cape High Court for a determination on quantum. The basis for the finding of the CC was that the determination of factual causation requires the courts to evaluate only the evidence that a plaintiff presented and not to require more evidence.⁷⁶ To this effect, the CC held as follows:

What was required ... was to determine hypothetically what the responsible authorities ought to have done to prevent potential TB infection, and to ask whether that conduct had a better chance of preventing infection than the conditions which actually existed during Mr Lee's incarceration. Substitution and elimination in applying the but-for test is no more than a mental evaluative tool to assess the evidence on record.⁷⁷

In applying this principle, the CC found that the probable causation had been established.⁷⁸ The CC took into account the following factors: there was nothing on record that suggested that the screening and examination of inmates for medical problems and the isolation of those who had diseases would not have reduced the risk of infection and contagion of a disease like TB;⁷⁹ the determination of wrongfulness entailed considering public and legal policy consistent with constitutional

to the right in s 27(1) in the case of TAC renders the court to fail to identify the health care services to which one is entitled to claim access or to determine whether these services involve preventative medicine, such as immunisations, or treatment for existing diseases, or both or to determine whether the right entitle one to primary, secondary, or tertiary health care services; Stewart in an article entitled 'Interpreting and limiting the basic socio-economic rights of children in cases where they overlap with the socioeconomic rights of others' 2008 *SAJHR* 479 argued that the content of the socio-economic right in question should first be established and once that has been established should an inquiry into the reasonableness of the measures be undertaken; McLean in a book entitled, *Constitutional Deference, Courts and Socio-Economic Rights in South Africa* 2009 174, argue that it is difficult for a court to determine the reasonableness of state action intended to realize it without having some point of reference regarding what the state is obliged to achieve.

76 *Lee v Minister of Correctional Services* n 33 at pars 43, 50, 55, 56-57.

77 *Idem* at par 58.

78 *Ibid.*

79 *Idem* at par 61.

norms;⁸⁰ the norm of accountability pointed to a legal duty on the part of the state to screen the incoming inmates in order to protect their rights;⁸¹ recognising Mr Lee's claim for damages vindicated his rights including his right to adequate medical treatment;⁸² and that the existence of a legal causation could be gleaned from the duty of the state to detain inmates in accordance with human dignity which included providing them with adequate health care services and to exercise public power in accordance with the rule of law, Constitution and the values of accountability and responsiveness.⁸³

This judgment, unlike the judgments in *Van Biljon* and *N and Others*, enforces inmates' rights including their right to adequate medical treatment through the application of the common law on the operation of the health system.⁸⁴ It, therefore, extends liability to the South African Police Service for damages that may be incurred as a result of the transmission of communicable diseases due to overcrowded police cells.⁸⁵ It also opens doors for the liability of the state for HIV/AIDS transmission as a result of overcrowding and the failure of the state to protect inmates from sexual assault and to provide them with condoms.⁸⁶ Therefore, this judgment, by far, compares well with the European case of *Kalashnikov v Russia*⁸⁷ and the American case of *Brown, Governor of California, et al v Plata et al*.⁸⁸ In both cases, the European Court and the United States Appeal Court found that overcrowding and its detrimental effect on the health of an inmate violated inmates' rights and ordered the states to pay them some damages.

However, in addition to the values of accountability and responsiveness that the CC partly considered in arriving at its conclusion, the value of human dignity could have also been taken into account and could have also led to the same conclusion. After all, section 35(2)(e) of the Constitution, the Act and the Regulations oblige the state to detain inmates under conditions consistent with human dignity. Therefore, the court could have also argued that the failure of the state to deal with

80 *Idem* at par 53.

81 *Idem* at pars 64-67.

82 *Idem* at par 65.

83 *Idem* at par 70.

84 *Supra* n 18 at 77.

85 Chesne 'Dudley v minister of correctional services: a roadmap to some weak links to in the South African custodial chain' 2015 *Journal of Third World Studies* 164-165.

86 Nienaber 'Liability for the wrongful transmission of communicable diseases in South African prisons: What about HIV?' 2013 *SAPL* 170; *supra* n 18 at 79.

87 *Kalashnikov v Russia* Application no. 47095/99, judgement of 15 October 2002.

