

## ACCESS TO TREATMENT

*Dr. Jeremiah Ojonemi Alabi Abalaka and Medicrest Specialist Hospital Ltd. v. President of the Federal Republic of Nigeria, Attorney General of the Federation, and National Agency for Food and Drug Administration and Control (NAFDAC)*

[2014] Suit No. FHC/MKD/CS/75/2012

Nigeria, Federal High Court at Makurdi

### COURT HOLDING

The ban of a vaccine developed by the plaintiff was arbitrary and thus illegal, null, and void. However, since the plaintiffs' vaccine is a drug, patients must give their consent prior to the plaintiff administering the vaccine to them.

### Summary of Facts

Dr. Jeremiah O. Abalaka, a registered Medical Practitioner, a surgeon and the Chief Consultant of Medicrest Specialist Hospital Ltd. (the "plaintiff"), started an independent research trial to find an HIV vaccine in 1992. He claimed that following some tests and experiments he conducted on himself and willing HIV-positive subjects, he had discovered a vaccine that prevents HIV infection, and also a cure for HIV that works by inducing a conversion from a seropositive state to a seronegative status.

The plaintiff tried to promote his discovery and get the support of the government and other institutions in order to conduct more research. Even though governmental organizations were willing to work with him, the Ministry of Health did not cooperate with him. The Minister banned the vaccine and stated that the Ministry planned to issue guidelines for any assessment on HIV/AIDS product claiming cure or prevention. After 16 years, however, no such guidelines had been set out. The plaintiff therefore sought a declaration that the ban or suspension of the use of the HIV vaccine discovered by the plaintiff is illegal, null and void and of no effect, as the ban violates the patent granted to plaintiff; and an injunction restraining the federal government from implementing a ban or in any way interfering with the use of the patent or the plaintiff's vaccine.

### Issues

Several issues were raised before the Court by the plaintiff and defendants. The Court decided to make its determination on the basis of the issues raised by the plaintiffs, and focused on the following:

1. Whether the plaintiff had discovered a vaccine that prevents HIV infection, and a drug that cures HIV by causing sero-reversion from HIV positive to HIV negative; and
2. Whether the government's response to the discovery of this purported HIV vaccine and cure, including banning the work of the plaintiff, was justifiable.

## **Court's Analysis**

The Court agreed with the plaintiffs that the defendants did not submit any evidence to contradict the plaintiffs' claim about the vaccine and cure. The Court therefore accepted the plaintiff's evidence that he had conducted experiments that appeared to support the argument that he was on the course of developing or had developed a means to prevent HIV infection and cause sero-conversion.

The Court also agreed with the plaintiffs that despite the importance of the discovery, the government did nothing to promote the work of the plaintiff. Instead, it banned the plaintiff's work. The Court took cognisance of the devastating effects of the HIV epidemic in Nigeria and the world at large, and the challenges of addressing it. It noted the efforts of the plaintiff that seemed to provide a breakthrough to the problem of HIV and yet went unappreciated by the government. In fact, the government appeared to want to halt positive progress altogether, without justification.

A central argument raised by the defendants was that the plaintiff could not be allowed to use or promote the vaccine and cure without complying with registration requirements in accordance with the Food, Drugs and Related Products (Registration etc.) Act, CAP C 34 of the Laws of the Federation of Nigeria 2004 (the "Act").

The Court noted however the plaintiff's claim that more research was needed to confirm the vaccine and cure. It therefore held that the plaintiff could not be said to have a safe and effective vaccine or cure, because there was need for further studies to be conducted. However, the Court faulted the government for banning the work-in-progress when it did not even controvert the evidence about positive outcomes of the tests. Further, the Court agreed with the plaintiff that his work had not reached the status of a cure or vaccine and was therefore not required to be registered under the Act. The Court was concerned about the lack of government effort to put in place the necessary facilities and guidelines to support the plaintiff's initiative. It therefore held that the government's response of just banning the work-in-progress was unjustifiable, illegal, null, and void.

Realising the desperation of HIV-positive persons, the promising drug discovered by the plaintiff, and the government's unwillingness to promote research, the Court was of the view that the plaintiff could at his discretion promote the use of the drug, and potential clients could decide for themselves.

## **Conclusion**

The plaintiffs succeeded in their claim.

## **Significance**

One wonders why the government took such a negative attitude in addressing Dr. Abalaka's claim that he was onto some possible cure or vaccine. The claim sounded rather incredible, and raises questions about whether this was scientifically validated. But, as the Dr. Abalaka said, it was work-in-progress.

The Court seems to have been focused mostly on the government's response in the face of the claim. It appeared first of all as though the government did not have any interest, or rather, was interested in burying the claim and proceeding without Dr. Abalaka, and therefore decided to just ban his work. Even when the defendants were drawn to the Court, they never bothered to really engage the evidence

proffered by the plaintiff which showed that the vaccine and drug appeared to be effective. Much as the Court could not be the arbiter of claims better suited to an institution of immunology or science, the Court was impressed by the failure of the government to controvert the plaintiff's evidence. But, this is really as far as the legal issues could go. The case tells us little or nothing about the scientific truth or evidence behind the vaccine or drug, and instead demonstrates how the politics of HIV/AIDS played out among the various actors, including Dr. Abalaka as an innovator and the government as the regulator of vaccines and drugs. Obadare and Okeke ably discuss these politics in their article entitled "Biomedical loopholes, distrusted state, and the politics of HIV/AIDS 'cure' in Nigeria."<sup>97</sup>

Whether or not there was scientific truth to his vaccine or cure, Dr. Abalaka carried the day in Court because the government had banned his scientific research without any legal ground or rational justification.

### ***Dickson Tapela & 2 Others v. Attorney General & 2 Others*** **[2014] MAHGB-000057-14** **Botswana, High Court**

#### **COURT HOLDING**

The refusal to provide Highly Active Antiretroviral Therapy (HAART) to treat HIV in the applicants violates the applicants' rights under Sections 3, 4, 7, and 15 of the Botswana Constitution.

The refusal to provide HAART is a breach of respondents' duty to provide basic health care services for inmates in the respondents' care under the Prisons Act, Section 57(1).

#### **Summary of Facts**

Three applicants brought this action against the Botswana Attorney General, Ministry of Health, and Ministry of Justice, Defence and Security. Two were Zimbabwean nationals seeking review of a prison's denial of non-citizen inmates' entry into HAART. HAART was made available to citizen inmates. The third applicant was a non-governmental organization advocating for the rights of people living with HIV/AIDS and other marginalised groups. The applicants alleged that the exclusion of non-citizens from the HAART program violated constitutional protections, national HIV/AIDS policy and the prison's duty to provide health care services to inmates.

#### **Issue**

The issue put before the Court was the following:

Whether non-citizens' exclusion from the HAART program violated the constitutional protections of the right to life under section 4, 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.

#### **Court's Analysis**

The Court held that HAART is not only a medical necessity but a lifesaving therapy, the withholding of which will take away a constitutionally guaranteed right to life. HAART keeps HIV mutation in check