

**A CRITICAL EVALUATION OF THE PROTECTION OF THE RIGHTS OF
EMPLOYEES LIVING WITH HIV/AIDS IN THE SOUTH AFRICAN WORKPLACE**

by

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DECLARATION

I declare that **A CRITICAL EVALUATION OF THE PROTECTION OF THE RIGHTS OF EMPLOYEES LIVING WITH HIV/AIDS IN THE SOUTH AFRICAN WORKPLACE** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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SUMMARY

People living with HIV/AIDS have the right to be employed as long as they are physically fit to do the work. The unfortunate situation now is that in many South African workplaces employees who disclose their HIV/AIDS status or who are suspected of living with the disease face backlashes from fellow employees and sometimes even from employers. No one should be discriminated against or be prevented from being employed or dismissed from employment purely on the basis of having HIV or AIDS.

Any form of discrimination against employees living with HIV/AIDS constitutes a violation of their constitutional rights to among others human dignity, equality and fair labour practices. Discrimination may take the form of pre-employment HIV testing or a dismissal due to HIV positive status.

This research looks at the protection given to employees living with HIV/AIDS in the South African workplaces and whether the protection is adequate or not.

KEY WORDS

HIV/AIDS, protection, stigmatisation, discrimination, dismissal, human dignity, disease, pandemic, employees, unfair labour practice, workplace.

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ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome (AIDS)
ARV	Antiretroviral
ADA	Americans with Disabilities Act
BER	Bureau for Economic Research
CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act
ERISA	Employee Retirement Income Security Act
FMLA	Family Medical Leave Act of
HIV	Human Immunodeficiency Virus
HIPAA	Health Insurance Portability and Accountability Act
HPCSA	Health Professions Council of South Africa
ILO	International Labour Organisation
KAP	Knowledge, Attitudes and Practices
LRA	Labour Relations Act
NDF	Namibian Defence Force
NEHAWU	National Education, Health and Allied Workers' Union
NGO	Non-Governmental Organization
NUMSA	National Union of Metalworkers of South Africa
OSHA	Occupational Safety and Health Administration
SAA	South African Airways
SABCOHA	South African Business Coalition on Health & AIDS
SADC	South African Development Community
SALC	Southern African Litigation Centre
SANDF	South African National Defence Force
SASFU	South African Security Forces Union
SME	Small and Medium-Sized Enterprises
TAG	Technical Assistance Guidelines
WHO	World Health Organization

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CHAPTER 1: INTRODUCTION

1.1 Background

It is estimated that around 25 million people in the world have died as a result of Acquired Immune Deficiency Syndrome (AIDS) since it was first discovered in 1981. AIDS results from an infection by a virus known as Human Immunodeficiency Virus (HIV) which has spread all over the world in pandemic proportion.¹ The large death toll that AIDS has caused so far on the global population makes HIV/AIDS one of the most lethal pandemics in recorded history.²

In the wake of the HIV/AIDS tragedy, a deadly second pandemic has emerged in the form of abuse of the rights of those who are living with HIV/AIDS or those who are suspected of living with the virus. Discrimination and intolerance due to the stigma attached to the disease and the lack of understanding about the disease have caused thousands of people to lose their jobs and social standing³ either through dismissal or forced resignation.

1.2 Problem Statement

1.2.1 General

The International Labour Organisation (ILO) states that the labour force in South Africa will by the year 2020 be 17% smaller than it was in 2000 because of the impact of HIV/AIDS on workers.⁴ The report further mentions that the pandemic will affect business by increasing costs and by reducing revenue as employers will use their profit on health, funeral costs, and training and recruitment of a new workforce.

¹ Javier Vasquez (PAHO Human Rights Advisor), *Human Rights & Health, Persons Living with HIV/AIDS* 2008 (Pan American Health Organisation) 1.

² Javier Vasquez *Human Rights & Health, Persons Living with HIV/AIDS* 1.

³ Javier Vasquez *Human Rights & Health, Persons Living with HIV/AIDS* 2.

⁴ David Goos and Derek Adam-Smith *Organizing Aids Workplace and Organizational Responses to the HIV/AIDS Epidemic* 1 ed (1995) 8.

The business suffers when a worker is absent from work as a result of HIV/AIDS as this requires another employee to cover for that absent employee. On the other hand, productivity is slowed down when a sick worker suffering from HIV/AIDS attempts to work. Companies suffer when some of their employees are absent from work due to funeral attendance or as they will be taking care of those who are very ill because of HIV/AIDS. To re-train a new employee after the death of another employee can be catastrophic for some of the companies. HIV/AIDS has not only led to the death of millions of people but also to unfair discrimination of people living with the virus.⁵ Discriminating against people living with HIV/AIDS violates their constitutional rights to among others equality, human dignity, and privacy protected by the Constitution of South Africa, 1996 (the Constitution).

The United Kingdom Declaration of the Rights of People with HIV and AIDS developed in 1991 provides as follows:⁶

“No person should be barred from employment or dismissed from employment purely on the grounds of their having HIV or having AIDS or an AIDS related condition. Employers should ensure that their terms and conditions of employment are such as to enable people with HIV/AIDS or an AIDS related condition to continue in their employment and to do so in a healthy and safe working environment. Employers or their agents should not perform tests to detect the HIV status of current or prospective employees; in respect of the right to work, the right to privacy; and the right to protection or requirement upon an individual to disclose to an employer their own HIV status or the HIV status of another person.”

People with HIV and AIDS are continually discriminated against in the workplace by having to undergo HIV testing (pre-employment HIV testing) in order to ascertain their status, some are being dismissed as a result of being HIV positive and are denied or have their employee benefits reduced. In the workplace, unfair discrimination against people living with HIV and AIDS is continued through practices such as pre-employment HIV testing and dismissal of employees who are HIV positive.

⁵ *Joy Mining Machinery a division of Harnischfeger (South Africa) (Pty) Limited v National Union of Metal Workers of South Africa (NUMSA) and Others* (J 158/02) [2002] ZALC 7 (31 January 2002) para 3.

⁶ David Goos *Organizing Aids Workplace and Organizational Responses to the HIV/AIDS Epidemic* 9.

People living with HIV in South Africa and elsewhere face a number of challenges which include the risk of not being employed or losing employment because of the disease. Such employees face various forms of ill-treatment, including discrimination, harassment, and emotional and physical abuse. In the light of its association with behaviours that may be considered socially unacceptable and in some cases even immoral, HIV infection is widely stigmatised.⁷

1.2.2 Disclosure of confidential information and the right to privacy

South Africa has various pieces of legislation⁸ that impact directly or indirectly on how employers deal with HIV/AIDS in the workplace in South Africa. The issues emerging from legislation include among others protection against discrimination, confidentiality and the implementation of policies on HIV/AIDS including HIV/AIDS testing and the provision of healthcare services.⁹

In *NM v Smith*¹⁰ it was held that:

“...an individual’s HIV status deserves protection against indiscriminate disclosure due to the nature and negative social content the disease has, as well as the potential intolerance and discrimination that result from its disclosure”.

The legislature’s aim is to provide guidelines to employers and prospective employers on how to deal effectively with HIV/AIDS in the workplace and to minimize or put an end to discrimination against employees living with HIV/AIDS. Confidentiality and privacy are the two very important issues the employers must take into consideration with regard to employees living with HIV/AIDS in the workplace. Section 14 of the Constitution affords everyone the right to privacy. It is submitted that the right to privacy and the right to confidentiality encompass the right not to be tested for HIV without the employee’s consent. In South Africa an employee does not have any legal duty to disclose his or her HIV status to anyone including the employer.

⁷ “AIDSbuzz: Rights and HIV” accessed from <http://aidsbuzz.org>, at 1 (date of use: 18 March 2016).

