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LLM in Commercial Law

**Industrial Discrimination on account of HIV and AIDS: Perspectives
on Botswana and South Africa.**

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Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the LLM Degree in Labour Law in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Masters dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

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DECLARATION

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ACRONYMS AND ABBREVIATIONS

BLR	Botswana Law Reports
BONELA	Botswana Network on Ethics, Law and HIV/AIDS
BWLLR	Botswana Labour Law Review
IC	Industrial Court
AIDS	Acquired Immune Deficiency Syndrome
HIV	Human Immunodeficiency Virus
ILJ	Industrial Law Journal
SAJHR	South African Journal on Human Rights
EEA	Employment Equity Act
LRA	Labour Relations Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination
RSA (SA)	South Africa
SADC	Southern African Development Community
ARV	Antiretroviral
ILO	International Labour Organisation
WHO	World Health Organisation
UNAIDS	United Nations Joint Programme on HIV/AIDS

ABSTRACT

It is accepted that HIV positive employees or those perceived to be living with the virus encounter various forms of discrimination both in the workplace and in their day to day activities. Therefore, it is incumbent upon the states to come up with prohibitive measures to curb such unwarranted discrimination. The central question of this thesis is an evaluation of the frameworks adopted in Botswana and South Africa. Using a comparative approach it is the finding of this study that Botswana has in place an admirable policy framework whose shortcoming is lack of a legislative back-up. It has also been shown that Botswana's policies enjoy a lot of political support, an attribute that her South African counterpart lacks. Further, it has been shown that South Africa has both legislative and policy framework to protect people living with HIV in the workplace. Finally, it is argued that an ideal framework should boast of both policy and legislative framework which is backed by political will.

CHAPTER ONE OVERVIEW

1. Introduction

Globally, there are more than 39 million people living with HIV and AIDS.¹ On good record is that Botswana and South Africa are among the countries most hard hit by HIV and AIDS.² In 2007 there were an estimated 300 000 people living with HIV in Botswana, almost one –in-four adults .The country has an estimated adult HIV prevalence of 23.9%, the second highest in the world after Swaziland.³ In South Africa it is estimated that 5.7 million people live with HIV, 16.9% of which are aged between 15 and 49.⁴ Significantly, it is the productive age (which constitutes the workforce of the two countries) which has been hit hardest. Inevitably, in these circumstances, employer employee relations would time and again have to address issues related to HIV and AIDS in the workplace. As experience has shown, the HIV infected workforce or those perceived to be living with the virus encounter various forms of discrimination both in the workplace and in their day to day activities. Such discrimination, it has to be cleared, can either fair or unfair. The better part of this work however is concerned with the latter.

It is accepted in literature that discrimination encountered by the HIV positive section of the workforce emanates from different quarters; the employers, fellow employees, clients and so on. Therefore it is incumbent upon states to come up with protective measures to eliminate unfair discrimination in the workplace. The two countries under discussion have adopted different but not divergent approaches in this regard. Botswana has only policies in place while South Africa has both policies and legislation. This piece of work therefore is aimed at examining the approaches of the two countries and their efficiency or lack thereof, and attitudes of the courts. Further this paper shall evaluate the political will of the two countries as regards its relevance to HIV and AIDS discrimination in industrial relations.

¹ HIV Statistics - Estimates of the World's HIV Epidemic, at <http://www.aids.about.com/od/dataandstatistics/qt/worldstats.htm> [Accessed on 14th January 2010]. In 2005, there were, as per the ILO Code of Practice and Training Manual, approximately 38 million people living with HIV globally and 26 million of them were workers aged between 15 and 49.

² AI Bulletin Vol.12 No.19, 6 November 2009, at <http://www.mmegi.bw/index.php?sid=1&aid=6&dir=> [Accessed on 5th November 2009].

³ UNAIDS 2008 report on the Global AIDS Epidemic.

⁴ South Africa, HIV and AIDS statistics, at <http://www.avert.org/safricastats.htm> [Accessed 17th January 2010]. See also UNAIDS 2008 Report on the Global AIDS Epidemic *ibid*. It is also predicted that the number would exceed 6 million by 2015, by which time around 5.4 million South Africans will have died of AIDS.

2. What is HIV and AIDS?

Perhaps it is apposite here to reflect briefly on what HIV and AIDS is. On this note I shall quote at length lock stock and barrel the expert synopsis given by Prof Schoub and accepted by Ngcobo J in the South African case of *Hoffman v South African Airways*⁵. The court outlined the following:

‘[11] The medical opinion in this case tells us the following about HIV/AIDS: it is a progressive disease of the immune system that is caused by the Human Immunodeficiency Virus, or HIV. HIV is a human retrovirus that affects essential white blood cells, called CD4+ lymphocytes. These cells play an essential part in the proper functioning of the human immune system. When all the interdependent parts of the immune system are functioning properly, a human being is able to fight off a variety of viruses and bacteria that are commonly present in our daily environment. When the body's immune system becomes suppressed or debilitated, these organisms are able to flourish unimpeded. Professor Schoub identifies four stages in the progression of untreated HIV infection:

- (a) Acute stage - this stage begins shortly after infection. During this stage the infected individual experiences flu-like symptoms which last for some weeks. The immune system during this stage is depressed. However, this is a temporary phase and the immune system will revert to normal activity once the individual recovers clinically. This is called the window period. During this window period, individuals may test negative for HIV when in fact they are already infected with the virus.
- (b) Asymptomatic immunocompetent stage - this follows the acute stage. During this stage the individual functions completely normally, and is unaware of any symptoms of the infection. The infection is clinically silent and the immune system is not yet materially affected.
- (c) Asymptomatic immunosuppressed stage - this occurs when there is a progressive increase in the amount of virus in the body which has materially eroded the immune system. At this stage the body is unable to replenish the vast number of CD4+ lymphocytes that are destroyed by the actively replicating virus. The beginning of this stage is marked by a drop in the CD4+ count to below 500 cells per microlitre of blood. ...Below 300 cells per microlitre of blood, the individual becomes vulnerable to secondary infections and needs to take prophylactic antibiotics and anti-microbials. Although the individual's immune system is now significantly depressed, the individual may still be completely free of symptoms and be unaware of the progress of the disease in the body.

⁵ (2000) 21 *ILJ* 2357 (CC).

- (d) AIDS (Acquired Immune Deficiency Syndrome) stage - this is the end stage of the gradual deterioration of the immune system. The immune system is so profoundly depleted that the individual becomes prone to opportunistic infections that may prove fatal because of the inability of the body to fight them.

[12] HIV is transmitted through intimate contact involving the exchange of body fluid. Thus, sexual intercourse, receipt of or exposure to the blood, blood products, semen, tissues or organs of the infected person or transmission from an infected mother to her foetus or suckling child are known methods by which it can be transmitted. HIV has never been shown to be transmitted through intact skin or casual contact.⁶

It is beyond question that for a lot of people, the workplace is where a better part of their time is spent. With the current HIV and AIDS prevalence, there is also no question that HIV and AIDS has a great impact in the workplace. Inevitably therefore, legal implications as a result of employer-employee relations would come to the fore together with commercial and economic challenges to the employers. For instance, employees would not attend work regularly because they would have either gone for medical interventions or on sick leave. Doubtless, this is a cost on the part of the employer. In some instances, employers would have to consider whether or not to dismiss an employee because an employee is incapacitated due to HIV-related ill health or he is regularly absent from work. These scenarios would be discussed in this dissertation later below.

It is apposite, I think, to reflect on what discrimination is and why it is frequently experienced on the basis of HIV and AIDS.

What precisely does this term mean? It is generally conceded that there is no single acceptable meaning of this term. Usually, the term is used to insinuate prejudice though the term can be non-pejorative in that it may refer to both warranted and unwarranted differential treatment. Popularly, as observed by McCrudden,⁷ the term discrimination presupposes action motivated by prejudice: treating a person with particular characteristics less favourably than others because of feeling of dislike or hostility towards persons with their characteristics. Put differently, the term suggests failure to treat persons equally where no reasonable or justifiable distinction can be found between those favoured and those not favoured. However, it is also

⁶ Para 11 to 12.

⁷ Christopher McCrudden, *Anti-Discrimination Law* (1991) at page 14.

accepted that the term discrimination can refer to fair discrimination in which case it merely means 'differentiation.'

3. Why HIV positive status attracts discrimination?

It is beyond question that HIV and AIDS related stigma and discrimination is rampant all over the world. The attitude towards the epidemic comes in different forms. However, it is generally accepted that the stigma and discrimination is manifested mainly because of lack of accurate understanding about the disease and the socially unacceptable activities associated with it. The stigma metamorphoses into discrimination, and it is believed that it is influenced by 'fear of contagion coupled with negative, value-based assumptions about people who are infected.'⁸ From other quarters, factors that contribute to HIV and AIDS related stigma are outlined as follows:

- 'HIV/AIDS is a life-threatening disease, and therefore people react to it in strong ways.
- HIV infection is associated with behaviours (such as homosexuality, drug addiction, prostitution or promiscuity) that are already stigmatised in many societies.
- Most people become infected with HIV through sex which often carries moral baggage.
- There is a lot of inaccurate information about how HIV is transmitted, creating irrational behaviour and misperceptions of personal risk.
- HIV infection is often thought to be the result of personal irresponsibility.
- Religious or moral beliefs lead some people to believe that being infected with HIV is the result of moral fault (such as promiscuity or 'deviant sex') that deserves to be punished.'⁹

As hinted *above* there is fair and unfair discrimination. Generally, the latter is outlawed as reprehensible in many jurisdictions. The common forms of unwarranted discrimination on account of HIV and AIDS in industrial relations include refusal to employ, dismissal, denial of promotion, denial of training and so forth. The patent unfairness of this discrimination is that it emanates not from an individual's capacities but solely from his HIV positive status which usually has got nothing to do with the inherent requirement of the job. As it shall be argued later on, it is the responsibility of the governments to define what is acceptable or unacceptable

⁸ UNAIDS 2008 Report on Global AIDS epidemic.

⁹ Why is there stigma related to HIV and AIDS? at <http://www.avert.org/aidsstigma.htm> [Accessed 14th January 2010].

discrimination and adopt whatever measures that should at optimum level eliminate or abate unwarranted discrimination. In the workplace spectrum there is already some guidelines on what form those measures can take having regard to the international legal instruments discussed in the next chapter.

4. Freedom of Contract

Generally speaking an employer has a choice in deciding whom to hire. That is his freedom to contract.¹⁰ The corollary to this is that the employee also has a choice in deciding whom to work for. The concept of freedom of contract, the autonomy of the will and right to choose whether, on what terms and with whom one wants to enter into an employment agreement stems from the right to freedom of association which is recognized in various jurisdictions including both Botswana and South Africa. Understandably it is on the basis of the right to freedom of contract that employers have come up with some screening mechanisms such as pre-employment medical examinations which in some instances include HIV tests.

In the context of HIV in the workplace, some employers owing to their understanding of the right to association and or the right to contract have formulated pre-employment policies which they consider appropriate in their organizations. To place this in perspective, I shall highlight some common factors that have often influenced the emergence of some of the HIV related policies in the employment spectrum.

(a) Occupational Transmission

Though workplace transmission is not impossible, it is said to be a theoretical possibility.¹¹ Some employers argue that to guard against this possibility (no matter how remote it is) they need to try to maintain an HIV free work environment through pre-employment HIV testing.

(b) Impairment of Employment-related Capacity

Some employers perceive HIV positive status as an ailment and fear that an employee who is HIV positive may not perform satisfactorily due to the virus.

¹⁰ Ngwenya C, '*HIV in the Workplace: Protecting Rights to Equality and Privacy*,' (1999) 15 SAJHR 513.

¹¹ Albertyn S, and Rosengarten D, '*HIV and AIDS: Some Critical Issues in Employment Law*' 1993 SAJHR 77.

(c) Costs

It is argued in some quarters that pre-employment HIV testing can minimize employment costs by identifying people infected with HIV, removing them from recruitment roll, since they are likely to become ill at some point and be a cost to the employer. It is contested that costs incurred in training and recruiting, or incurred as a result of lost efficiency can be mitigated by pre-employment HIV screening.

Another argument on costs relates to risks borne by benefit programmes such as medical schemes, pension funds, retirement funds and so forth. Proponents of this argument warn that HIV positive members are a risk to these schemes. They further propose that employee members have the right to exclude those with HIV from their benefit coverage, or limit their coverage of HIV-related costs.¹²

(d) Protection of Employee in the Workplace

Advocates of pre-employment HIV screening argue that it may be for the benefit of the employees themselves to know their status from the beginning so that employers could make necessary workplace accommodation. For instance, employees may upon finding out their HIV positive status avoid or take precautions against exposure to opportunistic infections which may be there in the workplace.¹³ Another example which portrays HIV pre-employment testing in the interest of employees is found in the American case of *Local 1812 v United States Department of State*.¹⁴ The issue concerned a policy which required members of foreign service who were subject to long term deployment in countries without appropriate medical care to be tested for HIV. The policy was challenged in court but the court upheld it and reasoned that it was in the best interest of the employees.

(e) Fears of co-workers and customers

Some employers may want to exclude employees with HIV so as to guard against possible workplace disruptions resulting from co-worker attitudes towards HIV. Again, employers may

¹² South African Law Commission, Aspects of the Law Relating to AIDS, Project 85 page 23.

¹³ Ibid.

¹⁴ 662 F Supp 50 (1987) as quoted ibid.

want to ensure that they maintain their clientele who may be uncomfortable with service from an HIV positive employee. This is common in hospitality industries such as restaurant and hotels.

The above factors simply give a picture of the mind-set of some of the employers. Some are not sound to human rights activists but they are some of the basis upon which employers, given a chance, would use to justify pre-employment HIV screening. The validity or otherwise of these attributes shall be addressed during the course of this dissertation.

5. Why Botswana and South Africa?

Botswana and South Africa are not only neighbours but have for over a century interacted very closely. The socio-economic and political relations of the two countries have been there since their time as British colonies. South Africa being an economic super power in Africa currently, labour migration from Botswana is common. Furthermore, a good number of South African investors have invested in Botswana and on that note they form part of the employment spectrum in Botswana. Another significant characteristic shared by the two countries is that they both have Roman-Dutch law as their common law. Both countries have a sound sense of human rights and are constitutional democracies. Botswana's retarded legal jurisprudence draws heavily from South African courts' decisions. Lastly, and most importantly, the two countries though similarly in the mist of HIV pandemic and discrimination in the workplace, have adopted somewhat different approaches in the fight against such a reprehensible phenomenon. And, in the region, South Africa seems to be far ahead in terms of aligning their domestic laws with international standards while Botswana seems to be the least responsive.¹⁵

6. The thesis

In this thesis I shall examine the law relating to discrimination at the workplace and the approaches adopted by Botswana and South Africa in their attempt to address such discrimination. I shall also reflect on the contemporary policies of both jurisdictions and to what extent they address discrimination in an industrial environment. Furthermore, I shall compare the efficiency of the two approaches and to what extent they accord with prescribed international standards.

¹⁵ International standards as prescribed in international legal instruments such as ILO.

At the end I shall argue that South Africa has in place the legislation and policies which sufficiently regulate unfair discrimination in the industrial relations. However, I shall argue, the legislative and policy framework in place lack political will and for that reason fails to protect employees from fair discrimination in the industrial spectrum.

In relation to Botswana, I shall argue that the policy framework in place sufficiently addresses discrimination on account of HIV in the workplace. What is lacking, I shall argue is the legislative framework. I shall also argue that policy alone is not enough to address the issue of workplace discrimination and HIV.

Lastly, I would argue that political will in Botswana, as demonstrated by political leadership is pivotal when it comes to discrimination and HIV in the employment set-up. Put differently, I shall argue that political will, policy and legislation are key when it comes to meaningfully addressing issues of discrimination on account of HIV in an employment environment.

CHAPTER TWO INTERNATIONAL STANDARDS

1. Introduction

Owing to its global prevalence and impact, HIV/AIDS has become an international human rights issue. As indicated at the commencement of this paper, an individual's perceived HIV and AIDS status has also been the basis for discrimination in some spheres of life such as the employment spectrum. The international community therefore has the burden of addressing the challenges associated with this epidemic.

International human rights instruments and policies promulgated by various international bodies are of relevance on issues of HIV and AIDS. Those instruments, in general terms, prescribe how best to promote, protect and fulfill human rights. Their impact would, through the principles of equality and non-discrimination, extend the protection to employees with HIV and AIDS. The overarching principle is that all persons are entitled to the full enjoyment of fundamental human rights and freedoms on the basis of equality and without discrimination of health status.¹⁶ This principle has become part of customary international law and binds all States, whether or not the State has ratified the treaty in which a particular guarantee appears.¹⁷

It is worth noting that the international legal framework relating to human rights and employment relations takes various forms. Essentially it comprises of principles and rules, adopted within international fora by states, establishing basic freedoms and rights for individuals and setting minimum standards in the fields of employment and social security for those who work.¹⁸ These rules are of varying legal effect. Some may be legally binding either internationally or within domestic systems while others may be framed in far more general terms and setting promotional standards which states are under a general duty to try to attain.¹⁹

¹⁶ Report of the United Nations Consultative Expert Group Meeting on International Norms and Standards Relating to Disability 1998, at <http://www.un.org/esa/socdev/enable/disberk0.htm> [accessed 6th February 2010].

¹⁷ Ibid. See also Woolfrey DGJ, 'The Application of International Labour Norms to South African Law' (1986-7) 12 South African Yearbook of International Law 135 at 139.

¹⁸ Angela Byre, Human Rights at the Workplace p3.

¹⁹ Ibid.

2. The United Nations

Discrimination on account of HIV and AIDS status is not only regarded as unfair but also contravenes various human rights international instruments. The United Nations Charter pledges to reaffirm faith in the fundamental human rights in the dignity and worth of the human person, and in the equal rights of men and women.²⁰ Further the Charter prescribes that all States have a duty to ensure respect for and to observe human rights including the incorporation of human rights standards in their domestic legislation.²¹ This general stance of the United Nations is applicable on issues of HIV and AIDS discrimination.

Motivated by the United Nations Charter, several international human rights instruments were formulated and it is submitted they are equally applicable on issues of discrimination and HIV and AIDS. In 1948 the Universal Declaration of Human Rights was adopted by the United Nations General Assembly. It recognized that respect for the inherent dignity, and the equal inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.²² Further, in its pledge for equality, the Declaration stipulates that

- All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.²³
- Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁴
- Everyone has the right to life, liberty and security of person.²⁵
- All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.²⁶
- (1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

²⁰ Preamble to the United Nations Charter of 1945.

²¹ Article 55.

²² Preamble to the Universal Declaration of Human Rights;

²³ Article 1.

²⁴ Article 2.

²⁵ Article 3.

²⁶ Article 7.

- (2) Everyone, without any discrimination, has the right to equal pay for equal work.
- (3) Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
- (4) Everyone has the right to form and to join trade unions for the protection of his interests.²⁷

Another international instrument which is worth a mention is the International Covenant on Civil and Political Rights of 1966. Its preamble is similar to that of the Universal Declaration of Human Rights. Its particular relevance is found at Article 26. It states that,

‘All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’

The International Covenant on Economic, Social and Cultural Rights also of 1966 is another international instrument relevant to this discussion. Its preamble is identical to that of the International Covenant on Civil and Political Rights. This instrument recognizes the right to work as including the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.²⁸ It also recognizes the right of everyone to the enjoyment of just and favourable conditions of work which *inter alia* includes equal opportunity for everyone to be promoted in his employment to an appropriate higher level, subject to no considerations other than those of seniority and competence.²⁹

What is notable from the reading of the afore-mentioned instruments is that, all human beings are equal; and generally, discrimination of any form is prohibited. Though the instruments do not say HIV and AIDS specifically, it accords with logic that health status, which will include HIV and AIDS status, is one of the grounds on which an individual may not be discriminated against.³⁰ This argument is sustained by the United Nations Commission on Human Rights that

²⁷ Article 23.