88 *Brown, Governor of California, et al v Plata et al*, Appeal from the United States District Courts for the Eastern and Northern Districts of California No. 09-1233, decided May 23, 2011, 13, available from <http://www.supremecourt.gov/opinions/10pdf/09-1233.pdf> (accessed 2014-05-10).

overcrowding which has been tormenting inmates for a long period of time, and which partly caused Mr Lee to contract TB, is contrary to the value of human dignity and inmates' right to adequate medical treatment.

4 4 *Stanfield v Minister of Correctional Services and Others*⁸⁹ and *Du Plooy v Minister of Correctional Services & Others*⁹⁰

The applicants, in both cases, applied for medical parole on the basis that the state was not in a position to provide them with adequate health care for their illnesses. However, the Correctional Services Parole Board refused their applications. They then approached the High Courts. Having taken into account the rights of the inmates, which include their right to adequate medical treatment,⁹¹ the courts ordered the state to release the applicants on medical parole as required by the Correctional Services Act 8 of 1959 as the Act was not yet in operation. Pieterse argued quite correctly that while an analysis of section 35(2)(e) of the Constitution was not conducted in these cases, the court considered it:

... as essentially requiring an inquiry into whether detention conditions are consistent with human dignity, the outcome of which depended, among other factors, on whether the correctional facility was capable of rendering such medical care as was required by the detainee's condition.⁹²

These cases, therefore, provide an alternative remedy in cases where a detainee requires medical treatment that the state cannot afford.⁹³

4 5 *S v Mpfana*⁹⁴ and *S v Vanqa*⁹⁵

In the case of *S v Mpfana*, Mr Mpfana applied for bail in the Magistrate Court on the basis that: (1) he was incarcerated in a small cell with 14 other awaiting trial inmates; (2) he sustained injuries while in detention and; (3) his requests to consult his own medical practitioner were turned down. The Magistrate Court refused his bail application but ordered the police officials to permit him to see a medical practitioner of his choice. On appeal, the High Court held that Mr Mpfana's refusal to consult with his medical practitioner entitles him to do the following: relying on section 35(2)(e), he can apply to the authorities of the correctional centre and inform them about the inhuman conditions in the correctional centre, challenge the detention before a court of law as being

89 2003 4 All SA 282 (C).

90 2004 JOL 12850 (T).

91 *Idem* at parr 26-27; *Stanfield v Minister of correctional services supra* n 91 at pars 87-102; 129-131.

92 *Supra* n 4 127.

93 *Supra* n 18 at 24.

94 1998 1 SACR 40 (Tk).

95 2000 2 SACR 371 (Tk).

unconstitutional or obtain a court interdict to force the authorities to comply with the law, should they fail to remedy his concern.⁹⁶

However, the High Court proceeded and set aside the order of the Magistrate Court that refused Mr Mpofana's bail application and remitted the case to the Magistrate Court for a reconsideration of the application. The court reasoned that the magistrate arrived at her decision on the basis of insufficient information as she did not request information as to why the identification parade was not held for a period of 30 days.

In the case of *S v Vanqa*, Mr Vanqa applied for bail in the Magistrate's Court. This application was based on the following grounds: Mr Vanqa suffered from asthma; he had three asthma attacks during the period of his detention; he was refused medication brought by his relatives; and that he was not taken to a doctor. However, the Magistrate Court refused his bail application. On appeal, the High Court overruled the judgment of the Magistrate Court and granted bail to Mr Vanqa. According to the High Court, these facts constituted exceptional circumstances that warranted the granting of bail.⁹⁷ In stressing the importance of inmates' right to adequate medical treatment, the High Court went as far as to say the denial of his medical treatment is deplorable and contrary to sections 35(2) (f) and 35(2) (e) of the Constitution which guarantees his right to be visited by his own medical practitioners and obliges the state to provide him with medical treatment at its expense, respectively.⁹⁸

5 Impediments on the Realisation of Inmates' Right to Adequate Medical Treatment

5.1 The Failure of Some Correctional Centres to Conduct Health Status Examination to Inmates Upon Their Admission to the Correctional Centre

The examination of inmates' health status upon their admission to correctional centres is necessary as it enables the DCS to take the necessary steps to prevent other inmates from becoming ill.⁹⁹ However, conducting such an examination of inmates' health status has proved to be a challenge for some correctional centres. This much is evident from the Judicial Inspectorate Reports for correctional services which indicate that some correctional centres do not conduct health status examination to inmates upon their admission in certain cases.¹⁰⁰ The failure to conduct health status examination results in undesirable health

96 *S v Mpofana supra* n 96 at 45.

