

# South African government to appeal against AIDS drug verdict

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The South African government is to appeal a court decision instructing it to make the drug Nevirapine universally available in order to prevent maternal transmission of the HIV virus. It is appealing to the Constitutional Court, the country's highest legal body, against the right of a judge to set government policy.

Health Minister Manto Tshabalala-Msimang claimed that the government was not opposed to developing a program to reduce mother to child transmission of HIV. It was only appealing to clarify "a constitutional and jurisdictional matter which, if left vague, could throw executive policy making into disarray and create confusion about the principle of separation of powers, which is a cornerstone of our democracy."

The ANC government is in fact opposed to the use of anti-retroviral AIDS drugs, not out of medical or scientific concern about the safety or validity of the treatment but because of the cost of providing universal access to healthcare for all members of society, including the poorest. South Africa, unlike most countries, has this right to healthcare written into its constitution. In giving his ruling in the High Court on December 14, Judge Chris Botha specifically cited Section 27 of the post-Apartheid constitution that guarantees access to health care services including the right to reproductive health care.

The ruling was in response to an action brought by the Treatment Action Campaign (TAC) an umbrella group of Aids activists, the Children's Rights Centre and *Save Our Babies*, backed by a group of paediatricians. On present government practice Nevirapine can be made available to about 10 percent of pregnant women and is prescribed on an experimental basis through 18 health centres.

In his judgement Botha took up the arguments the government had used not to make the drug more widely

available. "Much was made of the conditional registration of Nevirapine and its possible side effects", the judge said. "The evidence was that the side effects are associated with long-term use, not with the one-off use for the prevention of intrapartum MTCT (Mother To Child Transmission) of HIV. The evidence was also that the mutations that lead to resistance are transient and disappear when Nevirapine is no longer in the body".

Worldwide testing has shown that Nevirapine can prevent maternal transmission of the HIV virus in up to 50 percent of cases. In South Africa, the country with the highest number of AIDS cases in the world, between 70,000 and 100,000 babies are born HIV positive every year. As many as 25 percent of pregnant women are HIV positive and up to 30 percent of these pass on the virus to their babies. Far more effective drug treatments are available in the wealthier western countries where the rate of preventing HIV transmission to babies is 95 percent and higher.

The German manufacturer Boehringer Ingelheim has offered South Africa Nevirapine free of charge for the next five years. Like all anti-AIDS drugs, Nevirapine has serious side effects in long-term use, but to prevent mother to child transmission only a minimal dose is required—to the mother at the onset of labour and to the baby after birth.

In the one province of South Africa where Nevirapine has been made available—Western Cape where the ANC were not in political control when it was introduced—the main cost incurred has been not in drugs but providing formula feed to prevent breast milk transmission. Counselling services also had to be provided.

In court the government had argued against the usefulness of giving Nevirapine when breast-feeding would render the newborn at risk. In his judgement

Botha responded: “It would be irresponsible to administer Nevirapine to the mother without counselling her as to the risks of breast feeding.” Botha also took up the government’s argument that it would be too expensive to make Nevirapine universally available. “The arguments against allowing doctors in the public sector to prescribe Nevirapine are mainly that it would throw the system in disarray, that it would cause budgeting distortions, and that it would set a precedent for the prescription of expensive drugs for the most esoteric conditions. I cannot agree with these arguments. We are not concerned with the prescription of an expensive drug. Its cost is minimal, if it is to have any price at all.”

The government had also argued that the pilot programme to provide the drug at 18 centres was the precursor to its wider distribution. TAC countered this, claiming that the government had no political will to make the drug more readily available. The judge agreed with TAC and accused the government of procrastination. “This leads only to one conclusion: that there is no comprehensive and coordinated plan for a roll out of MTCT [mother to child transmission] prevention programme”, Judge Botha said. “There is no unqualified commitment to reach the rest of the population in any given time or at any given rate.” He insisted, “a countrywide MTCT prevention programme is an ineluctable obligation of the state.”

Despite Judge Botha’s reference to the minimal cost of the programme for maternal transmission, it is the wider implications for AIDS treatment that particularly concern the ANC government. It is for this reason that they have appealed to the Constitutional Court, with the result that even if the High Court order is finally accepted it could be delayed by up to a year.

Mark Heywood, TAC secretary-general, made clear that the broader issue of AIDS treatment in the whole population was at stake. Even if babies could get the medication “they need parents.” He insisted that anti-retroviral drugs had to be made available as well as treatment for AIDS-related infections and support programmes. “The problem of AIDS is a deep and multi-dimensional one. This judgement is very, very significant but it doesn’t solve the problem.”

In opposing the right to treatment of the millions condemned to die from AIDS, the ANC government has to attack the constitution it claims to support. That

the right to universal healthcare was written into constitution when Apartheid was ended was an admission that the discrimination practised by the white racist regime was socio-economic, as well as political. When President Thabo Mbeki began to question the connection between the HIV virus and AIDS last year, it was to distract attention from the political crisis faced by the ANC leadership as millions of poor black demanded what they were told was a right. The huge mobilisation of resources needed to tackle the AIDS catastrophe in Africa are in direct contradiction to the free market economics espoused by Mbeki and his backers in the West.



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