²⁸ Article 6.

²⁹ Article 7.

³⁰ Dingake O.K, Legal Aspects HIV/AIDS at the Workplace in Botswana and South Africa p27.

the term 'other status' in international instruments should be interpreted to include HIV status.³¹ Further, Dr Kisting, Director of ILO Programme on HIV and AIDS and the World of Work, has argued that HIV and AIDS has been covered implicitly by international instruments such as ILO Labour Standards, Convention 111 on Discrimination (Employment and Occupation).³²

It is evident that the lists of grounds in the afore-mentioned international covenants are not exhaustive. Thus, there are some other unlisted grounds upon which it may not be permissible to discriminate an individual. What is also apparent is that the listed grounds paint a picture that what is protected is the inherent self worth of a human being by prohibiting any unjustifiable discrimination. Therefore, it is submitted, any unjustifiable differentiation which proves to be an assault on the human dignity of an individual would be read into the lists. Examples which immediately come to mind are discriminations on the basis of HIV and AIDS and disability.³³

Within the continent there is the African Charter on Human and Peoples' Rights of 1945. It stipulates rights whose content make them relevant to issues of HIV and AIDS. In its preamble it indicates that its draft was promulgated to provide *inter alia* for the establishment of bodies to promote and protect human and peoples' rights. The core content in the personality rights within Charter are human dignity and equality, attributes which are of great relevance in HIV and AIDS discourse.³⁴ The Charter also stipulates that everyone shall have the right to work under equitable and satisfactory conditions.³⁵

2.1. United Nations Commission of Human Rights

In the absence of HIV and AIDS specific Conventions, the United Nations Commission of Human Rights has formulated International Guidelines on HIV and AIDS. In a forum held in

³¹ ILO member States take significant steps in the development of a new human rights instrument on HIV/AIDS, at http://staging2.ilo.org/wcmsp5/groups/public/--asia/--ro-bangkok/documents/meetingdocument/wcms_112445.pdf [Accessed 7th February 2010]

³² Ibid.

³³ See the reasoning in *Sara Diau v Botswana Building Society* IC 50/2003. Note further that in the case of *Bradgon v Abbott* the US Supreme Court held that even though the respondent's HIV infection had not progressed to the so-called symptomatic stage, it was a 'disability' under the Americans with Disabilities Act of 1990. HIV infection, the court observed, satisfies the statutory and regulatory definition of 'physical impairment.'

³⁴ See Articles 2, 3 and 4.

³⁵ Article 15.

Melbourne³⁶ forum members recalled the resolutions of the United Nations Commission on Human Rights and United Nations Security Council, as well as the United Nations Millennium Declaration and the United Nations General Assembly Declaration on the Commitment on HIV and AIDS (2001) which emphasize the increasing challenges presented by HIV and AIDS and the need for intensified efforts to ensure universal respect for and observance for human rights and fundamental freedoms for all, to reduce vulnerability to HIV and AIDS and to prevent HIV and AIDS related discrimination and human rights violations.³⁷ The guidelines in a nutshell assist the States in creating a positive, rights- based response to HIV that is effective in reducing transmission and impact of HIV and AIDS and is consistent with human rights and fundamental freedoms.³⁸ The guidelines further highlight that a rights-based approach is grounded in concepts of human dignity and equality which can be found in all cultures and traditions.³⁹

Perhaps it is worth mentioning that the era of lack of specific conventions on HIV and AIDS is soon coming to an end. Currently, the ILO is in the process of formulating an International Human Rights instrument on HIV and AIDS and the World of Work, whose adoption in 2010 would mark the first international human rights instrument to focus explicitly on HIV and AIDS.⁴⁰

2.2. International Labour Organisation- ILO

This is one of the specialized agencies of the United Nations which lays down internationally recognized labour standards in the form of conventions and recommendations. It prescribes minimum basic labour rights. In its Declaration of Philadelphia,⁴¹ the ILO spelt out its aims and purposes which were incorporated in its Constitution. The Declaration reaffirms the fundamental principles of social justice on which the organization is based and, in particular, that: labour is not a commodity; poverty anywhere constitutes a danger to prosperity everywhere; and all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security

³⁶ HIV/AIDS and Human Rights 6-8th October 2001, Australia.

³⁷ Ibid para 4.

³⁸ International Guidelines on HIV and AIDS 2006 para 7.

³⁹ Ibid para 101.

⁴⁰ ILO Programme on HIV/AIDS and the World of Work, 98th International Labour Conference, 30th June 2009. See also foot note 16 above.

⁴¹ Adopted on the 10th May 1944.

and equal opportunity.⁴² Notably, ILO has no specific convention or recommendation on HIV and AIDS. However, issues of HIV/AIDS are implicitly covered by ILO's standards such as Convention 111 on Discrimination (Employment and Occupation) of 1958, whose aim is to deal with the problems of discrimination on various grounds most commonly encountered. In this regard the Convention allows each country to include in its definition such other grounds of discrimination as it considers appropriate after consultation with employers' and workers' organisations.⁴³ Such other ground may be HIV and AIDS.

On the other hand the Convention permits discrimination on account of inherent job requirements.⁴⁴

2.2.1. ILO Code of Practice on HIV and AIDS

In one of its responses to the impact of HIV/AIDS in the workplace, the ILO came up with an instrument referred to as the ILO Code of Practice on HIV and AIDS and the World of Work.⁴⁵ Its primary objective is to provide a set of guidelines to address HIV and AIDS epidemic in the world of work within the framework of the promotion of decent work. Further, it focuses on helping the spread of the epidemic; mitigate its impact on workers and their families and providing social security so as to help to cope with the disease. Most significantly, it is premised on key principles such as recognition of HIV and AIDS as a workplace issue, non-discrimination in employment, gender equality, screening and confidentiality, social dialogue, prevention and care and support, as the basis for addressing the epidemic in the workplace.⁴⁶ The Code is a valuable document for all players in an employment relationship.

3. Southern African Development Community -SADC

At regional level, SADC, as an inter-governmental partnership, has formulated a number of human rights instruments relevant to HIV and AIDS in the work place. What is evident about SADC is that it also recognizes the centrality of human rights as enshrined in the Universal

⁴² Declaration of Philadelphia, Article 1.

⁴³ Article 1 para 1(b).

⁴⁴ Article 1 para 2.

⁴⁵ Adopted by ILO governing body in June 2001.

⁴⁶ Preamble to the ILO Code of Practice on HIV and AIDS.

Declaration of Human Rights and African Charter on Human and Peoples' Rights.⁴⁷ Also apparent in this body is that it is guided by one of its core objectives; thus 'to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration.'⁴⁸ In their general undertakings the member states pledged not to discriminate any person on grounds of gender, religion, political views, race, ethnic origin, culture or disability.⁴⁹ Consequently, member states are urged to provide for and enforce mechanisms aimed at ensuring access to justice, particularly for the marginalized and vulnerable social groups such as people with disabilities and people living with HIV and AIDS among others.⁵⁰ In 2003 SADC member states undertook to facilitate the expansion of workplace programmes on HIV and AIDS prevention and to support it by appropriate policy and legal frameworks.⁵¹ At the same Declaration the member states also pledged to remove stigma, silence, discrimination and denial which are recognized as factors that hamper and undermine HIV control efforts towards people living with HIV and AIDS.⁵² Further, the member states undertook to create an enabling environment consistent with ILO conventions on discrimination and equality so that equal treatment and opportunities for men and women are guaranteed; in particular, to access to employment, working conditions, social protections etc.⁵³ The member states also pledged to create an enabling environment such that all persons with disabilities, whatever the origins and nature of their disability, shall be entitled to additional concrete measures aimed at improving their social and professional integration.⁵⁴

3.1. SADC Code of Conduct on HIV and AIDS and Employment

Perhaps one of the most commendable responses by this regional body is the formulation of the Code of Conduct on HIV and AIDS⁵⁵ whose guidance appears to be of invaluable measure. It is, it appears, a product of the international labour standards observed by the ILO and WHO over

⁴⁷ SADC Treaty of 1992, Article 4; Communique of SADC Civil Society Forum on 'Democratic Governance and Regional Economic Integration.' Held in Lesotho, 14-16 of August 2006, para 7.

⁴⁸ SADC Treaty of 1992, Article 5.

⁴⁹ Declaration and Treaty of SADC of 17th August 1992, Article 6.

⁵⁰ Note 14 para 7.3.

⁵¹ Maseru Declaration on HIV/AIDS of 4th July 2003, para 2.

⁵² Ibid.

⁵³ Charter of Fundamental Social Rights in SADC of 26TH August 2003, Article 6.

⁵⁴ Ibid Article 9.

⁵⁵ Adopted in 1997 at a SADC Summit.

the years. This Code is now an official policy of the region and it urges member states to incorporate its provisions in their legislations. The purpose of the Code is to guide member states on the most effective and humane ways to address issues of HIV and AIDS within an employment relationship. In its approach it aims to achieve a balance in protecting the rights of all the parties, including those with and without HIV, employers, employees, and others. It prescribes equal treatment for employees with HIV. Thus, employees with HIV related illnesses should be treated no different from any other employee with life threatening illness. In short it prohibits any form of discrimination on account of HIV and AIDS status. Of significance is that its protective scope does not cover employees only, but extends to prospective employees. It is in this spirit that it prohibits pre-employment HIV testing, and prescribes normal medical exam of fitness for work.

CHAPTER THREE BOTSWANA

1. Introduction

Botswana is internationally commended for its fight against HIV and AIDS.⁵⁶ However, there is to date no specific legislation on HIV and AIDS at the workplace. A few years ago Judge President of Industrial Court, Legwaila J, criticized this state of affairs and challenged the government to develop and implement laws and regulations to eliminate the stigma and discrimination against people living with HIV and AIDS.⁵⁷ The absence of legislative framework notwithstanding, the Industrial Court as a court of law and equity has on occasions interpreted some legislative provisions as applicable in cases of HIV and AIDS, and the workplace.⁵⁸ Further, as observed by Dingake J in *Nelson Matlhodi Lemo V Northern Air*⁵⁹ the court is entitled to have regard to international principles and standards on rights at work.

The first part of this chapter therefore shall focus on different statutes and their applicability and lack thereof to issues of HIV and AIDS at the work place. A cursory reflection shall also be made on various legislations applicable in employment relationships.

2. Statutory Anti –Discrimination Framework

As pointed out above, there is no legislative provision in Botswana which specifically mentions issues or matters of HIV and AIDS at the workplace. However there are some provisions in various statutes whose interpretation and or application is capable of including HIV and AIDS, and discrimination in the workplace. A discussion of those statutes would follow herein under.

2.1. The Constitution

There is no provision in the Constitution which specifically deals with HIV and AIDS. Though this position cannot be celebrated, it is understandable because at the time this Constitution was drafted in 1966, there was no known case of HIV and AIDS in Botswana.⁶⁰ However the

⁵⁶ 'Botswana has demonstrated a high level of political commitment to addressing the HIV/AIDS pandemic...' WHO, June 2005.

⁵⁷ *Rapula Jimson v Botswana Building Society* IC. 35/03 at page 19.

⁵⁸ *Sara Diau v Botswana Building Society* 2003 (2) BLR 409.

⁵⁹ IC 166/2004 at page 30.

⁶⁰ According to reports, Botswana's first case of AIDS was reported in 1985. See History of HIV and AIDS in Botswana, at <http://www.avert.org/aids-botswana.htm> [Accessed 18January 2010]

substantive effect of various sections in the Constitution applies to HIV and AIDS, and the workplace. As it shall be demonstrated below, those sections provide for the right to privacy;⁶¹ the right to equality (or the right against unfair discrimination);⁶² the right against inhuman and degrading treatment;⁶³ and the right to liberty.⁶⁴ I believe a brief look at the sections in question and the corresponding resultant rights would be appropriate.

2.1.1. The Right to Equality

This right though not specifically provided for under section 15 the Constitution, results from the right against unjustifiable discrimination. Section 15 states:

'15 (1) Subject to the provisions of subsections (4), (5) and (7) of this section, no law shall make any provision that is discriminatory either of itself or in its effect.

(2) Subject to the provisions of subsections (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any public office or any public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded persons of another such description.

(4) ...

(5) ...

(6) ...

(7) ...

(8) ...

(9) ...'

⁶¹ Section 9(1).

⁶² Section 15.

⁶³ Section 7.

⁶⁴ Section 3.

This section in short protects against unjustifiable discrimination. This it does, according to Fombad⁶⁵, in two main ways: First, against enactment of any law which is discriminatory either expressly or in its effect. Thus, indirect or de facto discriminatory legislation designed to achieve an apparently neutral objective, but which has the practical effect of placing a protected group at a disadvantage because of past discrimination or past circumstances. Secondly, against any discriminatory action by persons acting under written law, or in performance of the functions of any public office or any authority.

2.1.2. The Right to Privacy

The right to privacy is provided for under section 9(1) of the Constitution which states that:

'9(1) Except with his own consent, no person shall be subjected to the search of his or her person or his or her property or the entry by others on his or her premises.

(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision-

(a) that is reasonably required in the interest of defence, public safety, public order, public morality, public health, town and country planning, the development and utilization of mineral resources,, for the purpose of any census or in order to secure the development or utilization of any property for a purpose beneficial to the community;

(b) that is reasonably required for the purpose of protecting the rights or freedoms of other persons;

(c) that authorizes an officer or agent of the Government of Botswana, a local government authority or a body corporate established by law for a public purpose to enter on the premises of any person in order to inspect those premises or anything thereon for purposes of any tax, rate or duty or in order to carry out work connected with any property that is lawfully on those premises and that belongs to that Government, authority or body corporate, as the case may be; or

(d) that authorizes, for the purpose of enforcing the judgment or order of a court in any civil proceedings, the search of any person or property by order of a court or entry upon any premises by such order, and except so far as that provision or, as the case may be , anything done under the authority thereof is shown not to be reasonably justifiable in a democratic society.'

Judicial understanding of this section shall be discussed later below.

⁶⁵ Charles Manga Fombad, 'The Constitutional Protection Against Discrimination in Botswana,' *International and Comparative Law Quarterly*, 2004 Vol 53 (1) 139 page 147.

2.1.3. The Right not to be subjected to inhuman and degrading treatment

This right finds expression under section 7 which *inter alia* provides:

‘7 (1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment’

This section together with the one following immediately below shall be scrutinized later as well.

2.1.4. The Right to Liberty

Section 3 in part provides:

‘3. Whereas every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his or her race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest to each and all of the following, namely-

- (a) Life, liberty, security of the person and the protection of the law;
- (b) ...
- (c) ...’

2.2. Employment Act

There is no specific provision in this Act which specifically deals with discrimination and or termination of a contract of employment on account of ill health or HIV and AIDS, or matters related to HIV and AIDS generally. The Act deals with general employer/employee relations including, *inter alia*, how employers should handle employee’s ailments in the work place. Significantly section 23(d) prohibits discrimination of employees on account of race, tribe, origin, marital status, political opinion, sex, colour or creed. Notably, HIV and AIDS is not mentioned. The implication is that employers are at liberty to test prospective employees for HIV and refuse to employ them on that basis. This, it is submitted, is not a far- fetched possibility because a pre-employment medical examination is provided for under this Act at section 46. Further, section 32 permits an employer to turn down a prospective employee on the basis of the

results of the medical examination carried out under section 46. This is what happened in the case *Rapula Jimson v Botswana Building Society*.⁶⁶

I consider below some Acts regulating employment relations of some of the biggest employers in the public service. Those are the Botswana Police Act, Botswana Defence Force Act and the Botswana Prisons Service Act the relevance of which I shall briefly discuss. Of significance, in so far as this paper is concerned is that there is nowhere in any of these Acts where there is provision for the protection of HIV positive employee against unfair discrimination. The Acts give room for unfair discrimination on account of HIV positive status.⁶⁷

3. Policies and Codes

Policies and Codes form the bulk of soft law in the employment spectrum in Botswana. They lack legislative force, hence their reference as soft law. However, our courts have over time, on the strength of section 18(5) of the Trade Dispute Act, resorted to them for guidance and direction.⁶⁸

3.1. Botswana National Policy on HIV and AIDS of 1998

It is accepted that this policy is based on the World Health Organization and IOL guidelines on HIV and AIDS in the workplace. In acknowledgment of its relevance, Dingake J in the case of *Sara Diau v Botswana Building Society* observed that this national policy is a progressive document in that it seeks to eliminate HIV and AIDS related unfair discrimination, promote equality and fairness especially at the workplace and more fundamentally, gives effect to Botswana's international obligations.⁶⁹ Simply put, notable key objectives of this policy are the elimination of unfair discrimination and the promotion of non-discrimination. And to this extent it accords with international legal instruments discussed in chapter 2. The policy *inter alia* prescribes that:

⁶⁶ IC 35/03.

⁶⁷ For example, though officially denied, some senior officers in the Botswana Police Service and the Botswana Defence Force interviewed on condition of anonymity have confirmed that their forces still conduct HIV test as a recruitment policy.

⁶⁸ Section 18(5) of the Trade Dispute Act provides that 'the court may take into consideration any existing code of industrial practice agreed between the Government, employers' organizations and trade unions.'

⁶⁹ IC 50/2003 at page 27.

- Workers with HIV infection who are healthy should be treated the same way as any other worker with regard to training, promotion, etc.
- Workers with HIV- related illness and AIDS will be treated the same way as any other worker with an illness and should be retained in employment for as long as they are medically fit to work.
- HIV –infected employees should have access to and receive standard social security and occupational related benefits.
- HIV – infected employees should be protected against stigmatization and discrimination by their colleagues, employers, unions and clients.

This policy is clear and devoid of any ambiguity. In a nutshell it prescribes for the elimination of unfair discrimination and the promotion of non-discrimination.

3.1.1. Pre-Employment HIV Testing

The policy addresses the issue of pre-employment testing in clear and straight forward terms.⁷⁰ It states that pre-employment testing as part of the assessment of fitness to work is unnecessary, and should not be carried out.⁷¹ The reasoning is that the test cannot identify a person who has recently been infected and it also does not guarantee that a person will not become infected in the future.

3.2. Public Service Code of Conduct on HIV and AIDS in the Workplace 2001

Key to the objective of this code is that it strives to eliminate HIV and AIDS discrimination and stigmatization in the public service. Importantly, it states clearly that pre-employment medical examination shall not include HIV test.

⁷⁰ The Public Service Code of Conduct on HIV and AIDS and the National Industrial Code of Practice discussed below have similar prohibitive provisions.

⁷¹ Para 6.2. The SADC Code on HIV and AIDS and employment also states that there should be no direct or indirect pre-employment HIV test.

3.3. National Industrial Relations Code of Practice of 2002

This Code in essence prescribes fair labour practices from which courts seek guidance time and again. Under its Code of Good Practice: Employment Discrimination it prescribes as its objective the elimination of discrimination in the workplace and promotion of equality of opportunity and treatment in employment. Its other Code⁷² specifically strives to eliminate discrimination in the workplace on account of HIV and AIDS.