⁸ They include the following:

-Labour Relations Act 66 of 1995; Basic Conditions of Employment Act 75 of 1997; Compensation for Occupational Injuries and Disease Act 130 of 1993; Mine Health and Safety Act 29 of 1996; Employment Equity Act 55 of 1998; Occupational Health and Safety Act 85 of 1993; Constitution of the Republic of South Africa, 1996 and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

⁹ “AIDSbuzz: Rights and HIV” 3.

¹⁰ *NM v Smith* (2007) ZACC 6; 2007 5 SA 250 (CC) para 42.

Therefore, confidentiality is vital to protect employees from unfair discrimination where stigma-based diseases are involved. Even during incapacity proceedings, the confidentiality of an employee's HIV status must be respected and protected.¹¹

1.2.3 Perceptions about HIV/AIDS

There is a perception that once a person is diagnosed with HIV/AIDS, that person is incapacitated and will no longer be able to perform his or her duties. On the other hand, the rights of people living with HIV/AIDS are not adequately protected.¹² Society has responded with intense prejudice to the plight of people living with HIV/AIDS in South Africa as they constitute a minority. These people have been subjected to systemic disadvantage and discrimination. For example, in *Hoffmann v South African Airways*¹³ the applicant, Hoffmann was denied employment because of his HIV status without giving regard to his ability to perform the duties relating to the position. Early diagnosis of HIV often leads to early treatment which leads to a prolonged lifespan. However, notwithstanding medical evidence of how the disease is transmitted a number of people have chosen not to disclose their HIV status for fear of prejudice and this has prevented some of them from receiving the help that they need.¹⁴

1.3 Objectives and outline of the study

This study aims to determine whether employees living with HIV/AIDS receive adequate protection they deserve.

The study provides a critical analysis of the laws that protect employees living with HIV/AIDS in South Africa and international instruments. It also looks at how countries such as the Netherlands, the United States of America, United Kingdom and Mozambique are dealing with this pandemic in their workplaces.

The study considers HIV/AIDS to be a disease characterized by ignorance, prejudice, discrimination and stigma.

¹¹ "HIV and AIDS and the Law: Paralegal Manual: Chapter 9", accessed from <http://www.paralegaladvice.org.za/docs> (date of use: 24 March 2016).

¹² "AIDSbuzz: Rights and HIV" 3.

¹³ *Hoffmann v South African Airways* (2000 (11) BCLR 1235; [2000] 12 BLLR 1365 (CC) (28 September 2000) para 28.

¹⁴ Section 8(1) of the Occupational Health and Safety Act 85 of 1993.

The study is premised on the assumption that, an HIV positive employee does not pose an immediate threat to fellow employees and is not necessarily unable to perform his or her duties. On the other hand, the employers are required to provide their employees with safe working conditions including protection from being exposed to HIV/AIDS¹⁵. This study suggests ways in which protection can be extended to employees living with HIV/AIDS.

Chapter 1 of this study provides some background to the study. Chapter 2 discusses the protection of employees who are living with HIV/AIDS in the South African workplace and the role employers should play in ensuring that the rights of such employees are protected. Chapter 3 discusses different pieces of legislation and international instruments that protect the rights of employees living with HIV and AIDS in the South African workplace. The chapter also determines whether the protection offered by existing legislation is adequate or not.

Chapter 4 provides a comparative study on how other countries namely the Netherlands, the United States of America, the United Kingdom and Mozambique protect employees living with HIV/AIDS and determines if there are any lessons South Africa can take from these four countries. Chapter 5 consists of the conclusion and recommendations on how employees living with HIV/AIDS could be better protected.

¹⁵ Section 8(1) of the Occupational Health and Safety Act 85 of 1993.

CHAPTER 2: THE IMPACT OF HIV/AIDS IN THE WORKPLACE AND THE ROLE EMPLOYERS SHOULD PLAY IN ENSURING THAT THE RIGHTS OF EMPLOYEES LIVING WITH HIV/AIDS ARE PROTECTED

2.1 Introduction

The impact of HIV/AIDS in the workplace is being felt mainly in production costs. The Bureau for Economic Research¹⁶ conducted South African Business Coalition on Health and AIDS¹⁷ (BER/SABCOHA) survey on 1006 companies in South Africa in 2004. The results of the survey shed some light on how Small Medium-Sized Enterprises (SMEs) are responding to the HIV/AIDS pandemic. The survey showed that overall only a quarter of SMEs have an HIV/AIDS policy in place.¹⁸

The business environment in South Africa has become riskier as a result of the HIV/AIDS pandemic. This has brought about reduced productivity, failure to meet deadlines and low staff morale as a result of psychological impact on non-affected staff. HIV/AIDS mostly affects those of working age as it is generally sexually transmitted. The SABCOHA survey also revealed that the small business sector is currently not effectively dealing with and mitigating the impact of HIV/AIDS. Most SMEs operating in the Southern African Development Community (SADC) are not well equipped to deal with the impact of the pandemic. The impact of HIV/AIDS on businesses comes in three ways namely, direct, indirect and systemic costs.

¹⁶ The Bureau for Economic Research (BER) is one of the oldest economic research institutes in South Africa. It was established in 1944 and it is part of the Faculty of Economics and Management Sciences (EMS) at Stellenbosch University. Over the years, the BER has built a local and international reputation for independent, objective and authoritative economic research and forecasting. The BER initiated its HIV/AIDS research in 1999 with a study of the macro-economic impact of the epidemic on the South African economy.

¹⁷ SABCOHA's strategic goal at inception was to co-ordinate the South African business sector in the development of strategies to create a platform for high-level advocacy and leadership and to develop policies and programmes based on universal good practice that can be applied both in and outside the workplace. It exists to mobilise and empower business in South Africa to take effective action on Health and AIDS in the workplace and beyond. It seeks to mitigate the impact of Health and AIDS on sustained profitability and economic growth by ensuring that business is a key part of an integrated effective national response to Health and AIDS, and it aims to co-ordinate a private sector response to Health, and more specifically the TB and AIDS epidemics. It is a member-based organisation, including service providers who have joined forces in the private sector initiative to combat Health and AIDS.

¹⁸ Vass Jocelyn and Phakathi Sizwe "Managing HIV in the Workplace: Learning from SMEs" (HSRC Press, 2006- Health & Fitness) 8.

Direct costs involve increased financial outlays. Indirect costs include a reduction in the workforce productivity; fewer outputs for a certain level of labour expenditures by all infected employees and diversion of day to day duties as well as systemic costs resulting from the cumulative impact of multiple HIV/AIDS cases.¹⁹

HIV/AIDS impacts on companies in a number of ways. The primary impact is on the employee's ability to work effectively as they become too ill. This results in lower productivity and it also increases absenteeism. An employee who dies as a result of AIDS leaves behind a vacancy which needs to be filled and replacing such an employee involves recruitment and retraining costs to the company. Other consideration within the workplace is the impact of AIDS illness and death on medical insurance, and pension provision.²⁰

2.2 HIV/AIDS and Human Rights

In *Hoffman v South African Airways*²¹ – the Constitutional Court had to decide if the South African Airways (SAA) had violated Hoffman's fundamental human rights to equality, dignity and fair labour practices. Hoffman applied for a job with SAA as a cabin attendant. He was asked to go for an HIV/AIDS test and was refused the job because he was HIV positive. The court pronounced that the denial of employment to Hoffman because of his HIV status constituted unfair discrimination and impaired on his dignity.²²

The *Hoffman* case supra illustrates the huge impact the disease has in the workplace in that infected people are still being discriminated against and such treatment is continued in the form of being requested to undergo an HIV test before being considered for a job, dismissals, or not being offered a job at all.²³

¹⁹ "Managing HIV in the Workplace: Learning from SMEs" (HSRC Press, 2006- Health & Fitness) 8.