97 *Supra* n 97 at par 16.

98 *Idem* at par 27.

99 *Lee v Minister of Correctional Services* 2011 (6) SA 564 (WCC) par 215.

100 *Judicial Inspectorate Report for Correctional Services* 2009-2010 12 available from <http://www.pmg.org.za/files/docs/101116jics.pdf> (accessed 2011-02-02); *Judicial Inspectorate Report for Correctional Services* 2011-2012 50

consequences for inmates such as putting their health at risk as those inmates who pose, or could reasonably pose, a health risk to others are not detained separately. This is even worse for inmates who are incarcerated in Pollsmoor correctional centre which is characterised by '... poorly ventilated cells which provide favourable conditions for expelled organisms and congestion, with prisoners being confined in close contact for as much as 23 hours every day'.¹⁰¹

The state needs to attend to this shortcoming to protect inmates' health and also to avoid litigation. In the case of *Lee v Minister of Correctional Services*, both the High Court and the Constitutional Courts found the state liable for damages as a result of, among other things, its failure to screen inmates for TB upon their arrival in the crowded Pollsmoor correctional centre.¹⁰²

5 2 Overcrowding, Shortage of Nurses and Social Workers and Double-up Serving of Meals

South African correctional centres have been characterised by overcrowding for many years.¹⁰³ In fact, at some stage, South Africa was reported to have one of the highest per capita correctional centre population in the world.¹⁰⁴ The situation is so bad that even awaiting trial disabled inmates sometimes have to share a cell designed for 32 inmates with 87 other inmates.¹⁰⁵ The DCS needs to focus more on releasing inmates on medical parole as overcrowding is associated with the improper utilisation of medical parole.¹⁰⁶ According to the court in *Stanfield v Minister of Correctional Services* and the latest Judicial Inspectorate Report, only a tiny percentage of inmates are released on medical parole, despite the high percentages of HIV positive inmates in

available from <http://judicialinsp.dcs.gov.za/Annualreports/Annual?%20Report%202011-2012.pdf> (accessed 2017-05-28); *Judicial Inspectorate Report for Correctional Services 2015-2016* 54 available from <http://judicialinsp.dcs.gov.za/Annualreports/JICS%20Annual%20Report%20%202015-2016%20as%20at%20October%202016%20v%2012.pdf> (accessed 2017-05-28).

101 *Supra* n 3 at par 11.

102 *Supra* n 33 at pars 59, 61.

103 *Judicial Inspectorate Report for Correctional Services 2011-2012* 29-32 available from <http://judicialinsp.dcs.gov.za/?Annualreports/?Annual%20Report%202011-2012.pdf> (accessed 2017-07-10); *Judicial Inspectorate Report for Correctional Services 2015-2016* *supra* n 115 pp 47-49, 108.

104 *Supra* n 104 at 39.

105 Raphaely Help for South Africa's Prisoner A *Guardian Africa network* 2013 available from <http://www.guardian.co.uk/world/2013/mar/08/south-africa-disability-prisoner-INTCMP> = SRCH Help for South Africa's Prisoner A, Friday 8 March 2013 05.00 GMT (accessed 2013-05-01).

106 Jansen & Achiume 'Prison conditions in South Africa and the role of public interest litigation since 1994' 2011 *SAJHR* 187.

the correctional centres and the large numbers of applications for medical parole.¹⁰⁷

The shortage of nurses and social workers is another challenge facing the DCS.¹⁰⁸ This issue has undesirable effects on the health of the inmates. In the case of *Lee v Minister of Correctional Services*, the Constitutional Court found the state to have violated inmates' rights as a result of, among other things, its failure to take reasonable steps of hiring more nursing staff in order to provide adequate nutrition to those inmates who were undernourished and vulnerable to TB.¹⁰⁹ However, it is pleasing to note that the DCS has introduced a recruitment drive, called *Operation Hira*, so as to attract and retain scarce skills.¹¹⁰