3.4. Botswana National HIV/AIDS Strategic Framework 2003-2009

This framework is to provide guidance to Ministries, Non-Government organizations and private sector to enable them to work in collaborative manner in achieving the intended goal of the national response to HIV; being to eliminate the incidence of HIV and reduce the impact of AIDS in Botswana. Its other notable objective is to develop and implement laws, regulations and measures to eliminate stigma and discrimination against people living with HIV and AIDS.⁷³

3.5. General Orders of 1996

These orders govern conditions of service of the public service. Notwithstanding the spirit which runs through the Botswana policy framework they state in bold terms that applicants for posts in the public service who are recruited from outside the country must in addition to the medical examination which includes X-ray of the chest undergo HIV test.⁷⁴

4. Case Law

Discrimination in industrial relationships on account of HIV positive status can take different forms such as, refusal of employment, dismissals, demotion, denial of promotion, transfers and so forth. The most common form, if litigation before the Industrial Court is anything to go by, is dismissals.

⁷² Code of Good Practice: HIV/AIDS and Employment

⁷³ At page 8.

⁷⁴ GO 158.2 as read with GO 158.1. On interviewing some heads of ministries who are in the forefront in the employment of non-locals, the justification is 'the Government considers AIDS to be a burden and therefore does not want to assume burdens from other countries.' Ironically, not all employed from outside, for instance judges of the High Court, are subjected to the same screening process.

4.1. HIV and Dismissals

The issue of discrimination on account of HIV positive status leading to dismissals was addressed in the courts on several occasions in the past decade. Notably, and this has been a challenge to the courts, there is no provision in the Employment Act or any other Act which specifically deals with dismissal or termination of contracts of employment on grounds of incapacity or ill health. Furthermore, there is no specific legislative provision dealing with HIV and AIDS in an employment relationship. The courts have inevitably resorted to common law and international instruments to resolve issues before them. In the case of *Johani Moseki v Jonson Crane Hire (Botswana) (Pty) Ltd*⁷⁵ de Villers J had this to say:

‘There is no provision in Botswana legislation for termination of a contract of employment due to ill health....The Courts must therefore look elsewhere for guidance in this respect.’⁷⁶

The Learned Judge went on and laid down principles discussed by various authors relating to dismissals applicable in England and South Africa. The approach is generally that notwithstanding the provisions of sections 18 and 19 of the Employment Act, and having regard to the provisions of section 20(2), a contract of employment for an unspecified period should not be terminated unless a just cause can be shown.⁷⁷

4.1.1. HIV Positive Status

Some few years ago, the Industrial Court in the case of *Nelson Matlhodi Lemo v Northern Air Maintenance (Pty) Ltd*⁷⁸ was faced with a case in which an employee alleged that he had been discriminated against and dismissed because of his HIV positive status. The court had to consider whether the applicant’s dismissal was substantively and procedurally unfair. The facts as distilled from the evidence showed that applicant was employed by respondent as a Trainee Aircraft Engineer on 8th September 1998. As part of his duties, he was to undertake aircraft

⁷⁵ IC 143/1999. Carstens J expressed the same observation in the case of *Amelia Sanders v Dawson & Fraser* IC 92/2001.

⁷⁶ Page 15; De Villers J made the same comment at page 4 in the case of *Joe Sebonego v Newspaper Editorial and Management Services* IC 64/1998.

⁷⁷ *Rapula Jimson V Botswana Building Society* IC 35/2003 at page 4. The approach is consistent with the ILO Convention, Article 4 which provides- ‘The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.’

⁷⁸ Case No. IC 166/2004.

maintenance and service under the supervision of a qualified aircraft engineer. During this employment he acquired a persistent pattern of absenteeism, mostly, if not wholly, authorized over a period of three years. This was due to ill health because of his HIV positive condition. In consequence of his poor health, he exhausted his annual leave and paid sick leave days per annum and had to obtain unpaid leave on several occasions. Thus, he applied for unpaid leave for three months; from the 25th September, 2001 to the 31st December, 2001. He returned to work in January 2002. He was still constantly ill and his attendance did not improve either. He applied for another unpaid leave, which leave was granted for the period from the 27th May, 2002 to 27th August, 2002. He only returned to work in September, 2002. The applicant maintained that prolonged intermittent absenteeism until 2004 when he was dismissed.

Prior to his dismissal, on the 29th January, 2004 the applicant disclosed to his employer that he was HIV positive. Subsequently, a day later, on 30th he received a letter terminating his employment. The court concluded in certain terms that the applicant was dismissed because he was HIV positive. The court distinguished this case from *Botswana Ash case* (below). The court noted that in that case the applicant was dismissed because of incapacity due to ill health and there was evidence that he was too sick to perform his duties. The court reasoned that in this case there was no suggestion that the applicant was incapacitated or unable to perform his job.⁷⁹ The court therefore concluded that the applicant was dismissed purely because he was HIV positive. And, the court asserted, 'it is incompetent to dismiss an employee solely on the grounds that such an employee is HIV positive.'⁸⁰

Of significance, Dingake J commented

'Where an employee is HIV positive , employers should refrain from discriminatory practices towards an HIV and AIDS positive employee, and should view an employee in the same way as it would any other employee suffering from a life threatening illness. This is so because as a general rule an HIV positive employee may for years, even decades, experience no interference with his or her capacity for service in fulfillment of the demands of his job. This is particularly so in this era where anti-retroviral drugs are readily available....To exclude an HIV and

⁷⁹ Page 27.

⁸⁰ Ibid.

AIDS positive employee from employment solely because he is HIV positive and without having established that he is incapacitated, as in this case, lacks a rational foundation and is unfair.⁸¹

Further, Dingake observed that

‘..the employer is not expected to be saddled with an employee who is not productive, either on account of HIV and AIDS or some other ailments and is entitled to dismiss an employee who on account of illness is absent for unreasonably long time in the circumstances.’⁸²

Dingake J noted that when a period of absenteeism is deemed unreasonably long is dependent on the circumstances of each case. The reasonableness of absence, the learned Judge pointed out, should be evaluated according to factors such as the nature of the employee’s job, the extent to which the business of the employer is suffering, and or incurring losses, the prospect of the employee recovering.⁸³

On procedure the court pointed out that an employee is not obliged to inform his employer that he is HIV positive. The procedure as proposed by the court is that where an employee has become too ill to perform, the employer is obliged to follow a fair procedure. Thus, the employee has to be consulted and or warned that his or her persistent but intermitted absences on account of illness is worrisome and may lead to dismissal; he must be warned that if the situation does not improve the employer may be compelled to dismiss him. Most importantly, as the court observed, he should be allowed an opportunity to improve his attendance record with full knowledge that should he not improve he may be dismissed. Furthermore, before the decision to dismiss him is taken, he should be given a final opportunity to show cause why, given his persistent absenteeism on account of ill health, he should not be dismissed. In conclusion, the court held that substantively and procedurally the applicant’s dismissal was unfair and granted him a six (6) month salary as compensation.

In sum, the court held that to discriminate and dismiss an employee only because of his HIV positive status without suggesting any incapacity is not only unfair but unlawful. This is the position shared by the courts in the cases of *Rapula Jimson v Botswana Building Society*⁸⁴, *Sara*

⁸¹Page 33. Note that ARVS were more readily available in Botswana in 2004 than they had been in February 1998 when Monare in the *Botswana Ash* case was dismissed.

⁸²Page 33.

⁸³Page 33.

⁸⁴IC 35/2003.

*Diau V Botswana Building Society*⁸⁵ and *Edison Monare v Botswana Ash (Pty) Ltd*⁸⁶, whose detailed discussion shall follow later below.

4.1.2. Incapacity

It is beyond question that an HIV employee may at times be so ill that he or she is unable to discharge his or her duties. The general position of the law, in those circumstances, is that when a person is unable to perform in a contract of employment because he or she is too ill, the employer may decide to terminate the employment relationship on the grounds of incapacity. In the words of Grogan,⁸⁷ ‘incapacity is recognized as a legitimate reason for terminating the employment relationship as long as it is fairly done.’ Thus termination must be substantively and procedurally fair. This is the general rule and may be applied to an employment contract when the employee’s illness or injury prevents him from working for an unreasonably lengthy period on time.⁸⁸ Usually, as it shall become clear below, it is long absences from work which compromise an ill employee’s capacity to perform his or her side of the contract. As to how long an employee should be absent from duty or to what extent he or she should fail to perform before he can be adjudged incapable of performing is dependent on the circumstances of each case.⁸⁹

In the case of *Thekiso Seloba v Northern Mills (Botswana) (Pty) Ltd*⁹⁰ the court laid down some general rules dealing with incapacity. Those rules, as it shall be apparent in the subsequent cases, are applicable in situations of incapacity irrespective of the cause of the incapacity. And it is submitted the rules apply equally in instances where the incapacity is as a consequence of HIV and AIDS.

In the above case the applicant was employed as a paddling operator and his duties entailed lifting 50kgs of bundles of towels. He sustained a fractured arm as a result of a road accident outside the scope of his job. As a result he was hospitalized for 15 days and later given 6 weeks sick leave. When he returned for duty in December, two weeks before the Christmas

⁸⁵ IC 50/2003.

⁸⁶ IC 112/1998.

⁸⁷ Grogan J, *Workplace Law*, 7th Edition at page 191.

⁸⁸ Briscoe A, *A Guide to the Laws Affecting Health and Safety at Work in Botswana*, Morula Press, 2002 at page 37.

⁸⁹ *Nelson Matlhodi Lemo v Northern Air Maintenance (Pty) Ltd* IC 166/2004 at page 33..

⁹⁰ IC 118/1999.

break, he was told to do light duty- sweeping the premises. In the following year he was told to continue sweeping. Towards the end of January, on the 29th, he went for check up and was told verbally by the doctor that he was fit enough to resume his old duties. This recommendation notwithstanding the applicant was kept sweeping the premises. He occasionally worked as paddler when someone was away. He was fit enough to do his old job. When he told this to the management and demanded that he be restored to his old job the management told him that it was not for him to decide when he was fit enough to return to his old job. On the 13th of March 1998, the management asked him to resign and reasoned that his injury might develop some complications in the future and the company would be held liable. The management gave him time to consider the proposal. They also warned that if he refused to resign his pay would be reduced to that of a sweeper. After a week, in a meeting with the management, he indicated that he was not going to resign. The management told him that it was not possible for him to go back to his old job as it had already been filled by someone else. The applicant was offered to accept a lesser wage as a sweeper but he declined. On the same day he was by a letter backdated 17th March dismissed from employment. The letter *inter alia* alleged that he was unfit for employment due to an injury arising outside his job.

The applicant approached the Industrial Court and claimed that he had been unfairly dismissed because he refused to resign and to accept a lower wage.

The court after citing Article 4 of the ILO Convention⁹¹ approvingly quoted at length from Le Roux and Van Niekerk, *The South African Law of Dismissal* at page 229 what appears to be the test developed by the South African Industrial Court on the issue of incapacity. Thus,

- (a) The employer is obliged to ascertain whether the employee is capable of performing the work for which he was unemployed;
- (b) If the employee is unable to perform the work, the extent to which he is able to perform his duties should be ascertained;
- (c) The employer is thereafter obliged to ascertain whether the employees duties can be adapted ; and

⁹¹ Quoted at foot note 16.

- (d) If the employee cannot be placed in his former position, the employer must ascertain whether alternative work, at a reduced salary if necessary, is available.

The court held that the employer had no valid reason to offer the applicant an alternative job and or to dismiss him as he was fit enough to do his former duties.

In the case of *Edison Monare V Botswana Ash (Pty) Ltd*⁹² the court was faced with a situation where an employee who suffered from HIV positive related ailments was dismissed by his employer because he could no longer perform. The facts of the case were as follows:

The applicant started working for the respondent as a personnel officer on the 1st of January 1991. He was in charge of the industrial relations. He was HIV positive from 1994 and was treated for various occasional ailments by the respondent's doctor. He worked as such until the 5th of February 1998 when his services were terminated by the respondent. In July 1997 the applicant deteriorated rapidly and was in and out of the hospital. In the last six months of 1997 he was absent from work for 70 days and was at work for only 62 working days. From January 1998 to the 5th of February 1998, the day he was dismissed from work, he was at work for 8 days and sick absent for 16 days.

In addressing the justifiability of the applicant's dismissal, the court adopted a two-pronged approach. It considered whether the dismissal was substantively and procedurally fair. The court considered the question as to where should an employer draw the line if he has an employee who has a history of prolonged illness and long absenteeism. The court followed the general principles outlined in the case of *Thekiso Seloba* discussed above.

The judge noted that the respondent had known of the applicant's HIV positive status since 1993 but had not taken any action against him either then or during the following few years. This, according to the court, was because the applicant was still able to perform his duties despite occasional absenteeism. During the latter part of 1997, the court observed, the applicant's condition deteriorated so rapidly that he was absent from work for 70 days and was at work for only 62 days. The court further noted that though the applicant was not productive, the respondent throughout provided him with accommodation; saw to it that he received the best medical care; paid up his medical aid fees; provided transport each time he had to go and be

⁹² IC 112/98.

fetched from the Gaborone Private Hospital,⁹³ and at one point, on the recommendation of the company doctor, he worked half day at full pay. The court found that the respondent was very tolerant with the applicant and showed him a lot of compassion during his long period of illness. As at February 1998, according to the medical evidence, the applicant was so ill with such low CD4 cell count of 65. He was very weak and unable to perform his duties. On this account the respondent dismissed him.

The court found that the respondent was justified in terminating the applicant's employment at the stage when he was no longer able to perform the duties he was employed for due to ill health and with no chance of recuperating.⁹⁴ In conclusion, having regard to the nature of the applicant's job and the effect of his absence on the respondent's business, the court noted, 'Monare (applicant) was the only employee doing this particular job', and thus, for operational requirements, his work could not just stand still indefinitely. The court thus concluded that the applicant's dismissal was substantively fair.

In *Jacob Mosinyi V Lobatse Engineering*⁹⁵ the applicant had been dismissed on account of his absence due to ill health. He claimed compensation for wrongful dismissal. The facts were that the applicant was employed by the respondent for an unspecified period as a boiler maker. That was sometimes in 1998. The applicant was frequently absent due to ill health. From February 1999 to the 16 of April 1999 he was off sick for at least 19 days. It was not in dispute that he was no longer capable of performing the work for which he was employed. The employer offered him an alternative job with lighter duties and a lower salary. The employee rejected the offer. The employer dismissed him with a one month notice.

In determining the substantive fairness of the dismissal Carstens J of the Industrial Court reiterated at page 11 some rules which employers should observe before an employee can be lawfully dismissed.⁹⁶ Such rules, it is submitted, would govern dismissals for HIV AIDS related incapacity to perform.

⁹³ Gaborone Private Hospital is more than 500km from where the applicant stayed and worked.

⁹⁴ The court relied on the evidence of the company doctor that at the time there were no anti-retroviral drugs on the market.

⁹⁵ IC 113/2000.

⁹⁶ Those rules were first laid down by de Villiers J in the case of *Johani Moseki v Jonson Crane Hire (Botswana) (Pty) Ltd* IC143/1999. See footnote 13.

1. Firstly, there must first and foremost be a valid medical reason for an employee's incapacity to perform. For instance, the illness must be such that the employee can no longer, as a result of that illness, perform the duty for which he or she was employed. Temporary absence from work because of illness is not a valid reason for termination of a contract of employment. The employer must first assess what the illness is, and assess the seriousness of such illness and then make a diagnosis. This must be done in consultation with the employee and if possible also with a medical practitioner.
2. If the employer is then satisfied that the employee is not capable of performing the work for which he or she was employed, and there is no available alternative work, the employer will be justified in terminating the employee's contract for incapacity to perform his or her duties. That would be a valid reason for such termination.
3. The termination of employment in such circumstances should be with notice in accordance with Article 11 of ILO Convention of 1958.

The court concluded that the dismissal was substantively fair. The court reasoned that for the 19 days of his absence, the applicant had failed to account for the 10 days; none of the sick notes stipulated the cause, diagnosis or extent of illness; and the applicant admitted that he was unable to perform the job for which he was employed. The court held thus, the applicant was incapacitated in that he was unable to perform the job he was originally employed for; and having declined alternative employment the employer had no option but to terminate his contract of employment.⁹⁷

On the issue of procedural fairness, the court again endorsed without qualification the guidelines in the case of *Johani Moseki (supra)*. And it is submitted that they are appropriately applicable in cases of HIV and AIDS. Thus,

⁹⁷ Page 17.

‘...the first phase is for the employer to establish the cause of the employee’s illness, preferably by obtaining a medical report on the employee or, depending on the circumstances, through meaningful consultations with the employee.

Should an employee refuse to submit to medical examination or after medical examination still refuses to inform the employer of the cause of his illness or refuses to meet for meaningful consultation, he will be frustrating the employer’s efforts to proceed to the second phase. In such a case the employer must warn the employee that if he persists in his refusal to co-operate his job could be in jeopardy. The employee should then be given a final opportunity to co-operate in regard to the cause of his ill-health. Should an employee still remain stubborn and uncooperative after such a final opportunity to cooperate in regard to the cause of his ill health.

Should an employee still remain stubborn and uncooperative after such a final opportunity to cooperate, he has only himself to blame if the employer then decides to terminate his contract of employment, which the employer will be entitled to do, if he is satisfied that the employee is no longer capable of performing the duties he was employed for to do (sic).⁹⁸

The court held that the employee’s demands to be examined at Gaborone Private Hospital at the company’s expense over a government hospital were unreasonable and unjustifiable. The applicant’s unreasonable behavior, the court noted, frustrated the employer’s efforts to meaningfully assess his condition. In conclusion the court held that since the employee was no longer capable of performing the job for which he was employed and he unreasonably declined alternative job, the company had no other option but to dismiss him. The dismissal therefore found to be both substantively and procedurally fair.

In the case of *Mokeresete Moswela V Furniture Mart*⁹⁹ the employee was dismissed because of poor eye sight. He applied to the Industrial Court for compensation on grounds of unfair dismissal.

The facts of the case were that the applicant was employed by the respondent as a Branch Manager in Francistown on the first of February 1996. He was a top performer and at one point was the best performing Branch Manager in the entire country. In 2001, after some five years with his employer, the applicant developed some eye sight problems. In 2003 after consultation, he was re-deployed to work as a Relief Manager. Though he maintained his salary, this was effectively a demotion as a Relief Manager position was junior to his original post. On 16th

⁹⁸ Page 26.

⁹⁹ IC (F) 8/2005.

August 2004 his employer asked him to be examined by an eye specialist to determine whether he was capable of performing his duties given his eye sight problems. The applicant was examined by a specialist who issued a report which confirmed that the applicant had serious eye defects but was fit to perform the work of a Relief Manager. Despite this report the employer decided to terminate the applicant's employment. The respondent reasoned that they wanted they wanted the applicant to use computers in his work but was unable to do so as a consequence of his sight problems.

The court held that the dismissal was substantively unfair as the employer disregarded the doctor's opinion that the employee was medically fit to perform his duties. The court also held that the procedure followed was unfair.¹⁰⁰ The court noted that the employee should have been openly consulted. Thus, as a productive member of the workforce, the employer had a duty to explain to him how he was failing in his post as Relief Manager despite achievement of target set and bonus payments received. The court noted that the applicant was able to reach sales targets set for him despite his inability to use computers. Furthermore, fairness demanded that it should have been explained to him why medical opinion was disregarded for, he reasonably expected that the doctor's opinion would be given the weight it deserved.

What is discernable from these cases is that incapacity due to ill health is a legitimate ground for termination of employment if on evidence (preferably medical evidence) the employee is unable to perform the job for which he or she was employed as a result of that ailment. If the employer follows a fair procedure of terminating such employment the courts will have no quarrels with such a dismissal. This general position applies to any kind of incapacity irrespective of its cause. It therefore follows, is submitted, that it would apply where incapacity results from HIV and AIDS epidemic.