²⁰ David Dickson "Managing HIV/AIDS in the workplace; just another duty" *South African Journal of Economic and Management Services* Vol 6. No 1 March 2003, 5 (David Dickson "Managing HIV/AIDS in the workplace").

²¹ *Hoffman v South African Airways* para 6.

²² *Hoffman v South African Airways* para 40.

²³ "AIDSbuzz: Rights and HIV" 3.

The Constitution of the Republic of South Africa, 1996 recognises everyone's right to equality through its "equality clause" in section 9 of the Bill of Rights. Section 9(3) of the Bill of Rights provides that the State may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, colour, sexual orientation, age, disability, conscience, belief, culture, language and birth.

On the other hand section 23(1) of the Constitution provides that everyone has the right to fair labour practices.²⁴ The Code of Good Practice on Key Aspects of HIV/AIDS and Employment which is complemented by the Technical Assistance Guidelines (TAG) suggests that in South Africa, testing without the authorisation of the Labour Court is permissible if it is done as part of the medical services rendered in the workplace, where an employee has been injured in the workplace and there is potential of that employee being exposed to infected blood or body fluids and where an employee who has been exposed to infected blood or body fluids needs to lodge a claim for compensation.²⁵

In terms of the Code, anonymous, unlinked surveillance or epidemiological HIV testing in the workplace may occur provided it is undertaken in accordance with ethical and legal principles regarding such research.²⁶ In this context "anonymous" is interpreted, to mean that it is not reasonably practical for an HIV person's status to be drawn from the results. However, all HIV testing must be accompanied by the employee's informed consent, pre- and post-test counselling, and procedures to ensure confidentiality and in the context of a health care worker and employee-patient relationship.²⁷ Despite the above, confidential, voluntary HIV testing and counselling are encouraged as an important part of managing HIV/AIDS in the workplace. Employees who feel their rights not to be tested have been violated may refer their complaints to the Commission for Conciliation, Mediation and Arbitration (CCMA), failing conciliation, the dispute can be taken to the Labour Court.²⁸

²⁴ Section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution).

²⁵ Item 7.1.5 (a) (i), (ii), (iii) of South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment (the Code).

²⁶ Item 7.1.8 of the Code.

²⁷ Item 7.1.8 of the Code.

²⁸ Item 11.1 of the Code.

It should be noted that in the workplace environment, an HIV positive employee does not pose an immediate threat to his or her fellow employees. However, section 8 of the Occupational Health and Safety Act 88 of 1993 obliges employers to provide a safe workplace as far as is reasonable, practicable and this could include ensuring safety from exposure to HIV. This is taken a step further by section 22 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, which provides that an employee infected with HIV as a result of an occupational exposure to infected blood or bodily fluids, can apply for compensation, provided the employee can prove that the disease was contracted as a result of the employment.

Employees do experience HIV-related discrimination from employers, supervisors or other employees. In *Hoffman v SAA* the court decided that SAA had discriminated against Hoffman and that the discrimination was unfair based on the medical evidence.²⁹

HIV/AIDS is a highly stigmatised disease. This is largely due to the fact that it is mostly sexually transmitted, loading infection with moral and cultural judgments. Even when such judgments can be put aside, sex remains for many people an embarrassing topic that is difficult to discuss openly. The absence of a cure for AIDS and the even greater ignorance of the positive steps that infected individuals can take to remain healthy makes HIV/AIDS a feared disease and reinforces its stigmatised status. Sometimes such stigma is independent of the workplace, being generated from wider social values and the nature of the disease.³⁰

Employers can play a huge role in ensuring that the rights of employees living with HIV/AIDS are protected. Many large employers have adopted workplace policies to mitigate the impact of the HIV pandemic on their businesses. Some of them have been in the forefront in providing HIV prevention, care and treatment services at no cost to low income earning employees. However, despite these positive developments, the AIDS Law Project continues to receive many complaints regarding unfair dismissals, unfair discrimination and the mismanagement of HIV related cases in the workplace, in small, medium and large enterprises.

²⁹ *Hoffman v South African Airways* para 39.

³⁰ David Dickson "Managing HIV/AIDS in the workplace" 21.

It appears that the implementation of HIV workplace policies is often patchy, while some companies offer free workplace prevention, care and treatment programmes, the historical fear of breaches of confidentiality and dismissals amongst employees has been a significant barrier to the up-take of these services within the workplace.³¹

The primary objective of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment (the Code) is to set out guidelines for employers and prospective employers as well as trade union representatives to implement workplace HIV/AIDS policies so as to ensure prohibition of unfair discrimination against employees with HIV infection in the workplace. This can be done by creating an environment where people living with HIV and AIDS are not discriminated against because of the disease and they are not subjected to being tested for HIV/AIDS without their consent and their right to confidentiality is protected and they are not obligated to inform their employers or fellow employees of their status and they are given the same employee benefits as other employees who do not have the disease. They are not to be dismissed without following proper procedures and they are given a platform to raise their grievances in the workplace. A positive environment should be created to encourage people to speak out about the disease.³²

2.3 HIV Testing

In *Joy Mining Machinery v NUMSA*³³, the court held that the following considerations should be taken into account in determining whether or not HIV testing is justifiable:

“The prohibition on unfair discrimination; the need for such testing; the purpose of such testing; the medical facts; the employment conditions; social policy; the fair distribution of employee benefits; the inherent requirements of the job; and the category or categories of jobs or employees concerned.”³⁴

³¹ AIDSbuzz: Rights and HIV 4.

³² Item 2.1 of the Code.

³³ *Joy Mining Machinery v NUMSA* para 22.

³⁴ *Joy Minings v Numsa* para 22.

The court also considered the following with regard to the testing of employees' HIV status: whether the employees are comfortable and are at ease about the test; whether the test to be performed will be voluntary and anonymous or compulsory testing which will require the authority of the Labour Court; the employees are not required to contribute financially in the test; the employees are to be well informed about the procedure of the test before the test can be undertaken and they are to be informed about the nature of the test so for them to make an informed decision whether to proceed or not with the test and after the test has been performed they are to receive counselling whether the results are negative or positive.³⁵

In the case of *Joy Mining* supra the court before making its order indicated that the order was made as AIDS-related illness and deaths of workers have an effect on employers as this has a potential of increasing costs and reducing revenues. The court found that employers now have to use more money on their employees' health, funeral costs and training and recruitment of new employees. It further found that the reduction in revenue resulted from absence from work due to illnesses and attendance of funerals.³⁶

The court ordered the following:³⁷

- The testing should be at the initiative of an employee i.e. shall be voluntary;
- The test to be used should be the Enzyme-linked immunosorbent assay (ELISA) saliva test;
- The tests should be done on an anonymous basis;
- The applicant should after the testing find that some employees tested positive for HIV, keep this information confidential and not disclose it to others and not use same to unfairly discriminate against such employees;
- The testing should not be compulsory but should be done with the employees' consent and same should not be used to determine the employee's ability to perform the work or to determine the employee's promotion or his or her entitlement to employee benefits;

³⁵ *Joy Minings v Numsa* para 23.

³⁶ *Joy Minings v Numsa* para 3.

³⁷ *Joy Minings v Numsa* para 23.

- The testing should be done to gather information about the prevalence and the potential impact of HIV infection in the workplace and to help the applicant in managing and preventing future infections; and
- The testing would not be an inherent or essential requirement to obtain the job.

The court's reason for this order was the fact that employers are already feeling the pinch of AIDS related illnesses and deaths of workers emanating from the infections by the disease. The court was justified for such pronouncement as this was done to protect those employees who are already infected with the disease. In *Joy Mining supra* the Judge stated that an employer may approach the Labour Court for permission to undertake an HIV test on his employees to determine the number of employees infected with the disease. The court will authorise the employer to engage in such an exercise of testing only if the employer has informed the employees of his intention by serving a notice of motion and supporting affidavits to the affected employees and their union representatives.

