

This is a synthesised version of a more comprehensive draft research paper entitled:

“The implications of HIV/Aids on the infant’s right to basic nutrition: Does the state have an obligation to provide formula milk for the prevention of mother-to-child transmission of HIV?”

Mr Sibonile Khoza
Socio-Economic Rights
Community Law Centre

South Africa faces the most tragic and devastating challenge of the HIV/Aids epidemic. The increasing phenomenon of child infections is a matter of greatest concern. It is estimated that 24% of pregnant women in this country are HIV positive, and approximately 70 000 children are infected each year through mother-to-child transmission (MTCT) of HIV. MTCT occurs during pregnancy, during labour and at birth, and through breastfeeding. MTCT presents a monumental challenge in South Africa.

However, it is scientifically evident that all spheres of MTCT can be prevented or reduced in two ways:

- Firstly, through the administration of anti-retroviral drug such as nevirapine which reduces the risks of transmission of HIV considerably during pregnancy and labour or at birth (antenatal transmission).
- Secondly, through the avoidance of breastfeeding and the adoption of exclusive formula feeding to reduce postnatal transmission in possible circumstances. In circumstances where the risks associated with formula milk are higher than the risks associated with postnatal transmission, exclusive breastfeeding is recommended.

The issue of the antenatal transmission of HIV has been addressed following the *Minister of Health and Others v Treatment Action Campaign and Others* (‘the TAC case’), where the Constitutional Court ordered government to make nevirapine available widely at public hospital and clinics.

However, in the same case, the Court declined to make a decision on the provision of formula milk at public health institutions for the purposes of preventing MTCT of HIV arguing that:

- the provision of formula feed was not a prerequisite for combating MTCT;
- the provision of formula feed raises complex issues particularly where mothers concerned do not have access to clean water or the ability to adopt a bottle-feed regimen because of personal circumstances;
- evidence presented before the court was not sufficient to justify provision of formula feed by government on request and without charge in every case;
- the information collected at the research and training sites would inform policy development in this regard; and
- therefore, this matter should be addressed by health professionals during counselling.

This aspect of the ruling does not only represent a missed opportunity in maximizing the efforts aimed at addressing the plight of MTCT of HIV – it is also ambiguous in three respects.

- Firstly, the ruling does not make it clear whether the government has an obligation to provide formula milk for the prevention of MTCT.
- Secondly, even if such an obligation existed, it is not clear to what extent such an obligation should be met immediately or urgently in the light of the fact that children’s lives are at stake.
- Thirdly, if the obligation existed, it is not clear as to which of the constitutional provisions would form the basis of such an obligation.

The implications of these observations are that although formula milk has been strongly recommended for the purposes of preventing MTCT, there is no obligation on the part of the state to distribute it. Currently, South Africa does not have a policy on the provision of formula milk for the purpose of preventing MTCT, except for the research and training sites. Therefore, as point of departure, I submit that both the decision to confine the provision of formula to the pilot sites, and the absence of a policy to extend the provision of formula beyond the pilot sites, are constitutionally suspect.

I suggest that the State obligation to provide formula milk arises from the rights of infant to basic nutrition as read with the right to basic health care services, the right of everyone to have access to health care, including reproductive health care. I also provide a preview of what could be an alternative argument for the location of such an obligation. In setting out these obligations, I examine the international and constitutional law. Inevitably, I also provide a critical analysis of the interpretation accorded to children's socio-economic rights thus far.

Arguments and conclusions

I start off by arguing that the state obligation in this regard should be evaluated with reference to the binding international human rights framework. According to the Convention on the Rights of the Child (to which South Africa is party), the State has an obligation to ensure

- that the child enjoys the right to survival and development by, for example, taking positive steps to prolong the life of child, including steps to reduce infant mortality (art 6).
- that the child enjoys the highest attainable standard of health by taking measures to diminish infant and child mortality, to combat disease malnutrition, including within its primary health care framework, through the provision of adequate nutritious foods (art 24).
- the provision of, in case of need, material assistance and support programmes, particularly with regard to, *inter alia*, nutrition (art 27).