4.1.3. Reasonable Accommodation and Duty to Consider Alternatives to Dismissals

The general rule is that where an employer is faced with an employee who suffers from incapacity due to ill health, the employer is entitled to dismiss him or her. However, before the decision to dismiss is arrived at the employer should consider other alternatives short of dismissal. The Industrial Court has on occasions decided on issues of this nature and it is

¹⁰⁰ Page 27.

submitted that the holdings and reasoning therein would in appropriate circumstances apply to cases of HIV and AIDS related ailments.

In the case of *Dzidzane Siwelav Botswana Building Society*¹⁰¹ the applicant had prior to his dismissal, employed by the respondent as security guard for two years. He was dismissed due to temporary incapacity. He was incapacitated by a serious case of athlete's foot. The respondent argued that the applicant's medical condition rendered him unable to effectively carry out his duties. They contested that his condition compromised the security of the society having regard to the nature of its business. Therefore, they contended, it was a commercial decision to dismiss him.

On the evidence accepted in court it was not in dispute that the applicant suffered from a serious athlete's foot. On the 31st August 1993 the applicant's superior through a letter caused the applicant to be medically examined at Nyangagwe Referral Hospital in Francistown. On the other hand he requested his supervisors to replace the applicant because according to him he could not perform his duties. A letter dismissing the applicant from employment was drafted the same day. He was dismissed with a month salary in lieu of notice. On the 1st September he was medically examined and given a medical document which *inter alia* stated that 'he is recommended to have duties which does not(sic) need him to stand long time on his feet. He is recommended not to wear boots and can only wear sandles (sic) not necessarily slippers. He is to come back for other tests which are not yet out, on Friday 4th September.'

The respondent admitted in court that the dismissal was procedurally unfair. The applicant had not been consulted on his medical condition. Further, the employer disregarded the doctor's report on the condition which was still pending and due in a few days time. Like in other past cases the court noted the steps which have to be followed before a contract of employment is terminated on account of ill-health. Thus,

'there must first and foremost to be a valid medical reason for an employee's incapacity to perform, i.e. the illness must be that the employee can no longer, as a result of the said illness, perform the duty for which he was employed. Temporary absence from work because of illness is not valid reason for termination of a contract of employment. The employer must first assess what the illness is, then the seriousness of such illness and then needs to make a prognosis. This must be done in consultation with the employee and if possible also with the medical

¹⁰¹ IC 141/1998.

practitioner. If the employer is thereafter satisfied that the employee is not capable of performing the work for which he was employed and there is no alternative work, the employer will be justified in terminating the employee's contract for incapacity to perform his duties. There would be a valid reason for such termination.'

Simply put, if the incapacity is serious or permanent, the employer should consider alternative employment or adapting the employee's work to accommodate such disability.

In the case of *Amelia Sanders V Dawson Fraser*,¹⁰² the applicant who worked as a secretary and receptionist sustained a knee injury outside work in her leisure time. That was on the 29th of September, 1999. On the 4th of October, 1999 she was granted sick leave until the 11th of the same month. The employer considered the injury to be minor insisted that she reported for duty. Following the insistence by the employer the applicant worked from the 4th to the 11th of October, 1999. On the 19th she was granted sick leave again until 25th October 1999. She was referred to a specialist and underwent a surgical procedure on the 29th. She was booked off for four weeks from the 26th of October, 1999. She kept her employer upraised about her condition. However, on the 22nd November 1999 whilst still on sick leave, she received a letter terminating her employment.

The court found that the applicant's incapacity arising from her absenteeism due to ill health was the reason why her contract of employment was terminated. The court held that the dismissal was both substantively and procedurally unfair. Like in *Mosinyi's* case, the court held that before an employer decides to terminate the employment of an employee on ground of ill-health, the employer should first attempt to establish the cause of the employee's illness or injury. Further, the court observed, the employer had a duty to consider alternatives short of dismissal. The court also noted that there is a distinction between permanent and temporary incapacity, and observed as follows:

'If the incapacity is serious or permanent, the employer should consider alternative employment or adapting the employee's work to accommodate such disability. If the employee is temporarily unable to work, the employer should investigate the extent of the incapacity. If the employee's absence is prolonged, the employer should investigate alternatives short of dismissal taking into account the nature of the job, the period of absence, the seriousness of the illness or injury, the possibility of obtaining a temporary replacement and so on.'¹⁰³

¹⁰² IC 92/2001.

¹⁰³ Page 14.

The court finally concluded that the applicant's temporary absence from work because of her injury could not constitute a valid reason for the termination of her contract of employment. Furthermore the court observed that if the applicant's absence was unduly prolonged, the respondent was under a duty to show how the absence impacted on the business, or that there was a financial or operational basis for the termination of employment.

What can be gleaned from the above two cases is that the employer in an endeavour to consider alternative employment or adapting the employee's work to accommodate an employee's incapacity due to ill health, needs full co-operation of the employee. The employer has to assess the seriousness of the illness and or incapacity. This the employer can only achieve if the employee makes available facts (for example medical records) that the employer can take into account in order to make a meaningful assessment and how the incapacity can be accommodated.¹⁰⁴ Further, as was the case in the case of *Botswana Ash* case failure by an employer to give an employee an opportunity to participate in the consideration of his accommodation, possible adaptation of his job and alternative employment, would render his dismissal, if he is ultimately dismissed, procedurally unfair.

A classical case in which an employee refused to co-operate with the employer is *Joel Sebonego v Newspaper Editorial and Management Services (Pty) Ltd.*¹⁰⁵ The applicant in this case worked for the respondent as an editor of two newspapers. That was with effect from the 1st of December 1991. He worked as such until 1996, from when he was editor for only one of the two newspapers. The applicant was frequently ill and absent during his tenure with the respondent. In June 1997 his employment was terminated on account of 'continued absence from duty due to ill health.'

The undisputed evidence, which the court accepted, was that the applicant was in 1993 on sick leave for a day and again for 3 days. In 1994 he had no sick leave. Thereafter his sick-off record was as follows:

¹⁰⁴ See *Jacob Mosinyi and Johani Moseki* cases (supra).

¹⁰⁵ IC 64/98.

1 day (20th July, 1995); 7 days (31st July – 6th August 1995); 2 days (7 – 8th October 1996); 2 days (9 – 10th March 1997); 1 day (17th April 1997); 1 day (27th April 1997); 10 days (27th April, 1997 – 6th May 1997); and 6 weeks (12th May, 1997 – 27th June, 1997).

On this record the court found that the absenteeism could not be classified as temporary absence from work.¹⁰⁶ Importantly, the court noted that the applicant was very secretive about his illness. On that note the court found that the applicant frustrated the employer's attempts to try and find out what the cause of his illness was so as to assess the situation and to make a decision on his continued employment.¹⁰⁷ The court observed as follows:

'By so frustrating management's efforts, ... the respondent could not even get out of the starting blocks, because the starting point is always, what is wrong with the employee's health. By being unable to establish this, the respondent could not, without the assistance of the applicant go to phase two to ascertain whether his duties could be adapted or he be given alternative work.'¹⁰⁸

In conclusion therefore, the court found that the respondent was justified in terminating the applicant's employment.

What can be read from this case and the other two above is that for the employer to be able to accommodate an employee who is suffering from incapacity due to illness, it is very important for an employee to play a meaningful role in that exercise. If the employee is not prepared to take the employer in his confidence like in the case of *Joel Sebonego*, it would be difficult for the employer to assess the employee's condition and subsequently accommodate his incapacity.

4.1.4. Job Operational Requirements

While employers have a duty to accommodate employees with incapacity or disability, they can legitimately terminate an employee's employment on the ground of 'operational requirements of the undertaking, establishment or service' prescribed at Article 4 of the ILO Convention.¹⁰⁹ It was on this ground that the court in the *Botswana Ash* case (supra) considered as one of the factors to take into account in determining whether or not the dismissal on incapacity due to ill

¹⁰⁶ Page 16.

¹⁰⁷ Page 17.

¹⁰⁸ Page 19.

¹⁰⁹ See footnote 18.

health was substantively fair. The court in that case noted, having regard to the applicant's nature of the job and the effect of the employee's prolonged absence from work on the employer's business (the applicant was the only employee doing the particular job), that for operational requirements, his job could not just stand still indefinitely. The court consequently held that the applicant's dismissal was substantively fair.

In *Joseph Mothetho V Consumer Digest*¹¹⁰ the applicant was dismissed on account of temporary and prolonged absence from work. He was aged 68 and had been in the employment of the respondent as a driver for three years. The events which led to his dismissal were as follows: He was hospitalized from the 7th of May until the 9th May 2002. He underwent a surgery and was issued with a medical certificate which in part stated that: "He had an eye operation and should not work in a dusty environment for 2 months. Can start work on 24/06/02, if he is in a non dusty place. Otherwise should not start work until 22/7/02."

When he reported for duty on the 24th June 2002 he was through a letter dismissed from employment. At this time the applicant was to deliver some sand at a road construction site. The company argued in court that having regard to the nature of the work, they were unable to provide the applicant with a dust free environment; the road construction contract had a specific duration for completion; there was no other alternative to offer in a dust free environment; they were also paying monthly installments; and given the value of the vehicle, they could not take chances with part-time or inexperienced drivers and the company had to meet deadlines.

The court acknowledged the need by the employer to consider alternative employment or adapting the employee's work to accommodate a disability. In so doing, the court noted, the employer should investigate the extent of the incapacity; if the employee's absence is prolonged, the employer should investigate alternatives short of dismissal taking into account the nature of the job, the period of absence, the seriousness of the illness, the possibility of obtaining a temporary replacement and so on.

The court held that the applicant's long absence from work did justify termination of his employment because a point had been reached where the employer could no longer be expected

¹¹⁰ 140/2003.

to tolerate such absence. The court reasoned that the employer could not delay the work for 8 weeks as time was of essence.

What is discernable from this case is that even where the employee's illness or injury is temporary a point may be reached where it is legitimate for the employer to terminate employment having regard to the financial and operational circumstances faced by the business. What it also illustrates, as does *Botswana Ash* case, is that while an employer has a duty to consider to accommodate an employee who suffers from incapacity, there are circumstances like the operational requirement of the job which can make it impossible to find alternatives short of dismissal. What is worth noting is that it is the duty of the employer, as observed by the court in the case of *Amelia Sanders* (supra), to show how the absence and or incapacity of employee impacted on the business, or that there was a financial or operational basis for the termination of employment. These propositions, it is submitted, apply to all circumstances including HIV and AIDS induced incapacity.

4.2. Pre-Employment HIV Testing

Pre-employment HIV testing in Botswana is not specifically outlawed and some employers still lawfully use it as part of their pre-employment recruitment policy.¹¹¹ On this note reference is made to recent campaigns by Botswana Network on Ethics Law and HIV/AIDS (BONELA) calling for the Government to come up with legislation to prohibit pre-employment HIV testing as a screening mechanism.¹¹² Such screening policies, as it shall be apparent below, have been challenged in courts over the past years.

In 2003, the Industrial Court in the case of *Rapula Jimson v Botswana Building Society*¹¹³ had to decide on the lawfulness or otherwise of pre-employment HIV testing as a recruitment policy. The facts of the case were that the applicant was by a letter dated 20th of June 2002 offered a job as security assistant. The employment according to the letter was subject to-

- (a) Six months probationary period;

¹¹¹ Botswana AIDS Impact Survey II Popular Report of March 2005 indicate that 11% of employers tested prospective employees for HIV as their recruitment policy.

¹¹² BONELA calls for HIV law

<http://www.mmegi.bw/index.php?sid=1&aid=74&dir=2009/December/Monday14> and <http://www.mmegi.bw/index.php?sid=1&aid=3&dir=2008/May/Tuesday6>.

¹¹³ IC 35/2003.

(b) 48 hours notice of termination during probation;

(c) Passing a medical examination by a doctor chosen and paid by the Society.

On successful completion of probationary period the applicant was to be appointed to the permanent and pensionable service of the society and be required to join the membership of the staff Pension Fund. The applicant accepted the offer and started working on the same day of the 20th of June 2002. He duly underwent the medical examination and there was no negative recommendation. Nineteen days later, on the 9th of July 2002, the applicant received another letter from the respondent headed, 'Further Pre-Employment Medical Examination.' The letter in part read, '...you are advised there is still a requirement for you to undergo an HIV test as a condition of employment with the Society.'

In compliance the applicant submitted to an HIV test and was found to be positive. On the 27th of August, 2002 the respondent wrote a letter to the applicant informing him that his probationary employment with the society was terminated with effect from the 31st of August, 2002. A copy of the test result was enclosed in the letter. The applicant approached the Industrial Court for a ruling that his dismissal was unfair.

In its defence the respondent contended that the HIV test was part of the pre-employment medical examination which the employee had been required to pass as a condition of his employment. The court found on the facts that the HIV test was a compulsory post-employment test, and not a pre-employment test. The court held that by the time the applicant was caused to go for the test he was already an employee of the respondent, and the requirement for him to go for an HIV test amounted to an unlawful unilateral variation of his contract of employment. Consequently, the court concluded that the HIV test was in breach of the applicant's contractual rights, and rendered the dismissal substantively unfair.

On appeal the Court of Appeal interpreted the facts differently.¹¹⁴ The appellant court found that the HIV test was not an additional post-employment requirement by the respondent but part and parcel of the pre-employment medical examination of the employee while on probationary employment. Significantly however, the Court of Appeal agreed with the Industrial Court that

¹¹⁴ Civil Appeal No. 37 of 2003.

pre-employment HIV testing is not unlawful, and that employers therefore have the right in law to make their own decisions regarding recruitment policies.

Post-Employment Testing

Judge President of the Industrial Court, Legwaila JP held on the facts in the case of *Rapula Jimson*¹¹⁵ that the requirement to go for HIV test during employment was not part of pre-employment agreement. He argued that by introducing it at that stage, the employer unilaterally varied the contract of employment and it was therefore an unlawful and unenforceable term of contract. And, held the court, the employer could not legitimately act on what resulted from it to dismiss the employee.

It can be read from Legwaila JP's reasoning that it is competent for an employer to have in a contract that he enters into with an employee a term requiring HIV test during the course of employment irrespective of its rationale. Thus, according to Legwaila JP, a post-employment HIV test can lawfully be done on an employee as part of an employment agreement.

Dingake J in the case of *Sara Diau v Botswana Building Society*¹¹⁶ took a different approach. In that case, the applicant who worked for the respondent as an assistant security on permanent and pensionable terms was required by the respondent to go for an HIV test. The applicant refused to carry out that instruction and she was consequently dismissed.

Dingake J held that the instruction to undergo an HIV test amounted to post-employment testing and was irrational and unreasonable to the extent that such test could not be said to have been related to the inherent requirement of the job.¹¹⁷ Therefore, Dingake continued, the applicant was entitled to disobey that instruction.

It appears that if a post-employment test is required by an employer and it is found to be rational and reasonable in that, for instance, it can be shown to be related to the inherent requirement of the job, it would be a justifiable interference with the employee's rights to privacy, freedom from inhuman and degrading treatment, freedom from discrimination, and the right to liberty. Put simply, if the infringement of these rights can be shown to be reasonably

¹¹⁵ IC 35/2003.

¹¹⁶ IC 50/2003.

¹¹⁷ Page 23-24.

justifiable in a democratic society¹¹⁸ then the post-employment-test would be acceptable and lawful.

4.3. Constitutional Protection and Conflicting Judicial Views

The views discussed herein relate to the cases of *Rapula Jimson, Sara Diau v Botswana Building Society* and *Nelson Matlhodi Lemo* (supra). The facts in those cases have already been outlined above.

For purposes of clarity, it needs to be highlighted that the first case was decided by the Judge President of the Industrial Court Legwaila JP, while the latter two were by Dingake J. Legwaila JP in the case of *Rapula Jimson* had to decide among other things, the ambit of the constitutional protection to people living with HIV in an employment set up. To be more precise, he had to determine whether or not the constitution applies to private sector organizations and matters of HIV and AIDS.

The learned Judge President adopted a narrow approach and held that the constitution, section 15 to be precise, which protects against discrimination, has no relevance to employment in the private sector. Legwaila JP's impressions about this section which prescribes that no person shall be treated in a discriminatory manner by any person acting by virtue of written law or in the performance of the functions of any public office, as protecting against discrimination by public officers and persons and persons acting pursuant to a written law or in the performance of the functions of any public office or public authority. In a nutshell, he held that the section prohibits discrimination by the state, and by certain public authorities, but not by private companies and private organizations. Thus, employees and job seekers in the private sector are not protected against discrimination by the employers under section 15 of the constitution.

On the same issue, Dingake J in *Sara Diau* case came to a different conclusion. The following excerpts sum up his views:

'..the language of the constitution must be given a broad and purposeful interpretation, so as to give effect its spirit, and that this is particularly true of those provisions that are concerned with protection of fundamental human rights.

¹¹⁸ Section 9 of the Constitution.

This is particularly so in an employment relationship which more often than not is characterized by unequal bargaining power between the employer and the employee.¹¹⁹

‘In my considered view the purpose of a bill of rights is an important consideration in determining whether it is applicable to private conduct or not. For example, it would appear to me that the purpose of the right to liberty, equality before the law and human dignity does not demand a differentiation between the state or private conduct, for to draw such differentiation may authorize constitutional violations by private persons, that properly ought not be permitted.’¹²⁰

On the issue of the relevance of the constitution in matters of HIV Legwaila JP in his narrow approach concluded that the constitution of Botswana does not protect against discrimination on the basis of HIV status. He pointed out that ‘the only reason a court would outlaw testing for HIV ... would be in response to government policy.’¹²¹ He concluded that it is for the state to decide whether it wants to stop HIV testing in the workplace in which case it would introduce legislation to that effect. The learned judge is of the view that in the absence of legislation the courts are not in a position to outlaw HIV in the employment set up even though the National Policy on HIV and AIDS prohibits it. To an extent this view by Legwaila JP is endorsed by the Court of Appeal¹²² where they agreed with him that pre-employment testing is not unlawful, and employers are at liberty to make their own recruitment policies.

Dingake J on the other hand took a totally different approach. As pointed above, he holds the view that the constitution should be given a broad and purposive interpretation. He argued that there is no basis to interpret the applicability of the Bill of Rights in a restrictive manner. Thus, the constitution’s interpretation should not be unduly restricted. This is what he said in the case of *Sara Diau*:

‘The constitution as the supreme law is immensely relevant when interrogating issues of HIV and AIDS at the workplace to the extent that it guarantees that every person is entitled to equality before the law, equal protection of the law and human dignity-and also to the extent which prohibits unfair discrimination.’¹²³

¹¹⁹ Page 44-45.

¹²⁰ Page 49.

¹²¹ Page 20.

¹²² Court of Appeal (Civil) No. 37 of 2003

¹²³ Page 28.

On the Constitutional relevance to matters of HIV and AIDS, the learned judge in the case of *Nelson Matlhodi Lemo* had this to say:

‘...once an employee is dismissed because he is HIV positive, ...the Constitution is immediately implicated, in particular section 7(1) of the Constitution which prohibits inhuman and degrading treatment. This is so because to dismiss an employee because he is HIV positive is a violation of his right to dignity.’¹²⁴

Though Dingake held in *Sara Diau* case that the conduct of the employer was not discriminatory within the meaning of section 15(2) as read with section 15(3) of the constitution in that there was no evidence the applicant was treated differently (dismissed) because of the suspicion or perception that she may be HIV positive, he read into the listed grounds HIV as one of the grounds upon which it is not competent to discriminate. In his generous and purposive approach, he argued that the listed grounds outlaw discrimination on grounds that are offensive to human dignity and or on grounds that are irrational. He concluded that to dismiss a person because of perceived HIV status would offend against human dignity, in addition to being irrational. Therefore, he summed up, ‘the ground of HIV status or perceived HIV status must be considered to be one of the unlisted grounds of section 15(3) of the constitution of Botswana.’¹²⁵ The judge reiterated this position in the case of *Nelson Matlhodi Lemo*.