The court may issue an order or a *rule nisi*³⁸ and in the case of the latter, the respondents will have to provide reasons why an order should not be granted.³⁹

The Code of Good Practice on Key Aspect of HIV/AIDS and Employment provides that any person living with HIV/AIDS is entitled to all the workplace employee benefits provided for in the workplace and these people should not be discriminated against in the distribution of these benefits.⁴⁰ For example they should be selected and employed in any position available, receive the same remuneration as other employees, they should be given the same work related training as other employees, they should be assigned and be expected to perform any work available as long as they are fit and able to perform that job, their work performance should be evaluated and when they qualify for promotions they should be promoted, and if their performance does not meet the required standard they should be dealt with in a fair manner and a fair procedure must be followed before they can be dismissed in case they are incapacitated by the disease.

³⁸ A decree nisi or rule nisi (from Latin nisi, meaning 'unless') is a court order that does not have any force unless a particular condition is met. Once the condition is met, the ruling becomes a decree absolute (rule absolute), and is binding.

³⁹ *Joy Minings v Numsa* para 12.

⁴⁰ Item 6.1 (i)-(xiii) of South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment (the Code).

Item 6.2 of the Code further states that to promote the principles of equality, employers and trade union representatives should create a work environment where people with HIV and AIDS are protected from victimisation and are not discriminated against because of the disease. This can be achieved through positive measures such as:

- creating one of the effective ways of dealing with HIV/AIDS in the workplace which is developing and implementation of HIV/AIDS policies and programmes to curb unfair discrimination and stigmatisation of employees living with HIV and AIDS;
- creating awareness and educating employees living with HIV/AIDS about their rights;
- devising and implementing mechanisms to encourage employees to accept and not discriminate against other employees living with HIV/AIDS in the workplace and to encourage employees living with HIV/AIDS to speak openly about their HIV status;
- providing care and support for all employees living with HIV/AIDS; and
- creating an environment where HIV related grievances are dealt with in the workplace.

The Code prohibits the employer from requesting an HIV test from an employee or potential employee to ascertain that person's HIV status unless the employer first obtains authority from the Labour Court.⁴¹ Despite the above, HIV testing and counselling are encouraged by the Code as an important part of managing HIV/AIDS in the workplace. Item 15.2 of the Code provides that "every workplace should develop an HIV/AIDS policy, in order to ensure that employees living with HIV/AIDS are not unfairly discriminated against in employment policies and practices". This policy should encourage voluntary testing and establish easy access to pre-and post-HIV and AIDS counselling and afford any other form of support for employees suffering from the disease.⁴²

⁴¹ Item 7.1 of the Code.

⁴² Item 15.2 (ii)-(iii) of the Code.

Employees who feel that their right not to be tested has been violated may refer their complaints to the Commission for Conciliation, Mediation and Arbitration (CCMA), failing conciliation; the dispute can be taken to the Labour Court. Even though employees are protected from dismissals solely based on their HIV/AIDS status; an employer may in terms of section 188 of the Labour Relations Act 66 of 1995 dismiss an employee where valid reasons related to their capacity to work exist and if a fair procedure has been followed prior to the dismissal. Therefore, where an employee becomes too sick to continue working, the employer must follow the procedure for dismissing such employee due to temporary or permanent incapacity before terminating the employee's and confidentiality regarding the employee's HIV status should be maintained at all times.⁴³ The dismissed or incapacitated employee can apply for disability grant under the Social Assistance Act 13 of 2004.⁴⁴

It would appear that employees are afforded some protection even though same is not adequate because many HIV/AIDS related cases hardly reach the courts of law. This may be attributed to the fear of humiliation, stigma and discrimination or victimisation attached to the disease.

Every workplace, big or small should develop an HIV/AIDS policy, programme, in order to ensure that employees infected by the disease are not unfairly discriminated against in employment policies and practices.

Section 7 of the Employment Equity Act 55 of 1998 (EEA) provides that no employer may unfairly discriminate against an employee on the basis of their HIV status. This means for example that employers cannot unfairly discriminate against employees in giving employee benefits. Section 7(2) of the Employment Equity Act of 1998 (EEA) further prohibits the employer from testing an employee to determine his or her HIV status unless if authorised by the Labour Court in terms section 50(4) of Act. In terms of section 2(e) of the Medical Schemes Act 55 of 2001 no medical aid scheme may unfairly discriminate or completely exclude a person from the scheme on the basis of health status (including living with HIV or AIDS). This helps in ensuring that employees living with HIV/AIDS receive proper medical care, and are able to continue working in good health for longer.

⁴³ Section 9 of the Social Assistance Act 13 of 2004.

⁴⁴ Item 11.2 of the Code.

Although a person living with HIV/AIDS poses no risk to other employees, fear and prejudice sometimes lead to demand for the dismissal of a person who is known or suspected to be living with the disease. It is submitted that it is unlawful to dismiss an employee living with HIV/AIDS even if all the employees of the company refuse to work with that person. Instead the employees discriminating against a worker living with HIV/AIDS should be disciplined for this unacceptable conduct.⁴⁵

The protection of employees who are infected or affected by HIV/AIDS in the workplace is not adequate and the problem is with employers who are still discriminating against such employees as soon as they learn of their HIV positive status. Protection of one's HIV status and openness about the HIV disease and acceptance of people living with HIV in the workplace still has a long way to go in the South African workplace as employees are not educated or do not wish to attend prevention and awareness programmes where one's attendance would create a suspicion that they are living with the disease.

It is therefore submitted that cases related to HIV/AIDS should be tried separately like rape and cases involving minors in order to protect affected people from discrimination.

2.4 Discrimination on the grounds of HIV status

Discrimination is prohibited whether based on race, religion or HIV status. Thus, a person's HIV status should not be used as a basis of discrimination against such an individual. In *Jeffrey Faftine Sumbane v World of Windows (Pty) Ltd*⁴⁶, the applicant, Sumbane (who worked as a glass cutter at the time) became ill and was diagnosed as being HIV positive. His doctor informed the company that he should be put on light duties and he was told to work in the storeroom. He was selected for retrenchment on the basis that he had the shortest service of those working in the storeroom although he had longer service with the company. The main thrust of Sumbane's challenge to his retrenchment was that the company did not exhaust all reasonable alternatives that could have avoided his dismissal.

⁴⁵ HIV/AIDS and the Law: A Resource Manual - Published by the AIDS Law Project and the AIDS Legal Network, "Your rights at work" accessed from <http://www.section27.org.za>. (date of use 13 February 2017).

⁴⁶ *Jeffrey Faftine Sumbane v World of Windows (Pty) Ltd*, Case no: C492/2009 (LC) Cape Town para 35.

A critical aspect of the evidence at trial was the issue of whether the letter from the doctor suggesting an occupational therapist examine Sumbane, was seen by the company prior to his retrenchment. Taking into account the pleadings before the court, in particular the admission that Sumbane had delivered the report to Maphupha (Human Resources Director), and weighing up the probabilities in this regard, the Judge found that the letter was indeed delivered. It is highly improbable that it was Sumbane's intention as he was keen on keeping his place in the company to simply fail to deliver the letter to Maphupha. The Judge agreed with the submissions of counsel for Sumbane that Maphupha's credibility was dented by his evidence on this issue. Maphupha testified that he never received the letter advising him to get the Occupational Therapist to examine Sumbane prior to his retrenchment. Sumbane's loyalty and trust in the company and the deep hurt that he felt in the way he had been treated was palpable. His evidence that he never opened letters from his employer to the doctor and vice versa was found to be credible and in line with what could be termed "old school" deference to those in authority.⁴⁷

The question here is whether Sumbane would have been considered for retrenchment and ultimately dismissed or not if he was not diagnosed with HIV. The Judge in *casu* was correct when he quoted the Judge in the matter of *Maritz v Calibre Clinical Consultants (Pty) Ltd and Another*⁴⁸ that although it is not required that the procedural guidelines contained in section 189 of the LRA be followed to the letter, it is nonetheless expected of the employer to engage in this process meaningfully and with an open mind. The important question that the court will ask is whether or not the employee, who is ultimately retrenched, had a proper and fair opportunity to consult over all issues that are relevant to his or her retrenchment and which may have an effect on his or her continued employment.⁴⁹

⁴⁷ *Jeffrey Faftine v World of Windows* para 35.

