

# South African court case ends in climb down by drug corporations

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The withdrawal of a court case by 39 pharmaceutical companies against the South African government is a set back for the industry's defence of patent rights. They brought the case against a paragraph in the South African 1997 Medicines Act that gives the Health Minister powers to override patent laws in a health emergency.

Central to the decision to back down was a submission by a South African protest group, the Treatment Action Campaign (TAC). It included affidavits opposing the drug companies' claim that their high drug prices reflect the cost of research and development. TAC point out that the research behind most of the anti-AIDS drugs was carried out either by universities or the publicly financed US National Institute for Health.

Six weeks ago, the court case was adjourned at the request of the pharmaceutical companies in order to prepare a response to TAC's challenge. In granting their request the judge ruled that they must reply to all the points raised by TAC. Any point they refused to answer would be taken as proven. Unwilling to discuss their pricing policies and provide details of research funding that underlies their huge profits, the companies, led by transnationals such as GlaxoSmithKline and Merck, backed down.

It would be wrong to interpret this as an unalloyed victory over the drug companies, however. The South African government's Medicines Act was drawn up with assistance from the World Health Organisation, to make it compatible with the Trade Related Intellectual Property Rights (Trips) agreement of the World Trade Organisation (WTO). Although South Africa is a signatory to the WTO agreement, and has made clear it did not intend to use emergency legislation to break patent rules, ruling circles expressed fears that inward investment into the country would be affected. South Africa's Foreign Minister Nkosazana Dlamini-Zuma was in the United States meeting Secretary of State Colin Powell and national

security adviser Condoleezza Rice as the drug companies dropped their case. In an interview with the *Washington Post*, Rice said, "We have assured them [the pharmaceutical companies] that we don't want to undermine patent rights." She said that the South African government was "willing to work with [the industry] in drawing up the regulations" that would implement the 1997 Medicine Act.

Initially the South African government had agreed with the pharmaceuticals in opposing TAC taking part in the case. But TAC's campaign, taken up by charities like Oxfam and *Medecins Sans Frontieres*, swayed public opinion worldwide and prevented the government from making a deal before the case came to court. There is clearly growing opposition to drug companies' profits taking priority over health care, under conditions where official estimates are of 4.7 million people (out of a population of 43 million) in South Africa being infected with HIV, a figure that could rise to 7 million by 2010.

Under the Trips agreement, the South African government could, even without emergency legislation, issue "compulsory licences" to allow the production and sale of drugs protected by a patent, without the agreement of the patent holder. The government would then have to prove to the WTO that it was justified in following such a course for a health problem.

What has worried the pharmaceutical corporations is the threat of so-called "generic" drugs, copies of such branded drugs produced at a tiny fraction of the price. The South African case was designed to make an example to third world countries that the drug companies will not tolerate the importing or production of generic drugs.

In recent months, the pharmaceutical giants have attempted to offset public criticism by offering AIDS drugs to African countries at a fraction of Western prices. In deals done by Bristol-Myers Squibb, GlaxoSmithKline, Boehringer Ingelheim and Merck with a number of

African countries, including Senegal, Ivory Coast, Uganda and Rwanda, drug prices have been slashed by as much as 80 percent. Bristol-Myers Squibb reduced the price of its AIDS drug Zerit to Africa, after students at Yale University protested because the main chemical in the drug was invented by scientists there, earning the university \$40m a year in royalties. GlaxoSmithKline has offered its combination therapy drug to South Africa at \$56 for a month's treatment, an 84 percent reduction on world prices. All these deals, whilst attempting to improve the image of the companies, are likely to contain clauses that block the import of (generally cheaper) generics. They have also been criticised by Oxfam not only for demanding prices that are often higher than the generics, but also for only offering to provide limited quantities or for agreeing supplies of uncertain duration.

The US government, backed by the major American pharmaceutical corporations, will now pursue its case against Brazil for manufacturing generic drugs at the WTO in Geneva. Whereas sub-Saharan Africa currently represents one percent of total world drug sales, countries like Brazil, India and Thailand that manufacture generics have considerably bigger internal markets and have the potential to sell worldwide at prices up to 20 times cheaper than the market rate. The United States uses Clause 301 of its 1988 Trade Bill against over 30 countries, threatening sanctions if they are perceived to break the Trips agreement. Both Thailand and the Dominican Republic were "requested" to reduce the number of generics they manufacture, or see their exports to the US drastically cut.

In South Africa, whilst the ANC government proclaimed the court case a victory, AIDS campaigners have said they will now focus on the government itself. Health Minister Manto Tshabalala-Msimang said that the battle against the drug companies in the court reminded her of the struggle against apartheid, but then went on to repeat the ANC government's position of doubting the effectiveness of anti-retroviral drugs. She said that South Africa could not afford the infrastructure of clinics and doctors needed to distribute the drugs widely. "People who want to access anti-retrovirals can go to the private sector," was Tshabalala-Msimang's provocative comment to journalists after the court hearing.

This week, the Medicine Control Council (MCC), South Africa's drug regulatory body, finally approved the anti-retroviral drug Nevirapine that is given to HIV-positive pregnant mothers to stop transmission of the infection to their babies. It took seven months for the MCC to

sanction use of the drug, despite it already being approved by most Western countries and the World Health Organisation. In July last year, Boehringer had offered the drug to the South African government free of charge for five years. The Health Ministry is now moving to a pilot project to give Nevirapine to 90,000 expectant mothers at 18 test clinics throughout the country, but this still awaits cabinet approval concerned at the cost of the programme.

Whatever set back for the drugs companies the South African court decision represents, it will make little difference to the rest of sub-Saharan Africa. Most African countries can afford to spend only two to three dollars per person on healthcare, meaning that combination drug therapies for AIDS are out of the question. Nor do most of the 25 million people infected with HIV in Africa have access to an adequate healthcare system, which is essential to treat patients with these drugs, which have to be taken under a strict regime.

According to the *Financial Times*, Harvard economist Jeffrey Sachs calculates that it would cost \$5billion a year to treat the 3 to 4 million patients throughout the world in the advanced stages of AIDS with anti-retrovirals, including the necessary infrastructure. The United Nations Development programme puts the cost at nearer \$15billion.

Even with lower drugs prices, there is no sign of Western countries coming up with even a fraction of the money required to combat AIDS. Moreover, Western governments are making no seriously coordinated and properly financed effort to produce a vaccine against the disease that such a global catastrophe warrants.



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