It is worth noting that in his approach Dingake J’s reasoning accords with the holding in the Court of Appeal case of *Dow v Attorney General*¹²⁶ in which it was held the fact that the word ‘sex’ is not among the listed grounds does not mean that it is permissible to discriminate on the basis of sex. Furthermore, his argument is sustained by Fombad in his article, ‘The Constitutional Protection Against Discrimination in Botswana.’¹²⁷

The learned judge in his detailed judgment went on to outline the possible implications of HIV and AIDS in the workplace vis-a-vis various fundamental rights under the constitution. Thus, the rights to privacy, freedom from discrimination, right not to be subjected to inhuman and degrading treatment, and liberty. On the right to privacy he observed that coerced HIV testing is tantamount to unauthorized search of the person, the conduct prohibited under section 9(1) of the constitution. On discrimination he held that HIV status should be read into the list of

¹²⁴ Page 29.

¹²⁵ Page 61.

¹²⁶ 1991 BLR 233.

¹²⁷ International and Comparative Law Quarterly, 2004 Vol 53 (1) 139.

grounds upon which it is not competent to discriminate. On the right not to be subjected to inhuman and degrading treatment the learned judge observed that to punish an individual (by dismissing him or her) for refusing to agree to a violation of her right to privacy or bodily integrity is demeaning, undignified, degrading and disrespectful to the intrinsic worth of being human.¹²⁸ On the right to liberty under section 3, the judge argued that to compel somebody to go for HIV test is an interference with the right to liberty. He argued that that right goes beyond the notion of mere freedom from physical constraint and protects personal autonomy wherein individuals may make inherently private choices free from irrational and unjustified interference by others.¹²⁹ The judge however acknowledged that any interference with any of these rights which can be justified in a democratic society would be condoned.

I submit that the views expressed by Dingake J in the two cases of *Sara Diau* and *Nelson Matlhodi Lemo* are correct. The judicial activism demonstrated therein cannot be faulted. I agree with the learned judge that constitutional provisions which confer or protect fundamental rights should be construed generously and purposively. That is the trend of modern thinking in proper democracies of today. Botswana being part of the civilized community of the world, the approach by Dingake J is ideal in the circumstances.

It is however recognized that to the extent that Dingake J's holdings do not accord with those of Legwaila JP it is only the Court of Appeal that can resolve the conflict. Another possible solution, which is one of the recommendations of this paper, is for the legislature to intervene and enact laws that would end the confusion and uncertainties. For the present Botswana is stuck with two conflicting decisions of the Industrial Court.

¹²⁸ Page 64.

¹²⁹ Page 77.

CHAPTER FOUR SOUTH AFRICA

1. Introduction

South Africa has ratified most of the afore-discussed international human rights instruments, all of which contain non-discrimination provisions on the ground of sex, race, religion, political belief or other status.¹³⁰ 'Other status', as demonstrated above, includes health status, particularly HIV status. It is worth noting however that the international instruments that South Africa is not a party to can have some binding effect on the courts as they form part of customary international law.¹³¹ Of significance, South Africa has complied and enacted and or promulgated statutes and policies to give effect to international anti-discrimination laws. In this chapter I shall discuss such a legislative framework followed by jurisprudence.

2. Constitutional framework

One of the core attributes of the South African Constitution¹³² is to establish a society based on democratic values, social justice and fundamental human rights.¹³³ Further, the Constitution strives to improve the quality of life of all citizens and free the potential of each person, and afford every citizen equal protection of the law.¹³⁴ Also of profound significance in the Constitution are the concepts of 'human dignity', 'equality' and 'freedom' which repeatedly appear in the Bill of Rights as foundational values and as distinct personality rights.¹³⁵ Therefore, they are the notions against which any interpretation of personality rights should be formulated.

¹³⁰ Shadrack B.O. Gutto, *Equality and Non-Discrimination in South Africa*, p342

¹³¹ Section 232 of the Constitution; *NEHAWU V University of Cape Town* (2003) 24 ILJ 95 (CC); 2003 (2) BCLR 154 (CC) at para 34 n 33; and Darcy Du Toit, 'The Evolution of the Concept of 'Unfair Discrimination' in South African Labour Law', (2006) 27 ILJ 1311 at p1333.

¹³² Act 108 of 1996.

¹³³ Preamble to the Constitution.

¹³⁴ Ibid.

¹³⁵ Section 1 - 'The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- (b) ..., (c) and (d).'

Section 7-(1) This Bill of Rights is a cornerstone of democracy in South Africa.

It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.'

Section 10 - 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

Section 35(2) (e)- 'Everyone who is detained, including every sentenced prisoner has the right- To conditions of detention that are consistent with human dignity, ...'

There are several provisions under the South African Constitution which regulate labour relations. Among them are provisions for the rights to equality,¹³⁶ human dignity,¹³⁷ privacy,¹³⁸ freedom of trade, occupation and profession¹³⁹ and fair labour practices.¹⁴⁰ In a claim based on incapacity dismissal due to HIV/AIDS for example, all these rights are at issue. For purposes of clarity, it is apposite to glance at each one of them.

(a) Section 9

'Equality

- (1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.²

(b) Section 10

Section 36 – 'The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom...'

Section 39 – '(1) When interpreting the Bill of Rights, a court, tribunal or forum

- (a) Must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.
- (b), and (c)'
- (c)

¹³⁶ Section 9.

¹³⁷ Section 10.

¹³⁸ Section 14.

¹³⁹ Section 22.

¹⁴⁰ Section 23.

‘Human dignity

Everyone has inherent dignity and the right to have their dignity respected and protected.’

(c) Section 14

‘Privacy

Everyone has the right to privacy...’

(d) Section 22

‘Freedom of trade, occupation and profession

Every citizen has the right to choose their trade, occupation or profession freely.’

(e) Section 23.

‘Labour relations

(1) Everyone has the right to fair labour practices.

(2) ...

(3) ...

(4) ...

(5) ...

(6)’

2.1. The Labour Relations Act 66 of 1995 (LRA)

To give effect to and regulate the fundamental right to fair labour practices conferred by section 23 of the Constitution, the LRA was enacted. It is, as expected, premised on the principle of fair labour practices. Essentially, it regulates relations between employers and employees, and, among other things, guarantees protection to employees and applicants for employment from unfair labour practices. Its purpose as per the wording of section 1 is to advance the economic

development, social justice, labour peace and the democratization of the workplace by fulfilling the primary objects of the Act.¹⁴¹ In congruence with international labour law standards,¹⁴² the Act prohibits discrimination on account of grounds such as race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, language, religion, conscience, belief, political opinions, culture, marital status, or family responsibility.¹⁴³ The Act prescribes as automatically unfair any discrimination on the basis of any of these grounds. What is worthy of note is that health status like HIV status has been omitted as a ground upon which discrimination would be unfair. That notwithstanding, it is generally accepted that the Act prohibits discrimination and or dismissals solely on the basis that an employee may be HIV positive.¹⁴⁴ However, the Act permits termination of employment on the basis of incapacity, which may be due to any ailment including HIV/AIDS.¹⁴⁵

2.2. Basic Conditions of Employment Act No.75 of 1997 (BCEA)

This is another piece of legislation whose objective is to give effect to and regulate the right to fair labour practices referred to under section 23 of the Constitution.¹⁴⁶ Further, it strives to give effect to obligations incurred by the Republic as a member state of the International Labour Convention. To realize these goals it sets minimum standards of basic conditions of employment. The Act guards against inhuman basic conditions that may result on account of the notion of freedom of contract. It prescribes minimum working conditions, such as hours of work and leave days (sick, annual and maternity) which parties to an employment relationship may not exclude in their employment contract even if they are willing to do so. The provisions relating to sick leave are of paramount importance in so far as HIV and AIDS is concerned. For instance the Act stipulates that an employee is entitled, in a three year cycle, to paid sick leave of up to the

¹⁴¹ Those objects are stipulated under Section 1 as-

(a) to give effect to and regulate the fundamental rights conferred by section 23 of the Constitution;
 (b) to give effect to obligations incurred by the Republic as member state of the International Labour Organisation;
 (c) to provide a framework within which employees and their trade unions, employers and employers' organizations.....'

¹⁴² ILO Convention 111 of 1958.

¹⁴³ Section 187(1)(f).

¹⁴⁴ Dingake OBK, *Legal Aspects of HIV/AIDS at the Workplace in Botswana and South Africa. A Guide for Legal and Policy Reform* p106.

¹⁴⁵ Section 188(1)(a)(i).

¹⁴⁶ Section 1.

number of days he or she would ordinarily work over a period of six weeks.¹⁴⁷ Also of importance is that the Act allows room to negotiate more sick leave days, on terms and conditions that may be acceptable to the employer.¹⁴⁸

2.3. Employment Equity Act 55 of 1998 (EEA)

This is another Act which was promulgated to give effect to the constitutional fundamental labour rights- the right to fair labour practices under section 23 and the right to equality under 9 of the Constitution. Evidently, it is one of the 'national legislation enacted to prevent and prohibit unfair discrimination' in terms of sub-section 4 of section 9 of the Constitution. Its primary aim, it appears, is twofold: promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups.¹⁴⁹ In the former sense, the EEA places a duty on all the employers 'to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice.'¹⁵⁰ Further, the Act states that 'no person may unfairly discriminate against an employee, or an applicant for employment, in any employment policy or practice, or the basis of any arbitrary grounds which include HIV status.'¹⁵¹ Section 3 proscribes that the Act should be interpreted in compliance with the Constitution, Codes of employment and international law obligations, particularly those contained in the International Labour Organization Convention (111) concerning Discrimination in respect of Employment and Occupation. It is apparent that the Act seeks to emulate international labour law standards and practices set by the international bodies in the field of anti-discrimination laws.

¹⁴⁷ Section 22(2).

¹⁴⁸ Foot note 16.

¹⁴⁹ Section 2.

¹⁵⁰ Section 5.

¹⁵¹ Section 6(1).

2.3.1. Testing for HIV

The Act prohibits both pre and post- employment testing. An employer who wishes to test an employee or a job applicant must first apply for and get authorization from the Labour Court.¹⁵² Thus, compulsory and non-consensual testing of employees or job seekers for HIV is prima facie unlawful and is only permissible if the Labour Court declares it justifiable.¹⁵³ The Act stipulates that the court in authorizing such testing may make any order it considers appropriate in the circumstances and impose conditions relating to

- (a) The provision of counseling;
- (b) The maintenance of confidentiality;
- (c) The period during which the authorization for any testing applies; and
- (d) The category or categories of jobs or employees in respect of which the authorization applies.¹⁵⁴

Another aspect of this Act which broadens protection of employees or applicants of employment who live with HIV is the Code of Good Practice on Key Aspects of HIV/AIDS and Employment issued under section 54(1) of the Act. This leg of the Act shall be discussed below.

Code of Good Practice: Key Aspects of HIV/AIDS and Employment

As indicated above, this Code is the progeny of the Employment Equity Act. Its primary objective is to provide guidelines for employers and trade unions to implement so as to ensure that individuals with HIV infection are not unfairly discriminated against in the workplace. Another attribute of this Code is to give guidance to the courts of law when faced with HIV and AIDS related matters.

¹⁵² Section 7(2) as read with section 50(4).

¹⁵³ *ibid.*

¹⁵⁴ Section 50(4).

2.4. Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000 (PEPUDA).

This is another legislative tool that gives effect to section 9 of the Constitution. It is one of the several legislative mechanisms intended to prevent or prohibit unfair discrimination and to promote the achievement of equality. While EEA governs discrimination in the workplace, this Act applies to discrimination in broader society. In its preamble the Act equates 'unfair discrimination' with discrimination prohibited by international treaties to which South Africa is a member.¹⁵⁵ The Act is intended to respect, promote and fulfill the equality right in the Constitution. The Act does this by *inter alia* providing for

- (a) The equal enjoyment of all rights and freedoms by every person;
- (b) The promotion of equality;
- (c) The values of non-racialism and non-sexism;
- (d) The prevention of unfair discrimination and protection of human dignity;
- (e) The measures to facilitate the eradication of unfair discrimination;
- (f) The measures to educate the public and raise public awareness on the importance of promoting equality and overcoming unfair discrimination;
- (g) The remedies of victims of unfair discrimination; and
- (h) The measures to advance persons disadvantaged by unfair discrimination.

The Act essentially prevents and prohibits unfair discrimination, and provides a platform for those persons who do not fall within the scope of the EEA.¹⁵⁶ This means that employees who are excluded from the ambit of the EEA can bring a claim of unfair discrimination under PEPUDA. Those employees include members of the South African Defence Force, the National Intelligence Service and the South African Secret Services.¹⁵⁷ Admittedly, the scope of this Act is broad. Thus, any person can bring a claim of discrimination to the court in the public interest

¹⁵⁵ For example the ILO.

¹⁵⁶ Section 4 of the EEA.

¹⁵⁷ Section 4 of the EEA.

even if he or she is not him or herself directly affected. And the Act has established a specialized court, Equality Court, for this purpose.¹⁵⁸ What this Act means in the context of this thesis is that it is another piece of legislation whose ambit is wide enough to accommodate issues relating to HIV and AIDS discrimination in the workplace.

2.5. Limitations

Perhaps it is appropriate to mention that these afore-mentioned rights for an HIV positive employee are not absolute. Just like other personality rights, they may be limited in accordance with the general limitation clause in section 36 of the Constitution; in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, having regard to all the relevant factors. Such factors as the nature of the right; the importance of the purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.¹⁵⁹

3. Case Law

3.1. Introduction

As indicated above, the South African Constitution entrenches fundamental human rights such as the right to dignity; the right to freedom; the right to equality; the right to life; the right to freedom of trade, occupation and professions; the right to access health care and services; and the right to fair labour practices. These rights, it is submitted, are of paramount importance in so far as debates relating to HIV and AIDS and workplace discrimination are concerned. In exploring these rights, regard must be had to international law, and where appropriate, to foreign law as prescribed under section 39 of the Constitution.¹⁶⁰ It is apposite under this chapter to sub-head the discussions relating to these rights. However, I shall focus on those which are more encompassing and whose discussion would inevitably and or indirectly make reference to others.

¹⁵⁸ Section 16 of PEPUDA.

¹⁵⁹ Section 36 of the Constitution.

¹⁶⁰ It is imperative to note that consideration of international law is mandatory as per the wording of section 39 and 233.

3.2. The right to equality

This is one of the fundamental rights under the South African Constitution. Apart from being a substantive right, it is also one of the fundamental foundational values informing the Bill of Rights. Some commentators argue that it is the most important right in the South African legislative framework having regard to the country's unique past.¹⁶¹ Ngwenya argues that though the provisions in the Bill of Rights are not ordered hierarchically, it is a truism that the right to equality has a pride of place in the pantheon of fundamental rights.¹⁶² In *Fraser v Children's Court, Pretoria North and Others*¹⁶³ Mahomed DP, of the Constitutional Court explained the importance of this right as follows:

'There can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. ... Consistent with this . . . commitment to equality are the conditions upon which there can be any justifiable limitation of fundamental rights in terms of s 33(now s 36) of the Constitution. In order for such a limitation to be constitutionally legitimate it must be 'justifiable in an open and democratic society based on freedom and equality.'¹⁶⁴

It was stated in the case of *The President of South Africa and another v Hugo*¹⁶⁵ that

'The South African Constitution is primarily and emphatically an egalitarian Constitution. The Supreme laws of comparable constitutional states may underscore other principles and rights. But in light of own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and its organizing principle.'¹⁶⁶

It is beyond dispute that equality is central in the South African Constitution. The concept of equality, as understood from the above excerpts, presupposes that all people are equal and entitled to equality. This should be so irrespective of the position of an individual or group within the society. What is worth noting, which appears to be the primary concern within the

¹⁶¹For centuries South Africa was haunted by institutionalized discrimination; See Dingake OBK, *The Legal Aspects of HIV/AIDS at the Workplace* p 105; Brassely Martin, 'Labour Relations under the New Constitution,' *SALJHR* 1994 p179 at 180; Darcy Du Toit, 'The Evolution of the Concept of 'Unfair Discrimination' in the South African Labour Law,' (2006) 27 *ILJ* 1311 at 1316; and Cathrine Albertine and Janet Kintridge, 'Introducing the Right to Equality in the Interim Constitution,' (1994) 10 *SALJHR* 161 at 161 .

¹⁶²Charles Ngwenya, 'HIV In the Workplace: Protecting the Rights to Equality and Privacy' (1999) 15 *SALJHR* 513 at page 516

¹⁶³1996 (8) *BCLR* 1085; 1997 (2) *SA* 218.

¹⁶⁴1997 (2) *BCLR* (CC) at para 20. See also Darcy Du Toit, 'The Evolution of the Concept Unfair Discrimination in South African Labour Law,' (2006) 27 *ILJ* 1311 at page 1315.

¹⁶⁵(1997) 2 *SA* 897

¹⁶⁶Para 74.

constitutional equality jurisprudence is the need to protect the vulnerable minorities who are more often than not the marginalized section of the society. Therefore, the constitutional commitment to substantive equality seeks to protect individuals having particular regard to their individual varying circumstances. As observed by different commentators,¹⁶⁷ section 9 of the Constitution should be read as setting out a substantive conception of equality as opposed to formal equality. Carole Cooper has argued that substantive approach to equality is fundamental to the full enjoyment of all rights and freedoms by persons in a position of inequality.¹⁶⁸

A comparative glance at other jurisdictions is of some assistance in the discussion of this discourse. The Canadian and American jurisprudence, which the South African courts, including the Constitutional Court, have resorted to for guidance in the past, would be appropriate.¹⁶⁹ Thus, even though the Canadian equality clause differs slightly from the South African, the way in which the Canadian Courts have sought to identify the values and principles underlying the equality clause in developing a principled contextual understanding of equality provides a useful comparative model for South African jurisprudence.¹⁷⁰ The Canadian equality jurisprudence recognizes an anti-disadvantage principle which justifies Supreme Court's insistence that equality is concerned with legal protection against, and redress for, social, political and legal prejudice and vulnerability.¹⁷¹ On the other hand the American approach is expressed in similar terms as follows:

'The core value of this principle is that all people have equal worth. When the legal order that both shapes and mirrors our society treats some people as outsiders or as though they were worth less than others, those people have been denied the equal protection of the laws... Mediated by the antijudgment principle, the equal protection clause asks whether the particular conditions complained of, examined in their social and historical context, are a manifestation or a legacy of official oppression.'¹⁷²

¹⁶⁷ Catherine Albertyne and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' 1994 *SAHLR* 149 at 153.

¹⁶⁸ Carole Cooper, 'The Boundaries of Equality in Labour Law,' (2004) 25 *ILJ* 813 at 817 and 818.

¹⁶⁹ For example in one of their first cases, *Makwenyane v S* 1995 (6) *BCLR* 665, in which the death penalty was abolished, the Constitutional Court repeatedly referred to the Canadian and American jurisprudence.

¹⁷⁰ Cathrine Albertyne and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' 1994 *SAHRJ* 149 at 155.

¹⁷¹ Ruth Colker, 'Section 1, Contextuality and Anti-Disadvantage Principle' (1992) 42 *University of Toronto LJ* 77.

¹⁷² Laurance H Tribe, *American Constitutional Law* 2 ed (1988) at 1515.