⁴⁸ *Maritz v Calibre Clinical Consultants (Pty) Ltd and Another* (2010) 31 ILJ 1436 (LC) para 3.

⁴⁹ *Maritz v Calibre* para 7.1.3.

The Judge in the matter of *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre*⁵⁰, held as follows:

“It is common for employers with a less than legitimate motive to seek to disguise an act of discrimination as a misconduct dismissal since a dismissal for a discriminatory reason attracts significant penalties under the Labour Relations Act (LRA). Camouflaging discrimination under the cloak of misconduct is one of the most insidious forms of unfair labour practices. Quick to perceive the unfairness, employees struggle to prove it.”⁵¹

The Judge here was referring to the fact that employers find it difficult to dismiss employees as a direct result of the employees’ HIV/AIDS status as dismissal for incapacity is hard to prove if the employee is not incapacitated.⁵²

2.5 Dismissal as a result of ill health and/or HIV/AIDS

In a dispute about fairness of a dismissal arising from ill health or injury the arbitrator will generally consider the following:⁵³

Whether or not the employee is capable of performing the work; if the employee is not capable to perform the work; the extent to which the employee is able to perform the work; the extent to which the employee’s work circumstances might be adapted to accommodate disability, or where this is not possible the extent to which the employee’s duties might be adapted; and the availability of any suitable alternative work.

There are factors that the employer will have to take into account in order to be seen to have made reasonable accommodation. Those factors are the following: the size and type of the business; the nature and cost of adapting the employee’s job or in finding alternatives; the effect this will have on other employees; the nature and cause of the employee’s incapacity (for example, if it is temporary or permanent); the employee’s position within the company, length of service and work record; and the length of time the employee was off sick.⁵⁴

⁵⁰ *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* (2001) 5 BLLR 462 (LC).

⁵¹ *Allpass v Mooikloof* para 50.

⁵² *Allpass v Mooikloof* para 50.

⁵³ Item 11 (a), (b), (i) – (ii): Code of Good Practice: Dismissal.

⁵⁴ “Your rights at work” accessed from <http://section27.org.za> at 171 (date of use: 13 February 2017).

There has been a number of cases, which will be discussed below wherein employees have been discriminated against or dismissed because of their HIV status or suspicion of being a carrier of the disease.

In the case of *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre*⁵⁵ the applicant was dismissed because of his sexual orientation and of his HIV status. The court noted that since HIV infection is not expressly mentioned in the Labour Relations Act of 1995 as a prohibited ground for dismissal, the applicant had to prove that this was an arbitrary ground akin to those specifically mentioned.⁵⁶ HIV infection is expressly listed as a prohibited ground in section 3(1) of the EEA, which requires the employer to prove that discrimination on that ground was fair.

Section 54(1)(a) of the Act also requires the courts to have regard to the Code of Good Practice on the Key Aspects of HIV and AIDS in Employment, which *inter alia* confers on HIV positive persons a right to privacy against disclosure of their condition and against discrimination.⁵⁷ Discrimination on the basis of HIV/AIDS has also been deplored by the Constitutional Court in *Hoffman v SAA*⁵⁸ supra.

The court in *Allpass* supra noted that the respondent's claim that the applicant was dismissed for dishonesty had never been tested in a disciplinary hearing, and could be discounted for that reason alone. It was also noteworthy that the respondent had requested personal particulars from only the applicant and two other self-confessed homosexuals from the staff soon after the applicant commenced with his employment. This was plainly aimed at extracting admissions of HIV status from these employees, the inquiry which constituted unfair discrimination in itself. Furthermore, it was clear from the evidence that the general manager had been shocked, not by the applicant's condition, but by the fact that he had learned that the respondent had unknowingly employed an HIV positive employee. The court noted further that the applicant's evidence that he was fit enough to perform the demanding duties associated with his job had gone unchallenged.

⁵⁵ *Allpass v Mooikloof* para 36.

⁵⁶ *Allpass v Mooikloof* para 36.

⁵⁷ *Allpass v Mooikloof* para 40.

⁵⁸ *Hoffman v South African Airways* para 28.

The respondent's suspicion that he was gravely ill was the product of prejudice which was in itself discriminatory, and believed the true reason for the dismissal, which was the applicant's positive HIV status rather than alleged concerns about his "general state of health". The court concluded that the dismissal of the applicant was due to his HIV status and not his capacity to perform his work.⁵⁹

In the *Allpass* case the applicant in his pre-employment interview was questioned about his wellbeing, and he indicated that he did not suffer from any conditions or had any diseases, also about his marital status and so forth and a week later he was asked to complete forms wherein intimate details about his life was solicited from him wherein he was asked to list his allergies and chronic medication he was taking. He disclosed that he was taking retroviral drugs because he was HIV positive. He was dismissed and removed from the premises for not telling the truth about his health at his pre-employment interview.

The court pronounced that the respondent failed in his defence that the dismissal of the applicant was justified by an inherent job requirement as the defence related to the absence of a quality necessary for the performance of the work concerned. The court noted that the applicant was not legally obliged to disclose his HIV status. This case illustrates the fact that some employers will not take into account whether a person who is HIV positive can and will be able to continue to work. It would seem the employers just do not want their companies to be associated with individuals who are HIV positive.⁶⁰ The court concluded that the real reason for the applicant's termination of employment was solely his HIV status and the respondent was ordered to pay the applicant compensation amounting to 12 months remuneration.

Judge Pillay in *Bootes v Eagle Inc System KZ Natal (Pty) Ltd*⁶¹ held that HIV was an arbitrary ground as envisaged in section 187(1)(f) of the LRA. The Judge noted that an employer can be justified in dismissing an employee for reasons relating to HIV/AIDS if the employer can show that being HIV negative was essential to do the work (an inherent requirement) and failure to do so would be regarded as discrimination.

⁵⁹ *Allpass v Mooikloof* para 77.

⁶⁰ *Allpass v Mooikloof* para 78.

⁶¹ *Bootes v Eagle Inc System KZ Natal (Pty) Ltd* (2008) 29 ILJ 139 (LC) para 66.

The Judge went on to state the following:

“Relative to people living with HIV in many other jurisdictions, people in South Africa have the advantage of a constitutionally entrenched right not to be discriminated on the grounds of their HIV positive status. Furthermore, legislation facilitates proof of discrimination firstly by defining discrimination to include HIV as a prohibited ground of differentiation. Secondly, dismissal of the employee on account of his HIV status is, by definition, an automatically unfair labour practice. These three measures together impose an enormous burden on anyone who discriminates against an HIV positive person. 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.”⁶²

Despite these formal advances, the reality is that dismissals as a result of being HIV positive remain a serious problem. The pressure to dismiss may be external, for example, from customers who may refuse to be served by an employee who is suspected of having been infected with HIV/AIDS. This is common at food outlets. This may also happen internally, such as where fellow employees want the employee infected by HIV/AIDS to be dismissed. Such demands are often caused by lack of education about the disease.⁶³

The *Bootes* case supra illustrates the fact that South African employers are nowhere near accepting people with HIV/AIDS in the workplace despite existing workplace programmes and policies on HIV/AIDS.