The DCS is also facing the issue of double-up serving of meals by some correctional centres.¹¹¹ This shortcoming, as a Judicial Inspectorate Report argues, has serious consequences for those inmates who are to take chronic medication together with meals.¹¹²

5 3 Restriction of Traditional or Religious Food to Remand Detainees

In giving effect to section 8(3) of the Act, the DCS enacted Regulation 26D which, as already mentioned, obliges the state to provide pregnant or lactating remand detainees with food taking into account cultural or religious beliefs.¹¹³ However, Regulation 26D is arguably discriminatory and thus contrary to the rights to equality and health care services of sentenced inmates who had access to such food when they were remand detainees.¹¹⁴ After all, technically, Regulation 26D prohibits such inmates from demanding the DCS to continue to provide them with such food.¹¹⁵ In other words, the officials of the correctional centre would not contravene the law should they discontinue providing those inmates with traditional food or religious food. Therefore, contrary to the value of human dignity, Regulation 26 D has the effect of treating such inmates as lesser human being simply because they are sentenced inmates and no longer remand detainee. In fact, Regulation 26D goes against the right

107 *Stanfield v Minister of Correctional Services supra* n 91 par 128; Judicial Inspectorate Report for Correctional Services 2015-2016 *supra* n 104 pp 74-75. However, as Mujuzi argues in an article entitled, 'Releasing terminally ill prisoners on medical parole in South Africa' 2009 *SAJBL* 60 that, the state is yet to cater for situations where an inmate on medical parole miraculously recovers from his or her terminal illness, it is responsibility of the state to ensure that inmates who qualify for medical parole are released on parole.

108 *Supra* n 102 at 29-32, 47-49, 108.

109 *Supra* n 33.

110 *Supra* n 102 at 74-75.

111 *Idem* at 52-53.

112 *Ibid.*

113 *Supra* n 22.

114 Liebenberg 'The value of human dignity in interpreting socio-economic rights' 2005 *SAJHR* 14, emphasis added.

115 *Supra* n 1 at 160.

to equality and health care services of those inmates. The case of *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others*, indirectly endorses this assertion as the Constitutional Court argued that 'At the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group...'¹¹⁶ Further, Regulation 26D amounts to an irrational exclusion of those inmates from programmes conferring health-related benefits such as access to cultural or religious food.¹¹⁷ After all, there is no reason provided for such exclusion of those inmates.

5 4 Failure of the State to Submit Information on the Admissibility and Merits of the Communication to the Human Rights Committee (HRC) on Civil and Political Rights

The failure of South Africa to submit information on the admissibility and merits of the communication of the HRC in the case of *McCallum v South Africa*¹¹⁸ represents a lack of respect for an institution tasked with enforcing civil and political rights that are related to inmates' right to adequate medical treatment. Such a lack of respect is indicative of its violation of International Covenant on Civil and Political Rights to which South Africa is a state party.¹¹⁹ Such an oversight of the HRC on the part of South Africa to a certain extent displays its unwillingness to comply with the obligations of inmates' right to adequate medical treatment. The reason is that the HRC found South Africa to be in violation of the rights not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment and to be treated with humanity as a result of denying an inmate his rights to medical treatment by disallowing him to see a doctor for a certain period and denying him an HIV test.¹²⁰

6 Conclusion

South Africa has made great strides on the fulfilment of the obligations of inmates' right to adequate medical treatment since the Constitution came into operation. This much is evident from the measures that the state adopted to fulfil this right and the role that the courts have played in ensuring the realisation of this right. Both the judicial pronouncements and the state's measures in this regard contribute positively towards the realisation of this right. However, this right is not fully realised because

116 *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 1 SA 6 (CC) par 129; Liebenberg 2005 SAJHR n 129.

117 *Supra* n 18 at 19 emphasis added; *supra* n 16 at 133 emphasis added.

118 *McCallum v South Africa*, Communication No. 1818/2008, U.N. Doc. CCPR/C/100/D/1818 par 4.

119 *International Covenant on Civil and Political Rights*, adopted by General Assembly Resolution 2200A (XXI) of 16 December 1996, entered into force 23 March 1976.

120 *Supra* n 120 at par 6.8.

there are some impediments that derail the strides that the state has made towards the realisation of this right and to a certain extent, the interpretation of this right by the courts overlooks the constitutionally compliant procedure of interpreting the Bill of Rights.