It has however been cautioned that we must exercise great caution not to import inapt foreign equality jurisprudence into our nascent equality jurisprudence.¹⁷³

Partly influenced by the above pronouncements, the South African courts have adopted a purposive value based approach in their interpretation and application of the equality principle.¹⁷⁴ In this vein, it is generally discernable from the South African equality jurisprudence that freedom from unfair discrimination to which I shall now turn, is one of the core attributes of the equality right under section 9 of the Constitution.

3.2.1. Freedom from Unfair Discrimination

Integral to the equality rights is an anti-discrimination legal framework. In *Harmse v City of Cape Town*¹⁷⁵ Waglay J of the Labour Court had this to say:

‘The right not to be unfairly discriminated against is an integral part of the right to equality and a necessary condition of the inherent right to dignity in section 10 of the Constitution.’¹⁷⁶

At international level, as stated earlier on, there are numerous international legal instruments which prohibit and prevent illegal discrimination. I do not need to repeat them here save to point out that South Africa is bound by such instruments hence its endeavour to legislate in compliance.¹⁷⁷ The relevant South African constitutional framework is found in section 9 (*supra*).

What is discernable from this section, as was observed by Moseneke J in the case of *Minister of Finance and Another v Van Heerden*,¹⁷⁸ is that the concept of equality under this section extends beyond the mere prohibition of formally unequal treatment (formal equality) to the goal of achieving equal enjoyment of rights (substantive equality). This is what he said:

‘It is incumbent on courts to scrutinize in each equality claim the situation of the complainants in society; their history and vulnerability; the history, nature and purpose of the discriminatory practice and whether it ameliorates or

¹⁷³ Moseneke J in *Minister of Finance and Another v Van Heerden* (2004) 12 BLLR 1181 (CC)

¹⁷⁴ Ibid para 31.

¹⁷⁵ [2003] 6 BLLR 557 (LC).

¹⁷⁶ Ibid para 47.

¹⁷⁷ The general theme of international human rights instruments, for instance the United Nations Charter, places obligations on all member states to incorporate anti-discrimination laws into their domestic legislation. The same obligation is also found in the ILO Convention 111 of 1958 at Clause 2.

¹⁷⁸ Foot Note 42.

adds to group disadvantage in real life context, in order to determine its fairness or otherwise in the light of the values of our Constitution. In the assessment of fairness or otherwise a flexible but “situation-sensitive” approach is indispensable because of shifting patterns of hurtful discrimination and stereotypical response in our evolving democratic society.’¹⁷⁹

He continued as follows:

‘A comprehensive understanding of the Constitution’s conception of equality requires a harmonious reading of the provisions of section 9. Section 9(1) proclaims that everyone is equal before the law and has the right to equal protection and benefit of the law.’¹⁸⁰

For his part, Goldstone J of the Constitutional Court in the case of *President of Republic of South Africa v Hugo*¹⁸¹ deliberated as follows:

‘We need, therefore, to develop a concept of unfair discrimination which recognizes that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not necessarily be unfair in a different context.’¹⁸²

What appears to be clear is that the Constitution, and in particular section 9 thereof, read as a whole, embraces for good reason, a substantive conception of equality inclusive of measures to redress existing inequalities.¹⁸³

In the labour law sphere, this right to equality protects employees from unfair discrimination. Thus, employees in the workplace are entitled to the right not to be unfairly discriminated against. This right, as observed by some commentators, is part of the constitutional right to fair labour practices.¹⁸⁴ Employees need, as matter of right, to be protected against any conduct that undermines their dignity as much as against conduct which unfairly threatens their economic interest.¹⁸⁵ Therefore, as observed by Darcy Du Toit, there is no fundamental disparity

¹⁷⁹ Ibid para 27.

¹⁸⁰ Ibid para 28.

¹⁸¹ [1997] 6 BCLR 708 (CC).

¹⁸² Ibid para 41.

¹⁸³ Ibid.

¹⁸⁴ Darcy Du Toit, ‘The Evolution of the Concept of Unfair Discrimination in South African Labour,’ (2006) 27 ILJ 1311 at 1314.

¹⁸⁵ Ibid at 1316.

between a concept of unfair discrimination rooted in the enforcement of fair labour practices and one premised on upholding the right of equality; and the prohibition of unfair discrimination in the workplace embodies an intersection of these two fundamental objectives.¹⁸⁶

In the case *Harksen v Lane*¹⁸⁷ the Constitutional Court was enabled a platform to lay down a framework for determining unfair discrimination in the context of legislative measures. This is what the court proposed:

‘At the cost of repetition, it may be as well to tabulate the stages of enquiry which become necessary where an attack is made on a provision in reliance on section 8 of the interim Constitution. They are:

(a) Does the provision differentiate between people or categories of people? If so, does the differentiation bear a rational connection to a legitimate government purpose? If it does not then there is a violation of section 8(1) (now section 9(1)). Even if it does bear a rational connection, it might nevertheless amount to discrimination.

(b) Does the differentiation amount to unfair discrimination? This requires a two stage analysis:

(c)(i) Firstly, does the differentiation amount to “discrimination”? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(c)(ii) If the differentiation amounts to “discrimination”, does it amount to “unfair discrimination”? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2) (now section 9(2)).¹⁸⁸

It appears, in the light of this analysis, each and every differentiation on specific or listed grounds is, on the face of it, deemed to be ‘discrimination’ and presumed to be unfair, regardless of its impact or purpose.¹⁸⁹ The case prescribes a two stage enquiry. Thus, fairness and justifiability enquiries are distinct phases of determining whether or not section 9 of the

¹⁸⁶ This argument is borne by the cases of *Professional Teachers v Minister of Education* (1995) 16 ILJ 1048 and *Harksen v Lane* 1997 (11) BCLR 1489 (CC).

¹⁸⁷ 1997 (11) BCLR 1489 (CC.)

¹⁸⁸ *Ibid* para 53.

¹⁸⁹ Darcy Du Toit, *Labour Relations Law: A Comprehensive Guide* p578.

Constitution has been breached. Further, if unfairness of discrimination is established, it is open for the offender to justify his conduct in terms of section 36 of the Constitution. However, owing to the impracticality of this approach in the employment spectrum, Kentridge J qualified it and suggested that ‘the differentiation issue must affect the complainant adversely in some way.’¹⁹⁰ In the case of *Prinsloo* (which was referred to in *Harksen*) the Constitutional Court held that differentiation should in particular impact negatively on human dignity.¹⁹¹

Prior to the EEA, it was generally accepted, as was held in the case of *Prinsloo v Van der Linder*¹⁹² that discrimination should be understood as suggesting a ‘pejorative meaning relating to the unequal treatment of people based on attributions or characteristics attaching to them.’¹⁹³

The case of *Hoffman*, which is undoubtedly the leading case on issues of discrimination and HIV and AIDS is another case which was decided along this reasoning. The Constitutional Court held that it was not competent to discriminate on the basis of HIV status. Because of the importance of this case I shall discuss it in more detail below.

The facts of the case show that Mr Hoffmann applied to South African Airways (SAA) for employment as a cabin attendant. He went through a four-stage selection process and was found, together with 11 other applicants, to be a suitable candidate for employment. This decision was subject to a pre-employment medical examination which included a blood test for HIV and AIDS. He was found to be clinically fit. However his blood test showed that he was HIV positive. He was therefore regarded as unsuitable for employment as a cabin attendant and was not employed.

The court reiterated the reasoning in the cases of *Prinsloo*, *Harksen* and *Hugo*. It noted:

‘At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity. That dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of the discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the

¹⁹⁰ Ibid p 579.

¹⁹¹ Para 31.

¹⁹² 1997 (6) BCLR 759 (CC).

¹⁹³ Para 31.

rights or interests of the victim of the discrimination have been affected, and whether the discrimination has impaired the human dignity of the victim.¹⁹⁴

The court reflected on prejudice and vulnerability of people with HIV and AIDS and observed thus:

‘People who are living with HIV/AIDS are one of the most vulnerable groups in our society. ..prejudices and stereotypes against HIV-positive people still persist. In view of the prevailing prejudice against them, any discrimination against them can, to my mind, be interpreted as a fresh instance of stigmatization and I consider this to be an assault on their dignity. The impact of discrimination on HIV-positive people is devastating. It is even more so when it occurs in the context of employment. It denies them the right to earn a living. For this reason, they enjoy special protection in our law.’¹⁹⁵

The court noted that SAA’s practice treated all persons living with HIV on the same basis. Thus, all of them are unfit for employment as cabin attendants. This practice, the court observed, was on assumptions that are true only for those persons whose infection has reached the stage of immunosuppression, and whose CD4+ count has dropped below 350 cells per microlitre.¹⁹⁶ The court held that the fact that some people who are HIV positive may, under some circumstances, be unsuitable for employment as cabin attendants does not justify the exclusion from employment as cabin attendants all people who are living with HIV.¹⁹⁷ The learned judge argued that people living with HIV should be judged on their merits. They must be protected against prejudice and stereotyping and be treated on the basis of reasoned and medically sound judgments.¹⁹⁸ The court concluded that the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination.¹⁹⁹ It violated his right to equality guaranteed by section 9 of the Constitution, the court held. In a nutshell, the court found that although HIV and AIDS is not listed in section 9

¹⁹⁴ Para 27.

¹⁹⁵ Para 28. Commenting on the case *Dingake O.B.K, in Legal Aspects of HIV/AIDS at the Workplace in Botswana and South Africa* at page 115 noted that the sense of hopelessness and shame resulting from being stigmatized often conspire to create obstacles that discourage people from knowing their status; from seeking treatment and care, and from protecting themselves and others against infection. He further observed that the fear of losing one’s job or the fear of being treated unfairly by one’s employer are often reinforced by stigma and negative attitudes.

¹⁹⁶ Para 30.

¹⁹⁷ Para 32.

¹⁹⁸ Para 35.

¹⁹⁹ Para40

(3) as one of the grounds upon which discrimination is prohibited, it is not competent to discriminate on the basis of HIV status.

Upon enactment in 1998, the EEA settled the position of discrimination and HIV status by codifying it in line with the language of the ILO Convention.²⁰⁰ Du Toit has argued, in the light of this Convention, that the South African approach towards discrimination must be understood as meaning ‘any distinction, exclusion or preference... which has the effect of nullifying or impairing equality of opportunity in treatment of employment or occupation.’²⁰¹ Notably, it introduced HIV status as one of the grounds upon which an employee should not be discriminated against.²⁰²

In the case of *Bootes v Eagle Ink Systems Kwazulu-Natal (Pty) Ltd*²⁰³ the Labour Court was seized with a matter in which the employer had dismissed the employee for alleged misconduct while in actual fact the real reason for dismissal was the employee’s HIV positive status. Pillay J, having in mind the case of *Hoffman* lauded the inroads made by South Africa in relation to HIV and AIDS legal framework. She observed that, (1) in South Africa people living with HIV enjoy the protection of a constitutionally entrenched right not to be discriminated against on the grounds of their HIV positive status; (2) differentiation and dismissal of an employee on account of his or her HIV status is, by definition, an automatically an unfair labour practice. According to Pillay D, J, these three aspects in the South African legal framework impose an enormous burden on anyone who discriminates against an HIV-positive person.²⁰⁴ She castigated the conduct of the employer in that case and stated that camouflaging discrimination under the cloak of misconduct is one of the most insidious forms of unfair labour practices.²⁰⁵ In conclusion, when determining the appropriate relief she remarked that HIV remains a highly stigmatized infection that continues to marginalize its weak and vulnerable victims. Further, she

²⁰⁰ The ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 proscribes discrimination that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. In terms of Article 2, member states have an obligation to pursue national policies that are designed to promote equality of opportunity and treatment in the field of employment, with a view to eliminating any discrimination.

²⁰¹ Darcy du Toit, *Labour Relations Law, A Comprehensive Guide*, p579.

²⁰² Section 6.

²⁰³ (2008) 29 *ILJ* 139 (LC).

²⁰⁴ *Ibid* para 67.

²⁰⁵ *Ibid* para 70.

said employers must be deterred from discriminating against employees on the basis of their HIV-positive status.²⁰⁶

3.3. The right to dignity

The notion of dignity in the South African human rights jurisprudence is understood in two senses; as a discrete human right²⁰⁷ and as a foundational value²⁰⁸ in the Bill of Rights. Its dual significance in the South African context makes it one of the high ranking (if not the most highly ranked) personality right under the Constitution. O'Regan J of the Constitutional Court stated in *S v Makwanyane*²⁰⁹ that:

'The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognizing a right of dignity is the acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worth of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched'²¹⁰

In *The President of the Republic of South Africa v Hugo*²¹¹ Goldstone J of the same court observed as follows:

'At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.'²¹²

What is important in so far as this essay is concerned is that unfair discrimination of any human being bruises human dignity both as a foundational value and as a human right.

From the cases discussed above on equality, it is patent that a breach of an equality right is a simultaneous assault on human dignity. Some writers say that human dignity is such a broad concept that it easily encompasses equality.²¹³ For this reason, the notion of human dignity is of invaluable relevance in the equality jurisprudence and anti-discrimination legal framework.

²⁰⁶ Ibid para 71.2.

²⁰⁷ Section 10 of the Constitution.

²⁰⁸ Sections 1 and 7 of the Constitution.

²⁰⁹ *S v Makwanyane* 1995 (6) BCLR 665 .

²¹⁰ Para 328.

²¹¹ (1997) 6 BCLR 708.

²¹² Para 41.

²¹³ W Freedman, 'Understanding the Right to Equality' 1998 115 SALJ 243 at 249.

Ngwenya has argued that in relation to discrimination and HIV, the crucial consideration consists of treating a person differently, adversely and with effrontery to human dignity on the basis of a personal attribute or characteristic.²¹⁴ This argument accords with the holdings in a number of cases. In the *Prinsloo v Van de Linde*²¹⁵ the court said that unfair discrimination principally means treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. In the *Hoffman* case Ngcobo J stated that dignity is impaired when a person is discriminated against.²¹⁶ He observed that the denial of employment to the appellant because he was living with HIV impaired his dignity and constituted unfair discrimination.²¹⁷ The court in its order for reinstatement of the complainant aimed specifically at restoring his dignity.

It appears from the South African human rights jurisprudence that human dignity is of immeasurable importance. It has been argued that its protection is inherent in the protection of virtually all other rights.²¹⁸ It is said to be central and a foundation of all fundamental rights, some writers have argued.²¹⁹ This proposition finds support from a lot of judicial literature involving South African cases. For example, as it shall be discussed below, it was observed in the cases involving a breach of a socio-economic right like the right to health care and services, and a breach of the right to privacy that such infringements offend human dignity both as a right and as a value under the Constitution.

3.4. The Right to Health Care and Services

One of the laudable and unique features of the South African Constitution is its provision for socio-economic rights as justiciable rights. The right to health care and services is one such right and finds expression under section 27.²²⁰ It guarantees everyone the right to have access to health

²¹⁴ Charles Ngwenya, 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 *SAJR* 513 at 520.

²¹⁵ Note 58 above, para 33.

²¹⁶ Para 27. See also *Bootes* para 71.

²¹⁷ Para 40.

²¹⁸ *Makwanyane* para 328.

²¹⁹ Davis, Cheadle and Haysom, *Fundamental Rights in the Constitution* (1997) 70.

²²⁰ The section *inter alia* provides that,

'(1) Everyone has the right to have access to-

(a) Health care services, including reproductive health care;

(2) The state must take reasonable legislative and other measures within its available resources, to achieve the progressive realization of each of these rights.'

care services. Thus the state has a positive duty, to take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. What this duty entails was discussed on a number of occasions by the Constitutional Court.²²¹ In the case of *Grootboom*, which dealt with housing policy, the court demonstrated that such socio-economic rights are enforceable subject to the availability of resources. It was held that the state's housing policy in the area in question failed to make reasonable provision for those people in desperate need. In *Soobramoney* the claim was dismissed because the applicant failed to establish that the state was in breach of its obligation in so far as the provision of renal dialysis to chronically ill patients was concerned.²²²

Reverting back to HIV and AIDS, in the case of *B and Others v Minister of Correctional Services and Others*,²²³ some HIV positive convicted prisoners who had reached a certain stage of the disease of AIDS approached the High Court and sought *inter alia* an order declaring that the right to adequate medical treatment under section 35 of the Constitution entitled them to receive at the State's expense appropriate anti-viral medication. Brand J of Cape of Good Hope Provincial Division held that by virtue of section 35 the State's duty to provide adequate treatment to prisoners includes providing expensive anti-viral drugs.

In 2002 the court was faced with the case of the *Minister of Health and Others v Treatment Action Campaign*. This case, it is generally accepted, is the face of the HIV and AIDS jurisprudence in the South African legal framework. The facts of the case are well known. It was a matter involving the Government's failure to provide access to health care services to HIV positive mothers and their newborn babies. The issue to be determined was whether the Government's measures fell short of its obligations under section 27 of the Constitution. At the end the court held that the Government was in breach of its constitutional obligations envisaged under section 27 and ordered the Government to provide for prevention of mother to child therapy.

²²¹ *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 and *Soobramoney v Minister of Health, KwaZulu Natal* 1998 (1) SA 756 (CC).

²²² Para 36.

²²³ 1997 (6) BCLR 789 (CC).

3.5. The Right to Privacy

It is recognized under the South African laws that an individual, let alone an employee, has the right to privacy.²²⁴ The law is understood to shun any conduct which is inconsistent with this general position. In the case of *Jansen van Vuuren NO v Kruger*²²⁵ the Appellate Division held that disclosure of a patient's HIV positive status to a third party without the patient's authorization was a breach of privacy. A similar decision was arrived at in the case of *NM and Others v Charlie, Smith, Patricia De Lille and Others*²²⁶ which involved the disclosure of the HIV positive status of some three women in a book. The women alleged that the publication of their names was without their consent and therefore their right to privacy and dignity had been infringed. The Constitutional Court in a majority decision held that the respondents had violated the dignity and privacy of the women and ordered damages in their favour.²²⁷ Madala J who delivered the majority judgment stated as follows:

'The disclosure of an individual's HIV status, particularly within the South African context, deserves protection against indiscriminate disclosure due to the nature and negative social context the disease has as well as the potential intolerance and discrimination that result from its disclosure. The affirmation of secure privacy rights within our Constitution may encourage individuals to seek treatment and divulge information encouraging disclosure of HIV which has previously been hindered by fear of ostracism and stigmatisation. The need for recognised autonomy and respect for private medical information may also result in the improvement of public health policies on HIV/AIDS.'²²⁸

In *C v Minister of Correctional Services*²²⁹ Kirk-Cohen J held that compulsory testing of a prisoner amounted to a breach of the right to privacy. In associating the importance of the right to privacy with the right to equality, Ngwenya argues that the right to equality in the workplace cannot be adequately protected unless there are sufficient safeguards against unwarranted invasions to privacy.²³⁰

²²⁴ Section 14 of the Constitution.

²²⁵ 1993 (4) SA 842 A.

²²⁶ See also the case of *Manto Edmie Tshabalala-Msimang and Others v Mondi Makhanya and Others Case No.18656/07* (not reported) in which the High Court discussed the rights to dignity and privacy relating to the protection of medical records and, the right to freedom of expression.

²²⁷ The court awarded R35 000 as damages to each of the applicants.

²²⁸ Para 42.

²²⁹ 1996 (4) SA 292 T.

²³⁰ Note 76 above page 513.