There has been a relative absence of cases related to HIV/AIDS reaching the courts because of the ignorance, prejudice, discrimination and stigma surrounding the disease. Even though it is well known that the prevalence of HIV/AIDS pandemic in the workplace will impact on continuous absence from work for a reasonably long time due to illness, prolonged staff illness and death affecting productivity, employers are still required to ensure that the rights of employees living with HIV/AIDS are protected.

⁶² *Bootes v Eagle Inc System* para 67.

⁶³ Paul Tobias Mtunuse “The Right to confidentiality in the context of HIV/AIDS” (LLD Thesis Unisa 2013) 32.

What this means is that employers cannot unfairly discriminate against employees in giving employee benefits and they also cannot request an employee to have an HIV test unless they get permission from the Labour Court.

In the case of *NS v Old Mutual*⁶⁴ the issue that the applicant was not entitled to any relief because of her having resigned prior to referring her matter to the Labour Court was dismissed and the fact that the court had no jurisdiction to grant the relief sought was left to the trial court.

The Judge said the following:

“If there is a dispute between an employer and employee relating to their employment relationship, simply because their employment relationship has come to an end at some date after the dispute came into being and had remained unresolved at the time the employment relationship is terminated, does not mean that the dispute is either resolved or is no longer capable of being referred for resolution. I see no basis in law or equity upon which a remedy sought in respect of a wrong committed by an employer or employee against the other can be denied simply because the relationship has come to an end, there has to be something substantially more. To uphold First Respondent’s argument would be to accept that a right to such relief only comes into existence on institution of an action for that relief and not when a wrong is committed. This clearly is not plausible or part of our jurisprudence. Once a right vest in a party, unless there are specific and specified circumstances which do not allow that party to exercise that right, a party with that vested right can be able to exercise it.”⁶⁵

The *Old Mutual* case illustrates the notion that even after dismissal or resignation as a result of HIV/AIDS the employee still has a right to institute an action against the former employer for unfair discrimination or constructive dismissal. In this case NS was asked by Old Mutual to have an HIV test of which she tested positive and was refused membership of three employee benefits including medical aid scheme. She then resigned and instituted legal action against the employer.⁶⁶

⁶⁴ *NS v South African Mutual Life Assurance Society Limited t/a Old Mutual and others* (C658/99) [2001] ZALC 65 (9 May 2001).

⁶⁵ *South African Mutual Life Assurance Society* para 13.

⁶⁶ *South African Mutual Life Assurance Society* para 14.

When people living with HIV become ill with AIDS they may use a lot of sick leave and their capacity to perform their work may be affected. Employees are entitled to sick leave and employers may not discriminate against employees who exercise their rights in this regard. It should however be noted that an employer may still dismiss an employee living with HIV/AIDS due incapacity or poor work performance as long as the employer follows a fair procedure prior to the dismissal.⁶⁷

2.5.1 HIV/AIDS Policies in the workplace.

There are four key elements which need to be put in place by each and every company for their HIV/AIDS policies and programmes to be effective namely, elimination of the spread of the disease, manage and give assistance to those infected or affected by HIV and AIDS, measures be put in place to stop the discrimination and stigma attached to the disease and develop stringent strategies to make the programme to be effective.⁶⁸

Putting these policies and programmes in place will depend on the nature, resources and the size of the company. Such measures are set up to reduce costs and to help small companies with costs, time and resources which they do not have.⁶⁹

Companies should create an environment where employees are able to speak without any fear of discrimination.

2.5.2 Threats posed by HIV/AIDS to the company and what companies are doing to protect themselves

Industries hard-hit by the pandemic, include mining, manufacturing, transport and financial sectors. Some companies, such as De Beers and Anglo Platinum, have come up with good HIV programmes.⁷⁰ The impact of HIV/AIDS on businesses are seen from the effect it has on economic activities and social progress all over the world. It is encouraging to note that because of the impact that HIV/AIDS has on company costs, most companies have now developed proactive approaches to the pandemic instead of allowing the situation to escalate.⁷¹

⁶⁷ ``Your rights at work`` accessed from <http://section27.org.za>, at 170 (date of use: 13 February 2017).

⁶⁸ "HIV & Business Overview" accessed from <http://www.sabcoha.org/case-study>, at 2 (date of use: 21 February 2017).

⁶⁹ HIV & Business Overview 2.

⁷⁰ HIV & Business Overview 2.

⁷¹ HIV & Business Overview 2.

The latest research which was undertaken by the SA Business Coalition on Health & AIDS (SABCOHA) found out that most companies in sectors such as mining, manufacturing, and transport have implemented HIV and AIDS awareness programmes to curb the spread of the disease. However, Small, Medium and Micro-Sized Enterprises (SMME's), are moving slowly in tackling the pandemic in the workplace because of lack of resources compared to bigger companies.⁷²

Companies should be encouraged to put aside money that would be used to develop HIV/AIDS awareness programmes. Companies are encouraged to collaborate in their fight against the pandemic. For example, companies which do not have a smaller number of employees can work together in their fight against HIV/AIDS by sharing the costs and resources.⁷³

Assessing the extent of the threat posed by HIV/AIDS to the company is usually the first step towards setting up an HIV/AIDS workplace programme. This can entail finding out the number of employees infected by HIV/AIDS (by conducting anonymous testing, although this is not encouraged more in particular if the employees did not consent to the testing and the company may face a lawsuit if the results are used to inflict fear and prejudice among those infected). Assessing the extent of the threat posed by HIV/AIDS in the company is also done by calculating the cost to the company arising out of low productivity brought about by the constant absence of HIV positive employees and the costs of implementing a workplace programme. Some companies use KAP⁷⁴ studies (assessing Knowledge, Attitudes and Practices) to determine what measures need to be taken.⁷⁵

2.5.3 Voluntary Counselling and Testing (VCT) for HIV/AIDS

Voluntary Counselling and Testing programmes (VCT) as the name suggests, must be the employee's own prerogative to utilize. VCT should be used to tackle the pandemic and to provide care to those already infected or affected by the virus.

⁷² HIV & Business Overview 2.

⁷³ HIV & Business Overview 2.

⁷⁴ A Knowledge, Attitude and Practices (KAP) is a survey that provides access to quantitative and qualitative information.

⁷⁵ HIV & Business Overview 2.

The programme should be ran in a climate of confidentiality and non-discrimination and failure to do this will be seen as an attempt to screen employees. For fear of the stigma, denial and ignorance associated with the disease, VCT campaigns have achieved very little success even if they are offered for free by companies.

For example, many companies and medical-aids in South Africa have reported low uptake of treatment of people living with HIV/AIDS. On the other hand, compulsory counselling and voluntary testing as well as campaigns led by senior officials of the company may improve the number of employees who do voluntary testing. Saliva testing which many companies have now resorted to has also proven to be a success as it is quick, accurate and easy to use.⁷⁶

2.5.4 Wellness Programmes

Employers should create an environment for those employees who are infected or affected by HIV/AIDS so that they are able to work without fear, discrimination and prejudice. Such employees should be given support, care and treatment. These initiatives not only impact on the employee in the workplace but can also play a huge role at home and in the community at large.

The initiatives may not only benefit HIV positive employees but also those who have any other disease which may affect the workplace. Condom distribution and easy access to ARVs should be encouraged.⁷⁷

2.6 Conclusion

HIV/AIDS-related illnesses and deaths of workers have an effect on employers as they have a potential of affecting production, increasing costs and reducing revenue. Employers spend more on health care and wellness programmes, funeral, training and recruitment of replacement employees. The reduction in revenue is due to absenteeism related to illness, funeral attendance and time spent on caring for the ill. HIV/AIDS continues to have an impact in the workplace as it mostly affects those of working age as it is generally sexually transmitted.

⁷⁶ HIV & Business Overview 2.

⁷⁷ HIV & Business Overview 3.