These provisions exhibit a cross-cutting interlinkage between the rights of the child to nutrition, health, survival and development. Article 24 elaborates on the intersection by establishing that the provision of adequate nutritious foods is but one way of preventing childhood diseases and child mortality. Article 27 implies that parents who are the primary care-givers for children should receive assistance from the State to, amongst others, nourish their children. Although the Convention does not state expressly that there is an obligation on the state to provide formula milk, it is submitted that formula feed would be an example of adequate nutritious foods for infants facing possible MTCT, along side breast milk and other recommended infant feeds. While formula milk provides a secondary nutritional value to infants and poses its own health threats in poor socio-economic environments, it is proven to play a significant role in the prevention of MTCT of HIV. It submitted that the international obligations converge on one point, that South Africa is bound to provide formula feed to prevent postnatal transmission of HIV.

Children's right to basic nutrition is recognised in section 28(1)(c) of the Constitution along side the right to shelter, basic health care and social services. These are collectively referred to as children's socio-economic rights. I confirm that there is a well-established medical literature to the fact that nutrition plays a major role in the child's health, growth, development and survival. It also makes reference to the legal understanding of the right to basic nutrition as denoting a standard of quality and quantity of nourishing substances that are required for the health, survival and development of the child. I suggest that such nourishing substances include recommended forms of feeds such as breastmilk, formula milk, heat treated expressed milk, and complimentary foods.

Children's socio-economic rights in the Constitution are not qualified by progressive realisation and available resources principles. However, the interpretation accorded to these rights thus far implies that these rights are also subject to the aforementioned principles. This interpretation was

provided in the *Government of South Africa v Grootboom* ('the *Grootboom* case) and was subsequently followed in the *TAC* case.

Furthermore, I critically investigates the applicability of this jurisprudence and asks the following questions:

1. When does the State incur the responsibility in respect of the right to basic nutrition?
2. Is there a distinction between the right to shelter and basic nutrition in s28? Does the right to basic nutrition in this case presents a free-standing obligation independent of the right of access to sufficient food? In other words, does the obligation to provide formula milk to infants arise from the right of children to basic nutrition or the rights of access to sufficient food and access to health care.
3. Should the Court have made a decision on the nature and scope of the state obligation in respect of the provisioning of formula milk?

On the first question, I conclude that the responsibility to provide basic nutrition for infants lies primarily with parents who can afford such service. However, the State still retains the obligation to provide basic nutrition to those children that are cared for by their parents where the latter does not have sufficient means to provide such services. In the case of those in desperate need for formulas, such a responsibility for formulas would also rests with the state. Given the state of desperation MTCT presents, it is contended further that such an obligation to provide formula is immediate.

On the second set of questions, I contend that the approach taken in *Grootboom* to interpret the relationship between the rights to shelter and access to adequate housing is problematic to apply in the present case – to the relationship between the right to basic nutrition and access to sufficient food. Following *Grootboom*, I make a distinction between the formulation of the right to shelter and basic nutrition. In *Grootboom*, the Court said that the formulation of the right to shelter in the absence of the adjective basic suggests that something more than simple shelter is meant by section 28. In elaborating on this it said that section 28 'embraces shelter in all its manifestations'. Following this reasoning, I conclude that the formulation of nutrition in s28 suggests that something less than nutrition – the basic of nutrition – is required to be fulfilled in respect of children.