In the context of HIV and AIDS in the workplace and, as another measure for the protection of privacy, the law generally prohibits any pre or post employment testing.²³¹ In the case of *Joy Mining Machinery, A Division of Harnischferger (SA) v National Union of Metal Workers of South Africa and Others*²³² however, the court allowed the employer to test employees for HIV in terms of Section 7 of Employment Equity Act. In motivating the application the employer argued that the exercise was to enable him to establish prevalence rate at work and subsequently formulate an appropriate strategy. The court was persuaded and consequently granted the order for the employees to be tested. For the purpose of guarding against abuse and protecting the employees, the order was accompanied by the following conditions:

- (1) Testing had to be voluntary and anonymous;
- (2) Testing had to be conducted with the consent of the employee and could not be required as a condition of employment, promotion and or other benefits;
- (3) the samples had to be received and processed by a particular company;
- (4) the applicant and its management could not be involved in the testing apart from participating as employees themselves;
- (5) the applicant could not discriminate against HIV positive employees should it become aware of their status;
- (6) the purpose of the testing was only to discover the percentage of HIV positive employees in order to enable the company to plan an effective HIV/AIDS strategy;
- (7) no prejudicial inference could be drawn from a refusal to submit to testing; and
- (8) the court order, together with a notice that any employee could decline to take the test without being subject to any prejudice, should be displayed.²³³

It appears to me that upon good cause being shown the courts are prepared to allow the employers to test their employees notwithstanding the right to privacy. For example where it can

²³¹ Section 7(2) of EEA prohibits the testing of an employee for HIV status unless the Labour Court, acting under section 50(4), determines that such testing is justifiable.

²³² (2002) 23 ILJ 391 (LC).

²³³ As summarized by Darcy du Toit in Labour Relations Law page 620- 621.

be shown by the employer that being HIV negative is an inherent job requirement²³⁴ or that the testing is in the best interest of the employees themselves. It is evident from the judgment in the above case that: the protection of employees and jobseekers is pivotal in deciding whether or not to allow the employer to test employees; and the South African legal framework is steadfast in its prohibition of discrimination on account of HIV status.

3.6. HIV and AIDS Dismissals

In terms of section 187(1) (f) of the LRA, neither an employee with HIV and AIDS nor a disabled employee may be dismissed solely because of such fact. However, there are circumstances whereby an employee with HIV and AIDS may fairly and lawfully be dismissed on account of such a condition. Examples of those include (i) where an HIV negative status is an inherent job requirement;²³⁵ (ii) operational grounds; and (iii) ill-health or incapacity grounds. These grounds, it has to be stated, justify an otherwise unfair treatment of an employee provided the employer has followed a substantive and procedurally fair procedure prior to the dismissing of the employee.²³⁶

3.6.1. Inherent Job Requirement

It is trite that not all forms of discrimination in the employment spectrum are prohibited. Equally settled is that the use of the word 'unfair' in conjunction with the word 'discrimination' suggests that the drafters intended that a distinction be made between 'permissible' and 'impermissible' discrimination.²³⁷ Therefore the concept of 'unfair discrimination' used in this context should accordingly be read to imply prejudicial differentiation.

Generally, differential treatment of employees on the basis of irrelevant inherent personal differences listed in section 9 (2) of the Constitution or any analogous grounds should not be condoned. The deciding factor on discrimination should therefore be on nothing other than the person's ability to do the job. It is in the realization of this constitutional dispensation that the

²³⁴ See *Bootes and Hoffman* cases.

²³⁵ Section 187 (2) of the LRA and section 6(2)(b) of the EEA.

²³⁶ John Grogan, *Dismissal Discrimination and Unfair Labour Practices*, page 353. See also Schedule 8- Code of Practice: Dismissal Item 10.

²³⁷ *Association of Professional Teachers and Another v Minister of Education and Others* (1995)16 ILJ 1048 at 1083; Cathrine Albertyne and Janet Kentridge, 'Introducing the Right to Equality in the Interim Constitution' 1994 SAHRJ 149 at p161.

South African legal framework recognizes as a valid a statutory defence that an employee can be discriminated against on the basis of the notion of 'inherent requirement of the job.' Put differently, 'inherent requirement of the job' is one of the statutory defences against any claim of unfair discrimination on any one or more of the prohibitive grounds.²³⁸ Thus an employer can invoke it to justify what might otherwise amount to unfair discrimination.

For example, in terms of sections 187(2) of the LRA and 6(2) (b) of the EEA an employer is entitled to dismiss an employee (an HIV employee included) if such a dismissal is based on the inherent job requirement. Put more specifically, an employer can legitimately dismiss an employee on account of HIV positive status if the employer can show that HIV negative status is an inherent job requirement. To find shield behind the inherent job requirement defence, the employer has to establish that the practice complained of is justified on the basis of some characteristics or qualification that is necessary for the performance of the job.²³⁹

The understanding behind this piece of legislation is that any unfair discrimination under section 187(1) (f) is justifiable as fair and lawful once it can be demonstrated that it was an inherent requirement of the job rather than discrimination in the unfair sense, that prompted the employer to either not appoint or to dismiss a particular employee with HIV and AIDS.

The evolution of this defence is traceable back to the International Labour Organization (ILO) in its Discrimination (Employment and Occupation) Convention.²⁴⁰ The Convention states that 'any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof shall not be deemed to be discrimination.'²⁴¹ The South African sections 187 (2) (a) and 6 (2) (b) (supra) are no doubt the progeny of this international standard.

This statutory framework, is 'an escape clause and qualifies automatically unfair dismissals (or any conduct, it is submitted) where the dismissals constitute unfair

²³⁸ Section 6(2)(b) EEA states that, 'It is not unfair discrimination to..distinguish, exclude or prefer any person on the basis of inherent requirement of a job.' Section 187 (2) of the LRA provides that, ' Despite subsection 1(f)- (a) a dismissal may be fair if the reason for dismissal is based on an inherent requirement of the particular job.'

²³⁹ Basson, *Essential Labour Law- Volume 1: Individual Labour Law* (2002) 3rd edition 165.

²⁴⁰ Convention 111 (1958).

²⁴¹ Article 1 (2).

discrimination.²⁴² Thus, an employer can successfully defend a claim of indirect unfair discrimination on the basis of an inherent requirement of the job.

It is appropriate at this stage to reflect on the content of this defence. What exactly does this notion mean?

It is unfortunate that neither the LRA nor the EEA defines this concept. Even the ILO Convention is of no assistance. Therefore, inevitably, regard must be had to other sources of the law for the understanding of the parameters of this defence. The first known case in which this defence was considered is *Collins v Volkskas Bank (Westonaria Branch)*.²⁴³ The case imported the test developed in the American case of *Griggs v Duke Power Company*²⁴⁴ in which the court held that it required a valid commercial rationale for an employment practice to be recognized as an 'inherent requirement' of the job. The facts of the case showed that the employer had refused the employee application for maternity leave in terms of a collective agreement stipulating that such leave would not be granted within two years of the previous maternity leave.

Though the employer did not raise the defence of inherent job requirement, the court nevertheless considered it and held that commercial rationale justified a policy that placed some limitations on the maternity leaves granted to employees. On the facts however the employer could do without the employee's services for three months as her section was in actual fact overstaffed. Therefore the defence of the inherent job requirement could not be sustained in the circumstances.

Not surprisingly, the test formulated in the judgment has attracted a lot of criticism both within and outside the American jurisdiction. It was argued that the case effectively placed commercial profitability and efficiency above the effect that the discriminatory impact had on the employees. In South Africa the courts subsequently rejected the approach as overly permissive and adopted a more conservative one. Naidu, one of the critics of the commercial rationale approach, has argued that requirements which cannot be removed from the job in

²⁴² Basson, *Essential Labour Law- Volume 1: Individual Labour Law* (2002) 3rd edition 165.

²⁴³ (1994) 5 SALLR 34 (IC); (1994) 12 BLLR 73 (IC).

²⁴⁴ (1971) 401 US 424.

question, without dramatically altering the nature of the job, will be regarded as an inherent job requirement.²⁴⁵

In the case of *Association of Professional Teachers and Another v Minister of Education and Others*,²⁴⁶ the court held that a differentiation on the basis of the inherent requirement of a job should be interpreted strictly. In its approach the court excluded business operational reasons. The court pointed out that a differentiation basis on inherent job requirement of a job 'should only be allowed in very limited circumstances.'²⁴⁷ The court also observed that not all forms of discrimination will be regarded as unfair: 'the deciding factor should be a person's ability to do a job.'²⁴⁸

The case of *Whitehead v Woolworths*²⁴⁹ is another case in which the South African courts had an opportunity to deal with the inherent job requirement defence. The matter involved a woman who had been refused appointment to a permanent executive position on account of her pregnancy. One of the issues therein was whether the requirement of uninterrupted continuity of employment was an 'inherent requirement of the job.' The court defined 'inherent requirement' as an indispensable attribute which must relate to in an inescapable way to the performing of the job. The attribute, the court continued, should be so inherent that if not met an applicant would simply not qualify for the post.²⁵⁰ It was therefore held that uninterrupted continuity cannot be an inherent job requirement because it can never be guaranteed.²⁵¹ However it was held on appeal that though no employer can receive any guarantee that any employee will be able to serve for an uninterrupted period of time, the pregnancy of a prospective employee can, on commercial reasons, be taken into account.²⁵²

In the case of *Langadien v University of Cape Town*²⁵³ the Labour Court had another opportunity to deliberate on the defence of inherent job requirement. The applicant in this matter had applied for a job whose advertisement inter alia stated that ability to work with the academic

²⁴⁵ Naidu Melanie, 'The 'Inherent Job Requirement' Defence – Lessons from Abroad,' (1998) *SAMLJ* 10 (Naidu).

²⁴⁶ 1995 (16) *ILJ* 1048 (IC).

²⁴⁷ *Ibid* 1081.

²⁴⁸ *Ibid* 1085.

²⁴⁹ (1998) 8 *BLLR* 862 (LC).

²⁵⁰ Para 37.

²⁵¹ Para 39.

²⁵² *Woolworths v Whitehead* (2000) 21 *ILJ* 571 para 130.

²⁵³ (2001) 1 *BLLR* 76 (LC).

sector was an essential requirement and a tertiary qualification would be an advantage. The applicant was rejected on grounds that she lacked a tertiary qualification. She approached the Labour Court and contended that she had been unfairly discriminated against on account of lack of academic qualification. The court dismissed her application and remarked as follows:

‘It was in this specific sector, the Respondent contends, involving the indispensable requirement of experience of the work described in an academic environment, that the Applicant, notwithstanding her undoubted strengths and attributes at other levels, fell short and was determined to be not appointable.... That requirement, bolstered as would unarguably be the case by a level of tertiary education, was not an unfair one and constituted justifiable discrimination within the ambit of section 6 (2) (b) of the Employment Equity Act 55 of 1998.’

Recently, in *Wallace v Du Toit*²⁵⁴ the employer dismissed his employee (a child minder) because she fell pregnant. In holding for the employee the court expressed in emphatic terms that it could not be said that there was an inherent requirement of the job of an au pair that the incumbent must not be pregnant nor a parent. The court further said that such generalisation or stereotyping confirms the unfairness of the discrimination as envisaged under section 6 (1) of the EEA.

The inherent job requirement was further explored in the case of *Hoffman v South African Airways*.²⁵⁵ Most significantly, in so far as the theme of this dissertation is concerned, the defence was considered in the context of HIV discrimination. The court rejected the employer’s contention that it was in the interest of the business that it ensured the health and safety of its passengers. The court reasoned that a policy that precluded appointment to the position of air steward on the basis of HIV positive status alone amounted to unfair discrimination. The court observed thus

‘...the devastating effects of HIV and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits.’²⁵⁶

It continued:

‘People living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systematic disadvantage and discrimination. They have been stigmatized and marginalized.

²⁵⁴ (2006) 8 BLLR 757 (LC).

²⁵⁵ 2001 (1) SA 1 (CC).

²⁵⁶ Para 35.

As the present case demonstrates, they have been denied employment because of their HIV positive status without regard to their ability to perform duties of the position from which they have been excluded.²⁵⁷

The court made it clear that where health and safety are the justification for the discrimination, nothing short of objective medical evidence will do.²⁵⁸

In *IMATU and Another v City of Cape Town*²⁵⁹ the court was faced with a situation similar to the one in *Hoffman*. The applicant in that matter contended that by reason of his diabetes, he had been discriminated against on the ground of disability or in the alternative, on an analogous ground in contravention of section 6 (1) of the EEA. The employer in response argued that the blanket ban was justified on the basis of failure to discharge the inherent requirement of the job. The court found that the decision not to appoint the applicant on the basis of his medical condition alone, without assessing his individual capacities, constituted unfair discrimination that could not be justified. The court condemned the employer's policy as over-inclusive and noted as follows:

'The respondent is guilty of assigning characteristics which are generalized assumptions about groups of people to each individual who is a member of that group, irrespective of whether that particular individual displays the characteristics in question. It is treating all insulin-dependent diabetics the same and imposing a blanket ban on the employment of that group as fire fighters, irrespective of whether the particular individual - such as Murdoch (the applicant), who is physically fit and in optimal control of the diabetes - displays any susceptibility to uncontrolled hypoglycaemic episodes.'²⁶⁰

What this means is that in determining whether a particular employee can discharge the inherent requirements of the job, it is important to move beyond generalizations about hypoglycaemic attacks in insulin-dependent diabetes sufferers; and it is essential to consider the individual circumstances and capacities of each sufferer.

What is discernable from the reading of the aforementioned cases is that the 'inherent requirement of the job' as a defence to a claim of unfair discrimination depends mainly on the nature of the job. In the context of HIV positive status, it appears, the employers would not find

²⁵⁷ Para 28.

²⁵⁸ Para 35.

²⁵⁹ [2005] 11 *BLLR* 1084 (LC).

²⁶⁰ Para 113.

it smooth to find shield behind this defence.²⁶¹ What is important, the courts have emphasized, is to consider the individual circumstances of an employee, his capacities *vis-à-vis* the nature of the job and its inherent requirements. This argument, it is submitted, will apply with equal force in cases of employees who are HIV positive.

3.6.2. Operational Requirement

It is worth noting that discrimination of an HIV positive employee in the workplace may be at the instance of people other than the employer. For instance, fellow employees may refuse to work with such an employee because of his or her HIV positive status. The question is, would the employer be justified to dismiss such an employee? The South African courts have on more than one occasion dealt with cases with similar scenarios.

In one case, *Mazibuku and Others v Mooi River Textiles Ltd*²⁶² members of a majority union refused to work with employees of a minority union. The employer basing its decision on operational grounds dismissed the employees of the minority union. The court however judged such dismissals as unfair and pointed out that the mere fact that dismissal would ensure ongoing, smooth commercial operation is not enough. 'Something more is required', held the court.²⁶³ The court held that the employer should, before dismissal, exhaust all available alternatives.²⁶⁴

In the case of *East Rand Propriety Mines Ltd v UPUSA*²⁶⁵ the Labour Appeal Court had to deal with a case in which some Zulu speaking employees were placed under threat by Xhosa speaking colleagues. The employer dismissed the Zulu speaking workers on the basis of operational requirements. The court held that:

'There can be no doubt that, for management itself to dismiss a worker merely because he is Zulu, or because she is Jewish, or because he or she has HIV, would be reprehensible. For management to dismiss not

²⁶¹ For example in the case of *Bootes v Eagle Systems Kwazulu-Natal* (2008) 29 ILJ 139 (LC) the employer camouflaged discrimination under the cloak of misconduct. The court therein made the following observation: 'Justifying discrimination on the grounds of an employee's HIV-positive status is a hard row to hoe. Not surprisingly, employers try to avoid basing a dismissal on an employee's HIV status.' Furthermore, in terms of section 11 of the Code, no employee may be dismissed solely because of his or her HIV status.

²⁶² (1989) 10 ILJ 721 (IC).

²⁶³ Page 886.

²⁶⁴ Page 887.

²⁶⁵ 1996 ILJ 1134.

directly for that reason, but because the rest of the work-force holds that reason, places management only at one remove from the opprobrious consideration. That remove is of course without significance. It means that management will, ultimately, when it truly has no alternative, be permitted to dismiss when it cannot guarantee the safety of employees whom the rest of its workforce, for reprehensible reasons of ethnic hostility, threaten with injury or death. But it also means, in my view, that management truly must have no alternative, and that no discretionary 'band of reasonableness' can be granted it.²⁶⁶

What this judgment suggests is that where an employer has no alternative and cannot guarantee the safety of the employees when the rest of the workforce threatens, it can lawfully and fairly dismiss the threatened workers. The court will countenance the dismissal, it was held, only if it is satisfied not only that the employer has acted reasonably but also that it had no alternative. This proposition, it is argued, is equally applicable to operational reasons which may result from HIV and AIDS prejudices.²⁶⁷

In a more recent case, *Lebowa Platinum Mines Ltd v Hill*²⁶⁸ the Labour Appeal Court dealt with a dismissal for 'incapacity' in circumstances comparable to the above cases, where a dismissal is instigated by the conduct of a third party. The court stated that while the question whether it was fair to dismiss an employee in response to a demand from a third party depended on the circumstances, certain principles had to be taken into account. These were:

- (i) the mere fact that such a demand had been made was not enough to justify the dismissal;
- (ii) the demand had to have sufficient foundation;
- (iii) the threat of action by the third party if its demand was not met had to be real and serious;
- (iv) the employer had to have no other option but to dismiss;
- (v) the employer must have made a reasonable effort to dissuade the third party from carrying out its threat;

²⁶⁶ Ibid p1150-1151.

²⁶⁷ Nicola Smit, 'Some Observations Regarding the Occurrence and Management of HIV/AIDS in South African Workplaces,' (2005) 2 *TSAR* 358 at 361.

²⁶⁸ (1998 7) *BLLR* 666 (LAC).

- (vi) the employer should investigate and consider alternatives to dismissal and consult with the employee;
- (vii) the extent of injustice to the employee must be considered; and
- (viii) the blameworthiness of the employee's conduct should be taken into account.²⁶⁹

It is argued that the propositions read from the aforementioned cases are equally applicable in the context of discrimination and dismissal on account of HIV and AIDS. The courts would thus be guided by them in a situation whereby employees refuse to work with an HIV positive fellow employee merely because of his or her status. What is clear from the above case law however is that the courts would be strict in their approach in determining whether or not to condone such a dismissal. The courts, it appears, would be very cautious and slow to endorse such a dismissal. The courts' attitude in these circumstances is quite understandable having regard to the fact that such discrimination and dismissal is inherently and painfully unfair as it is on account of no fault of the employee in question. That notwithstanding, the reality of the matter is that in some circumstances, an HIV positive employee may be discriminated against and subsequently dismissed if it is so demanded by the workforce. It would be unfortunate but it is not a far-fetched possibility. In this scenario, the employer may legitimately plead operational requirements to justify the dismissal if, like in the case of *East Rand Proprietary Mines*, the employee's life is placed under threat by fellow employees. The court for its part would, having regard to the principles laid down in the *Lebowa* case, countenance the discrimination and dismissal if it is satisfied that the employer not only acted reasonably, but that it had no alternative to dismissal.

3.6.3. Incapacity

It is settled that incapacity is one of the grounds upon which an employee may be fairly discriminated against and dismissed. This is on condition that a fair reason exists and fair procedure has been followed.²⁷⁰ This golden rule is based on international labour standards.²⁷¹ Section 188 of the LRA and the Code of Practice: Dismissal which are no doubt the progeny of these standards, give guidelines in this regard. In terms of these guidelines, an otherwise unfair

²⁶⁹Ibid. As listed in the head-note at p 666.

²⁷⁰ Basson A, *Essential Labour Law*, 4th ed, 2005 page 131.