HIV/AIDS employees are still being tested without their consent as some companies do anonymous testing to find out the prevalence of the disease and cost to the company.

South African employers are nowhere near accepting people with HIV/AIDS in the workplace despite existing workplace programmes and policies on HIV/AIDS, hence dismissals of employees living with HIV/AIDS remain high.

CHAPTER 3: PROTECTION OF EMPLOYEES LIVING WITH HIV/AIDS IN SOUTH AFRICA: LEGISLATIVE FRAMEWORK AND APPLICATION OF INTERNATIONAL LAW

3.1 Introduction

There are a number of statutes which provide some form of protection to employees living with HIV/AIDS in South Africa. These statutes will be discussed below to determine whether the protection they offer is adequate or not.

3.2 Constitution of the Republic of South Africa, 1996

The Constitution of the Republic of South Africa, 1996 (the Constitution) offers some protection against discrimination of employees living or affected by HIV/AIDS. Although HIV is not listed or mentioned in section 9 of the Constitution, it is now a prohibited ground of discrimination analogous to the listed grounds.⁷⁸

In terms of section 2 of the Constitution, the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid, and the obligations imposed by the Constitution must be fulfilled. Employees are also afforded human rights which all South Africans enjoy. Section 9 of the Constitution prohibits the State from unfairly discriminating directly or indirectly against anyone on one or more grounds, including race, gender, colour, sexual orientation, age, disability, conscience, belief, culture, language and birth. Thus, every employee in the workplace should be treated equally irrespective of their HIV status.

The Constitution protects everyone's human dignity. Everyone has an inherent dignity and the right to have their dignity respected and protected.⁷⁹ The right to dignity is an important right as it deals with self-worth, self-esteem and respect of an individual. This right also applies to employees living with HIV/AIDS as it protects them against violation and infringement of their rights based on their HIV positive status.⁸⁰

⁷⁸ Abel Jeru Mbilinyi "Protection against unfair dismissal of employees living with HIV/AIDS in the workplace: A comparative study" (LLM Dissertation Unisa 2008) 11.

⁷⁹ Section 10 of the Constitution.

⁸⁰ Abel Jeru Mbilinyi "Protection against unfair dismissal of employees living with HIV/AIDS in the workplace: A comparative study" 13.

The right to equality is afforded to everyone and this right entails equal protection and benefit of the law.⁸¹ This includes promotion of equality, legislative measures and the advancement of all the rights and protection of disadvantaged people and prevention of unfair discrimination.⁸²

Prohibited grounds of discrimination either directly or indirectly by the State are listed in section 9(3) of the Constitution. Section 9(4) of the Constitution requires that national legislation must be enacted to prevent or prohibit unfair discrimination and examples of such pieces of legislation in relation to employees in this country are the Labour Relations Act 66 of 1995, Employment Equity Act 55 of 1998, Occupational Health and Safety Act 85 of 1993, Basic Conditions of Employment Act 75 of 1997, Mine Health and Safety Act 29 of 1996, Compensation for Occupational Injuries and Diseases Act 130 of 1993 as amended and Medical Schemes Act 131 of 1998. Discrimination on one or more of the grounds listed in section 9(3) of the Constitution is unfair unless it is established that the discrimination is fair.⁸³

Section 9 of the Constitution reads as follows:

- (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, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

⁸¹ Section 9(1) of the Constitution.

⁸² Section 9(2) of the Constitution.

⁸³ Section 9(4) - (5) of the Constitution.

- (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.⁸⁴

Everyone has inherent dignity and the right to have their dignity respected and protected.⁸⁵ On the other hand, everyone has the right to bodily and psychological integrity, which includes the right to make decisions concerning reproduction; to security in and control over their body; and not to be subjected to medical or scientific experiments without their informed consent.⁸⁶

Every person living with HIV/AIDS has a right to privacy and this includes the right not to disclose their HIV status to their employers. Section 14(1) (d) of the Constitution provides that everyone has the right to have privacy which includes the right not to have the privacy of their communication infringed. Despite some employers or prospective employers having HIV/AIDS policies and programmes, it is important that after an employee has been diagnosed with HIV/AIDS his or her status not be disclosed without his or her consent as this may lead to discrimination, stigmatisation, victimisation and unfair dismissal.

Section 23(1) of the Constitution provides that everyone has the right to fair labour practices⁸⁷ and this entails that employees with HIV/AIDS should not be unfairly discriminated either directly or indirectly in employment matters.

⁸⁴ Section 9(1) -(5) of the Constitution.

⁸⁵ Section 10 of the Constitution.

⁸⁶ Section 12(2) of the Constitution.

⁸⁷ Section 23 of the Constitution.

Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that - prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.⁸⁸ This means that employers must keep the working environment safe and make sure that employees are not at risk of contracting HIV at work. Employers can do this by having Health and Safety Representatives who will deal with health (without revealing the employee's HIV status without the employee's consent) and safety of workers.

3.2.1 The Labour Relations Act 66 of 1995 (as amended)

The Labour Relations Act of 1995 (LRA) was enacted to change the law governing labour relations, to establish the Labour Court and Labour Appeal Court as superior courts, with exclusive jurisdiction to decide matters arising from the LRA and to give effect to the public international law obligations of the Republic relating to labour relations.⁸⁹ An employer cannot disclose information that is

- legally privileged;
- that the employer cannot disclose without contravening a prohibition imposed on the employer by any law or order at any court;
- that is confidential and, if disclosed, may cause substantial harm to an employee or the employer; or
- that is private personal information relating to an employee; unless that employee consents to the disclosure of that information.⁹⁰

Section 89 of the LRA does not specifically refer to or deal with HIV/AIDS but it could be inferred that the Act meant to also deal with the disease. The LRA is an important piece of legislation when coming to protecting employee's rights. For example, it among other things protects employees against unfair dismissals and unfair labour practices.⁹¹

⁸⁸ Section 24 of the Constitution.

⁸⁹ Preamble to the Labour Relations Act 66 of 1995.

⁹⁰ Section 89(2) of the Labour Relations Act of 1995.

⁹¹ Section 185.

However, it cannot be disputed that there are many employees living with HIV/AIDS who have been and are still subjected to unfair dismissals and unfair labour practices in this country.

A dismissal is automatically unfair if the employer, in dismissing the employee, acts contrary to section 5 of the LRA if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.⁹²

In terms of section 185 of the LRA every employee has the right not to be unfairly dismissed.⁹³ This section guarantees that employees living with HIV/AIDS just like any other employee will not be unfairly dismissed. For example, in the *Allpass v Mooikloof* case supra an employee was dismissed after disclosing his HIV status to his employer and the dismissal was found to constitute discrimination.⁹⁴

In terms of section 187(1) (f) of the LRA⁹⁵, an employee with HIV/AIDS may not be dismissed simply because he or she is HIV positive or has AIDS. An employee's employment can be terminated for valid reasons related to their misconduct, capacity to perform their duties or for operational reasons and where a fair procedure has been followed in accordance with section 188(1) of the LRA.⁹⁶

⁹² Section 187.

⁹³ Section 185.

⁹⁴ *Allpass v Mooikloof* para 77.

⁹⁵ Section 187(1)(f) of the Labour Relations Act of 1995 provides that a dismissal is automatically, and procedurally unfair if the employer, in dismissing the employee acts contrary to section 5 or, if the reason for the dismissal is that the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.

⁹⁶ Item 5.3.4 of South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

Section 188(1) of the LRA provides as follows:

- (1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-
 - (a) that the reason for dismissal is a fair reason-
 - i. related to the employee's conduct or capacity; or
 - ii. based on the employer's operational requirements; and
 - (b) that the dismissal was effected in accordance with a fair procedure.

If anyone feels aggrieved about any decision or has been automatically unfairly dismissed, he or she can approach the Labour Court.