I also contend that the undesirable results contemplated in the enforcement of the right to shelter for children and their parents in *Grootboom* cannot be similarly produced in the enforcement of the right to basic nutrition. In *Grootboom*, the Court noted that the enforcement of right to shelter for children and their parents would result in 'children becoming stepping stones to housing for their parents', and noted further that this would confuse 'a carefully constructed constitutional scheme for progressive realisation of the right to adequate housing'. I argue therefore that parents cannot benefit from the provision of basic nutrition for their infants. Basic nutrition is meant to confer the standard and quality of food necessary for children only. It particularises the immediate food needs for children. Measures to fulfill this right exist independently of those that are intended to fulfill access to sufficient food.

I argue that it is not possible, if one follows *Grootboom* and *TAC* cases, that the infant's right to food would be located in the right of everyone to have access to sufficient food. The right of access to sufficient to food discharges two obligations. Firstly, there is an obligation to create and maintain an enabling environment for self-sufficient persons to acquire food for themselves. Secondly, there is an obligation to provide food directly to those who may not, due to factors beyond their control, be able to take advantages of the environments created. It can be arguable that the second obligation was not contemplated to necessarily benefit children, but persons such as victims of natural disaster or famine or to support households that are struggling to secure a plate on the table for themselves. If the *Grootboom* interpretation that the children's rights should be read within the generic rights is followed in all circumstances, I argue that it will render the separate protection accorded to children's rights meaningless. I therefore conclude that the

obligation to provide formula milk for the purposes of MTCT occurs under the right to basic nutrition, not access to sufficient food.

In response to the third question, it is contended that the Court should have made the decision on the provision of formula milk. This decision should have followed along similar lines as those of the lower court in the same matter. The Pretoria High Court ordered that government 'to devise an effective comprehensive national programme to reduce MTCT including the provision of voluntary counselling and testing, and where appropriate, nevirapine or other appropriate medicine and *formula milk for feeding* which programme must be progressively extended to whole country' (emphasis added).

By simply leaving the matter to the health professionals, the Court confused the medical and legal issues. The Court is constitutionally mandated determine the scope of the obligation that government has to realise the right to basic nutrition. This is clearly a legal question. For example, the Court declared that nevirapine should be made available to all HIV infected women. However, it is not entitled to decide simply that all HIV positive mothers should receive nevirapine. Whether a particular woman receives nevirapine depends both on her own choice and on whether it is medically indicated for her specifically. Similarly, the pronouncement that the state should make available formula milk for the purpose of the preventing MTCT of HIV does not necessarily mean that all HIV infected mothers should receive such formula milk. But it means that it should be available at public institutions for those HIV infected mothers who choose formula milk after counselling and cannot afford it through their own means, and also if it is medically indicated for them. In this sense, the Court avoids meddling in the choice of the mother and also refrains from prescribing to doctors what to give to specific patients.

In the alternative, it is argued that this obligation can be located in section 27 of the Constitution – the right to have access to health care. As point of departure, it could be argued that the Court in the TAC case was mistaken in holding only for the provision of nevirapine and not formula milk for the prevention of MTCT. This holding is particularly concerning in the light of the constitutional principles that the Court established in *Grootboom* for the determination of whether measures taken are reasonable.

These principles are as follows:

- There must be a coordinated and comprehensive programme that is capable of facilitating the realisation of the right.
- Such a reasonable programme must clearly allocate responsibilities and tasks to the different spheres of government and ensure that the availability of financial and human resources.
- A reasonable programme must respond to the urgent needs of those in desperate situations.
- The programme must be reasonable both in formulation and implementation.
- The programme must provide for the progressive realisation of the right – meaning it must allow access to a larger and wider section of the society.
- In assessing the reasonableness of a measure, the availability of resources will be an important factor.

The failure to require government also to provide formula feeding is, for example, not consistent with the principle of coherence of a policy, which requires that the problem should be addressed holistically. It is also not consistent with the principle of responding to urgent needs of those in desperate circumstances. An HIV positive mother who would like to choose formula feed, whose environment is favourable, and for whom formula milk is medically indicated, but who cannot sustain formula feeding through her own mean, is effectively denied the right to exercise such a choice and her child is denied nutrition that could save her life.