²⁷¹ ILO Convention Article 4.

dismissal of an HIV positive employee would be justified if the employer can show that the reason for dismissal was for a fair reason and on account of incapacity, and the employer followed a substantively and procedurally fair procedure before dismissing the employee. The guidelines set in the Code are worth quoting:

‘Any person determining whether a dismissal arising from ill health.. is unfair should consider:

- (a) Whether or not the employee is capable of performing the work; and
- (b) If the employee is not capable-
 - (i) the extent to which the employee is able to perform the work;
 - (ii) the extent to which the employee’s work might be adapted to accommodate the disability, or where this is not possible, the extent to which the employee’s duties might be adapted; and
 - (iii) the availability of any suitable alternative work.’

Whatever is the cause of the incapacity, the employer is under a duty to assess the severity and the nature of the incapacity, and the extent to which the employee is unable to perform.²⁷² In the celebrated case of *Hoffman v South African Airways*²⁷³ the court pointed out that the onus is on the employer to prove that the employee is in fact incapacitated. The court concluded that the applicant had been denied employment not because of his inability to do the job, but because of irrational discriminatory assumptions against people with HIV infection. The court observed that the policy which precluded appointment to position of air steward on the basis of HIV- positive status alone constituted unfair discrimination.²⁷⁴ The court further pointed out that where health and safety are justification for the discrimination, nothing short of objective medical evidence will do.²⁷⁵

Similar reasoning was advanced in *Imatu V City of Cape Town*²⁷⁶ case where the court said that when determining whether a particular employee can discharge the inherent

²⁷² Grogan J, *Dismissal, Discrimination and Unfair Labour Practices* at page 355.

²⁷³ (200) 21 ILJ 2357 (CC).

²⁷⁴ Para 35.

²⁷⁵ Ibid.

²⁷⁶ (2005) 11 BLLR 1084 (LC).

requirements of the job, it is important to move beyond generalizations. It is important, the court observed, to consider individual circumstances and capacities of each employee.²⁷⁷

What is readable from *Hoffman* is that there may be instances where an employee has reached a stage of incapacitation due to any cause, including HIV, where the employer would be justified in dismissing the employee. In such circumstances, the discrimination and dismissal would be fair provided a fair procedure has been followed. What is also apparent is that incapacity as a result of an HIV infection should not be treated differently from any other chronic ailment.²⁷⁸

3.6.4. Reasonable Accommodation

The position of the law is that before the employer can dismiss an employee on account of incapacity (as a result of HIV infection for instance) he has a duty to consider reasonably accommodating the employee notwithstanding the incapacity.²⁷⁹ In this exercise, the employer has to consider possible alternatives to dismissal including adapting employee's current duties, providing reasonable assistance and or equipment to help cope with those duties, or finding alternative work.²⁸⁰ Ultimately however, after attempts to reasonably accommodate fail, the employer may legitimately dismiss the employee.

The above propositions were classically discussed in the case of *Standard Bank v Ferreira*.²⁸¹ The starting point according to the court is that implicit in the duty to accommodate employees is the employer's obligation to prevent discrimination.²⁸² The court held that if an employer fails to reasonably accommodate an employee with disabilities, the dismissal of that employee is not merely unfair but automatically unfair.²⁸³ The court noted that finding an accommodation and proving it to be reasonable is an onus resting on the employer. So is the onus of proving that a reasonable accommodation is unjustifiable.²⁸⁴ Thus,

²⁷⁷ Para 106

²⁷⁸ Grogan at page 355.

²⁷⁹ Section 1 of EEA defines 'reasonable accommodation' as any modification or adjustment to a job or to the working environment that will enable a person from designated group to have accesses to or participate or advance employment.

²⁸⁰ Grogan at page 357.

²⁸¹ [2008] 4 BLLR 356 (LC).

²⁸² Para 79.

²⁸³ Para 80. It is worth noting that the court uses the terms disability and incapacity interchangeably.

²⁸⁴ Para 92.

‘ the employer who tenders a reasonable accommodation discharges its duty if the employee rejects it unreasonably. If the employee rejects the tender, the employer may lawfully dismiss the employee on the grounds of her incapacity.’²⁸⁵

3.6.5. Unjustifiable Hardship

Implicit in the employer’s duty to reasonably accommodate an employee who is incapacitated due to illness (HIV infection for example) is consideration of the employer’s circumstances.

Unjustifiable hardship is a consideration which relieves employers of their obligation to accommodate disabled or incapacitated employees.²⁸⁶ The court in *Ferreira* case observed that

‘no hard and fast rule can be set as to what constitutes undue hardship. Each case has to be determined on its own facts.’²⁸⁷

The court observed that for any financially sound institution, proving unjustifiable hardship is hard. The court noted,

‘For the largest bank in Africa, employing 42 265 employees, having total assets exceeding R1 trillion, and making substantial donations to arts, culture, sport and education, the costs of a headset and OT report would have been infinitesimal.’²⁸⁸

In conclusion the court found that,

‘Having failed to accommodate Ferreira and discharge the onus of proving that any of the suggested adjustments would be unjustified hardship, the court finds that the Bank discriminated against Ferreira.’²⁸⁹

What is discernable from the afore discussion is that in considering the employer’s duty to accommodate an employee who is incapacitated due to HIV related ailments, regard must be had to the effect that that accommodation will have in the operation of the organization. This proposition is applicable to any incapacity irrespective of its cause.

²⁸⁵ Para 92.

²⁸⁶ Item 6.12 of the Code defines ‘unjustifiable hardship’ as ‘action that requires significant or considerable difficulty or expense. This involves considering among other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.’

²⁸⁷ Para 99.

²⁸⁸ Para 138.

²⁸⁹ Para 140.

CHAPTER FIVE CONCLUSIONS AND RECOMMENDATIONS

I have outlined the laws and policies relating to HIV and AIDS- induced discrimination in an industrial relations spectrum in Botswana and South Africa. In order to put my arguments in perspective, the basis of my conclusions is influenced by the two angles from which I look at the attitude of the two countries towards HIV and AIDS in an industrial spectrum. Thus, there is a workplace legislative and policy framework on one hand, and national policy framework on the other. My submission is that the latter is as important as the former in employment relations in so far as HIV and AIDS is concerned. Furthermore, it is a true reflection of political will and commitment towards the battle against HIV and AIDS- induced discrimination.

Botswana has in place a commendable policy framework, in particular the Botswana Policy on HIV and AIDS, which addresses unfair discrimination in the workplace. Salient in this policy document and others- such as the Public Service Code of Conduct on HIV and AIDS in the Workplace and the National Industrial Relations Code of Practice- is that it prescribes elimination of any unfair discrimination and the promotion of non-discrimination. It prohibits discrimination on arbitrary grounds, including HIV and AIDS. Generally, on the face of the Botswana policy framework, one can hardly ask for a better workplace policy framework which protects employees with HIV and AIDS.

Notwithstanding the fore- mentioned policy framework, there is at present no specific legislation dealing with discrimination in the workplace on account of HIV and AIDS, or the epidemic generally. It is one of the findings of this study, and a recommendation that there is a need to turn this existing policy framework into anti- discrimination legislation that would clearly confer protective rights to employees with HIV and AIDS. In the 2003 decision of *Rapula Jimson*,²⁹⁰ Legwaila JP of the Industrial Court lamented the absence of legislative framework and decried that the time had come for the government to ‘develop and implement laws and regulations...to eliminate the stigma and discrimination against people living with HIV and AIDS’ as prescribed in the Botswana policy framework. This recommendation by the Judge President came about in this case in which an employee lost his job because of a discriminatory policy developed by an employer taking advantage of lack of protective legislation. The

²⁹⁰ IC 35/2003

employee's employment was terminated not because he was incapacitated but merely because he was HIV positive. The court observed in that case that the Botswana policies have no legal authority and advised that it is for the legislature to translate them into laws not the courts. This observation, it is submitted is quite sound. It is shared by amongst others, BONELA.²⁹¹ An officer from BONELA was quoted as saying that there are some companies which test people for HIV prior to their employment. He stated, '...a policy... cannot change the status quo...you cannot go to court using policy.'²⁹²

Of significance is that despite Legwaila JP's concerns and BONELA's campaigns, there is still at the present no response by the government to translate Botswana's admirable policies into law. The Botswana National Policy on HIV and AIDS has been in place since 1998. Its objectives, it is submitted, accord with international labour standards.²⁹³ However, it is apparent from the situation on the ground that despite its existence, some employers continue to infringe its spirit. It is therefore submitted that the policies' moral and persuasive force is not enough to deter employers from embracing unfair discriminatory employment policies within their organizations hence the need for legislative intervention.²⁹⁴ According to Botswana AIDS Impact Survey II of 2005, about 11% of workplaces in Botswana have HIV pre-employment test as their recruitment policy.²⁹⁵

Another reason why there is a need for legislative intervention is that the major sources of the policies are not always in congruence in matters relating to HIV and AIDS in the workplace. For instance, as noted by Legwaila JP in *Rapula Jimson*, the Botswana National Policy on HIV and AIDS is at odds with the Botswana National Strategic Framework for HIV and AIDS 2002-2003 (now 2003- 2009); the policy maker after categorically stating that there should be no pre-employment HIV testing, four years later in another policy document left it to

²⁹¹ Mmegi 13th March 2008

²⁹² South Africa, Zimbabwe, Namibia and Angola are examples of countries within the region which have passed laws to prevent HIV related discrimination in the workplace- Mmegi 13 March 2008..

²⁹³ ILO for instance.

²⁹⁴ Note the following: *Rapula Jimson* and *Nelson Matlhodi Lemo* cases; Botswana General Orders 158.1 and 158.2; Assistant Minister of Labour and Home Affairs, Mr Gaotlhaetse Matlhabaphiri was quoted in Mmegi 13th March 2008 as conceding that the government was aware that Diamond Firms in Botswana are testing people for HIV prior to employment and refused them employment upon testing positive- Business and Human Rights: HIV/AIDS Discrimination, at <http://www.business-humanrights.org/Categories/Issues/Discrimination/HIVAIDSdiscrimination> [Accessed 2nd February 2010]

²⁹⁵ Page 12.

the employers to make decisions regarding recruitment of people with HIV and AIDS.²⁹⁶ Further, the General Orders state in bold letters that any government employee recruited outside the country shall, among other tests, undergo HIV pre-employment testing.²⁹⁷

There are currently two decisions of the Industrial Court which are in conflict on the constitutional protection of HIV infected employees or job applicants, and the relevance or the extent of the relevance of the constitution in employment matters relating to the private sector. The discussion of the conflicting judicial views was done in chapter 3. They bolster the argument that there is a glaring need to legislate matters relating to HIV and AIDS as the South Africans have done.

On this note there is perhaps a need to broaden the protection of employees and job seekers within statutes. Further, section 23 of the Employment Act may be amended to include 'HIV and AIDS' and 'health status.' The concept of 'reasonable accommodation' should also be imported into our statutes so as to define the parameters within which HIV infected employees can be accommodated. Put simply, there is a need for statutory guidelines on incapacity and or ill-health as is the case in South Africa.

It is worth noting that the National Policy urges the private sector to develop and implement policies and programs for management of HIV and AIDS. However, it appears a lot of employers have not taken heed of this. According to Botswana AIDS Impact Survey II of 2005 about half (53%) of surveyed workplaces reported having HIV and AIDS policies.²⁹⁸ This low compliance rate, it is recommended, can be curbed if this requirement is made a legal requirement with resultant sanctions for non-compliance.

I have made a case for legislative intervention in the Botswana framework. It is submitted that Botswana should take a leaf from the South African legal framework to meaningfully regulate discrimination in the workplace on account of HIV and AIDS. South Africa has a comprehensive legal framework from which Botswana can draw.

²⁹⁶ *Rapula Jimson* p20

²⁹⁷ See foot note 74.

²⁹⁸ Page 12.

On political commitment towards HIV and AIDS, Botswana has over the years won international accolades.²⁹⁹ The following are some of the numerous international praises:

- ‘The Government of Botswana has demonstrated a very high level of political commitment to addressing the HIV and AIDS epidemic. ...Botswana’s success provides a fine example of how antiretroviral therapy can be provided on a large scale in resource-constrained settings.’³⁰⁰
- ‘Festus Mogae³⁰¹ prioritized combating the stigma associated with HIV and AIDS and put in place one of Africa’s most progressive and comprehensive programs for dealing with the disease.’³⁰²

Such commitment, it is argued, has been demonstrated in various ways, amongst them, the allocation of funds towards the fight against the epidemic within very tight financial constraints.³⁰³ Further, the National HIV and AIDS Strategic Plan referred to in Chapter 3 is aligned to the National Development Plan 9 to emphasize the longer-term development aspects of the national response to the epidemic; to ensure that the epidemic is sufficiently captured within the national planning and budgeting circles; and to ensure that it is given the necessary political endorsement.³⁰⁴

It has been demonstrated in chapters 3 and 4 above that an HIV positive employee may at one stage be too ill to work (incapacitated) and consequently liable to a fair dismissal. It has also been indicated that it is the most productive section of the society which is hardest hit by the epidemic. What does the outlined political commitment in Botswana therefore mean in the employment spectrum? It is argued that employees who are infected would as a result of readily available antiretroviral drugs live a longer and healthier life.³⁰⁵ Thus, they will be protected from HIV related illnesses and or incapacity which would otherwise render them liable to fair discrimination and dismissal on account of HIV and AIDS.

²⁹⁹ In the late 90s Botswana’s response to the epidemic was expanded in many directions to include education, prevention and comprehensive care. The country became the first African country to provide antiretroviral drugs to all its needy citizens. By 2006 almost all of those in need were receiving free medication- <http://www.avert.org/aids-botswana.htm> [accessed 18 January 2010].

³⁰⁰ WHO, June 2005.

³⁰¹ President of the Republic of Botswana, 1998-2008

³⁰² Kofi Annan, Former Secretary General of the UN, Issue 2 Vol. 6 Havard School of Public Health.

³⁰³ The Botswana’s annual budget reveals that in the past five years the largest share has been going to the State President Ministry within which HIV and AIDS falls. Further, it is revealed, the largest share in that Ministry has always gone to HIV and AIDS programs ahead of the Botswana Defence Force, Botswana Police Service and Directorate of Intelligence and Security.

³⁰⁴ Botswana National HIV/AIDS Strategic Plan 2003-2009 at page 8.

³⁰⁵ See foot note 1.

The South African legal framework on the other hand protects HIV positive employees at two levels, being the constitutional and statutory levels. The constitution, which is the supreme law of the land, confers protective rights on vulnerable members of the society such as those with HIV and AIDS. Such rights as the right to equal protection of the law, equality, dignity, privacy, freedom of trade, occupation and profession and fair labour practices, can be interpreted to protect people with HIV and AIDS.³⁰⁶ To give effect to these rights, the legislature enacted various statutes such as the LRA, BCEA, EEA and PEPUDA whose cumulative essence confers on HIV positive employees and job applicants the right to fair labour practices, the right to equality, the right not to be discriminated against on the account of HIV status, and the right not to be arbitrarily tested for HIV.

There is also the Code of Good Practice: Key Aspects of HIV/AIDS and Employment which gives guidelines to ensure that employees with HIV are not unfairly discriminated against. There are other Codes such as the Code of Good Practice: Dismissals and Code of Good Practice on Dismissal Based on Operational Requirements which may be implicated whenever a consideration of discriminating and dismissing an HIV infected employee arises. These Codes, it is worth a mention, are in line with the international labour standards as prescribed in the ILO. As a supplement to the constitutional and statutory framework, they complete a comprehensive protective framework for South African industrial relations and HIV and AIDS.

In contrast to the political relevance to HIV and AIDS, the above arguments for Botswana cannot be sustained in the South African context; at least during the reigns of Mbeki and Msimang.³⁰⁷ This is why. The story of political relevance towards the epidemic in South Africa has been criticized as the most controversial. It is littered with examples of Government's inaction and harmful interference, pseudoscience and conflict between politicians, AIDS organizations and scientists.³⁰⁸ The two leaders doubted international literature on HIV and AIDS and did not promote any policy to meaningfully fight the scourge. On the 28th of October, 1999, President Mbeki was cited as having said to the National Council of Provinces that it

³⁰⁶ *Hoffman v SAA*

³⁰⁷ Mbeki and Msimang were the President and Minister of Health respectively in the South African Government until recently.

³⁰⁸ HIV and AIDS in SA, at <http://www.avert.org/aidssouthafrica.htm> [Accessed 18th January 2010].

would be 'irresponsible' of the government to supply antiretroviral treatment to those who needed it because the drugs were alleged to be poisonous.³⁰⁹ The after-effects of this attitude are still felt today.³¹⁰

After immense pressure (from locally and internationally) the South African Government grudgingly implemented ARVs roll out in mid 2005. This step notwithstanding, the situation is far from being satisfactory.³¹¹ South Africa performs far worse than many countries which spend less on health.³¹² What does this mean in so far as this dissertation is concerned? What does this situation implicate in South African employment spectrum?

It is argued that in contrast to Botswana, the South African approach (at least during the Mbeki government) reflects a lack of political will in so far as HIV and AIDS policies are concerned. In the spirit of the thesis of this paper, the situation means that a lot of employees who get sick due to lack of treatment or interrupted treatment get quicker to a stage where employers can legitimately discriminate against them on account of their HIV induced incapacity and fairly dismiss them. It is my argument that the South African policies in this regard are by far lacking in protecting HIV infected employees as compared to their Botswana counterpart.

³⁰⁹ Zuma buries ghost of Mbeki's Aids denial, at <http://www.timeslive.co.za/news/article172702.ece> [Accessed 29th October 2009].

³¹⁰ In 2008 over 250 000 South Africans died of AIDS- Statistics South Africa (2009, July), at <http://www.statssa.gov.za/Publications/stasdownload> [Accessed 27 January 2010]; One study calculated that over 330 000 lost their lives between 2000 and 2005 due to the Government not making ARVs as widely available as was possible- Chigwete P, 'Estimating the Lost Benefits of Antiretroviral Drug Use in South Africa' (2008, December), *Journal of Acquired Immune Deficiency Syndrome*, at http://aids.harvard.edu/lost_Benefits [Accessed 27th January 2010]; It is estimated that by 2015, 5.4 million South Africans would have died of AIDS, at <http://www.avert.org/safricastats.htm> [Accessed 17th January 2010]; and In August 2009, Mark Heywood, the director of the AIDS Law Project and deputy Chair of South Africa's National AIDS Council in describing the current situation put it this way: 'What we are seeing today are the chickens of Mbeki's AIDS denialism coming home to roost.' - <http://www.plusnews.org/Report> [Accessed 28 January 2010].

³¹¹ At the end of 2007, only 28% of people living with HIV received ARVs, WHO (2008); In Free State for instance, 30 patients died a day in 2008 due to shortages of drugs, at <http://www.avert.org/southafrica.htm> [accessed 27th January 2010]. See also Mail and Guardian 2-8th October, 2009 at page 9. According to Magazine for Treatment Action, Issue 29 of September 2009, during the four months a moratorium was implemented in Free State province (lack of funds cited as the cause), the cost for the drugs would have been around R800 000. To demonstrate flagrant lack of political commitment to HIV infected people, a few weeks later the province gave R30 million to political parties' election campaigns! At around the same period the Provincial Cabinet spent R11 million on needless luxurious cars. Again, according to the same magazine, South Africa has invested 17.4 billion on the 2010 World Cup! See also South Africa, Free State Sufferings continues, at <http://allafrica.com/stories/200909010499.html> [accessed 29th January 2010].

³¹² Magazine for the Treatment Action Campaign, Issue 29 of September 2009, at page 11.

Finally, it is my argument that from the comparative reflection of the two countries, the ideal approach that can guarantee employees with HIV and AIDS some protection against unfair discrimination in an industrial set-up is the combination of sound policy and legislative framework backed by political commitment.

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