3.2.2 Compensation for Occupational Injuries and Diseases Act 130 of 1993

The Code of Good Practice on Key Aspects of HIV/AIDS and Employment⁹⁷ (the Code) states that an employee who is infected with HIV as a result of an occupational exposure to infected blood or bodily fluids, may apply for benefits in terms of section 22(1) of the Compensation for Occupational Injuries and Disease Act of 1993 (COIDA).

Every employer shall provide and maintain, as far as is environmentally reasonably practicable, a safe workplace and ensure that the risk of occupational exposure to HIV is minimized without risk to the health of his or her employees.⁹⁸

It is a bit of a relief that items 9.1 to 9.2 of the Code deal with compensation of people infected with HIV as a result of occupational accident or exposure to the disease.

Item 9.1 to 9.2 of the Code provide as follows:

- Employees are entitled to claim for compensation in terms of the Compensation for Occupational Injuries and Diseases Act if they become infected with HIV while in the cause and scope of their employment i.e. occupational accident.

⁹⁷ Government Gazette 21815, No R1298 of 1 December 2000.

⁹⁸ Section 8(1) of the Occupational Health and Safety Act 85 of 1993.

- Employees are to be assisted by their employers in the lodging of the claim for compensation wherein the employer is to lend a hand by providing ways and means of lodging a successful claim and for the employee to be entitled to the benefits will have to prove that the HIV infection was as a result of the exposure to HIV infected blood in the workplace.

Where employees are exposed to possible infections by the virus, such cases must be dealt with under the COIDA. It is also upon employers to make sure that they adhere to all the provisions of the COIDA.⁹⁹

3.2.3 Basic Conditions of Employment Act 75 of 1997

Section 22(2) of the Basic Conditions of Employment Act of 1997 (BCEA) provides that during every sick leave cycle, an employee is entitled to an amount of paid sick leave equal to the number of days the employee would normally work during a period of six weeks. Every employer is obliged to ensure that all employees receive certain basic conditions of employment including a minimum number of day's sick leave. Employees with HIV/AIDS are thus entitled to a paid sick leave.

Sections 78 and 79 of the BCEA deal with the protection of employees against discrimination and protection of their rights. It is submitted that these sections should be interpreted to also refer to employees with HIV/AIDS who also have rights that need protection.

Section 78 deals with the rights of employees who can lodge a complaint with a trade union representative, trade union official or a labour inspector concerning any alleged failure or refusal by an employer to comply with this Act, discuss his or her conditions of employment with his or her fellow employees, refuse to agree to any term or condition of employment that is contrary to this Act and request a trade union representative or a labour inspector to inspect any record kept in terms of this Act and that relates to the employment of that employee.

⁹⁹ Item 9.1 (i)-(ii) and 9.2 of South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

Section 79(1) and (2) deals with protection of rights of employees and provides that no person may discriminate, threaten, or prevent an employee from exercising his right because of a past, present or anticipated failure or refusal to do anything that an employer may not lawfully permit or require an employee to do; disclosure of information that the employee is lawfully entitled or required to give to another person; and no person may favour, or promise to favour, an employee in exchange for that employee not exercising his right. However, nothing in this section prevents both the employer and employee from concluding an agreement to settle the dispute.

3.2.4 Mine Health and Safety Act 29 of 1996

All employers have a duty to make sure that the workplace is safe and that HIV infection is reduced or is non-existent. Everyone has the right to an environment that is not harmful to their health or well-being as contained in section 24(1) of the Constitution.

Section 2(1) of the Mine Health and Safety Act of 1996 (MHSA) provides that the owner of every mine that is being worked must ensure as far as reasonably practicable that the mine is designed, constructed and equipped to provide conditions for safe operation and a healthy working environment.

Item 5.3.6 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment provides that this may include ensuring that the risk of occupational exposure to HIV is minimised.

Further, item 8 of the Code states that the employer should promote a safe working environment for his employees. It also provides that an employer is obliged to provide and maintain, as far as is reasonably practicable, a workplace that is safe and without risk to the health of its employees. The safe environment also includes the mines. This item is discussed in detail in the paragraph below.

3.2.5 Occupational Health and Safety Act 85 of 1993

Every employee living with HIV/AIDS is entitled to a safe working environment. Section 8 of the Occupational Health and Safety Act of 1993 (OHSA) provides that every employer shall provide and maintain as far as reasonably practicable a working environment that is safe and without risk to the health of his employees.

This provision means that employees have the right to a safe and risk-free environment. Specific to HIV status, it obliges employers to take the necessary measures to prevent the spread of the virus in the workplace.¹⁰⁰

This is taken a step further by item 8.2 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment which provides that the risk of HIV transmission in the workplace is minimal. However occupational accidents involving bodily fluids may occur, particularly in the health care professions. Every employer should ensure that it complies with the provisions of the Occupational Health and Safety Act of 1993, including the Regulations on Hazardous Biological Agents, and the Mine Health and Safety Act of 1996, and that their policies deal with, amongst others:

- (i) the risk, if any, of occupational transmission within the particular workplace;
- (ii) appropriate training, awareness, education on the use of universal infection control measures so as to identify, deal with and reduce the risk of HIV transmission in the workplace;
- (iii) providing appropriate equipment and materials to protect employees from the risk of exposure to HIV;
- (iv) the steps that must be taken following an occupational accident including the appropriate management of occupational exposure to HIV and other blood borne pathogens, including access to post-exposure prophylaxis;
- (v) the procedures to be followed in applying for compensation for occupational infection;
- (vi) the reporting of all occupational accidents; and
- (vii) adequate monitoring of occupational exposure to HIV to ensure that the requirements of possible compensation claims are being met.¹⁰¹

Section 14 of the OHS Act also places a duty on employees at work to take reasonable care for their health and safety and that of other persons. Section 12(2) of the Act further gives the employers the duty to keep the health and safety of representatives designated for their workplace or sections of their workplace.

¹⁰⁰ Section 8 of the Occupational Health and Safety Act 85 of 1993.

¹⁰¹ Item 8.2 of South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

Note should be taken that occupational exposure should be dealt with in terms of the Compensation for Occupational Injuries and Diseases Act of 1993. Employers should ensure that they comply with the provisions of this Act and any procedure or guideline issued in terms thereof.¹⁰²

3.2.6 Medical Scheme Act 131 of 1998

In terms of section 24(2) (e) of the Medical Schemes Act of 1998 medical schemes may only be registered if the Council is convinced that the scheme is not or will not in future discriminate either directly or indirectly against anyone on any one or more arbitrary grounds including race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health and the registration of the medical scheme is not contrary to the public interest. It is submitted that the Act prevents medical schemes from discriminating against people living with HIV/AIDS as same refers to the state of health of the individual. What this means is that every HIV positive person should have the right to belong to a medical aid scheme.

Every HIV positive person has to declare his status before joining a medical aid scheme and this will be regarded as a pre-existing condition but the cover will still be there.

3.2.7 The Employment Equity Act 55 of 1998

The Employment Equity Act of 1998 (EEA) is the only piece of legislation that specifically prohibits unfair discrimination based on one's HIV status.

Section 6(1) of the Act states as follows:

No person may unfairly discriminate, directly or indirectly against an employee, in any employment policy or practice, on one or more grounds, including race, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth, or any other arbitrary ground.

¹⁰² Item 9.2 of the Code.

Some of the prohibited grounds under this Act are the same as those in section 9 of the Constitution.¹⁰³ This in effect clearly portrays the measures the legislature has put in place in order to protect people with HIV/AIDS.

On the other hand, section 7(2) states that an employee cannot be subjected to an HIV test by an employer in order to determine that employee's HIV status unless the employer's testing is deemed justifiable by the Labour Court in terms of section 50(4). Section 50(4) states that the Labour Court can authorise medical testing of an employee to determine that employee's HIV status provided the employer's reasons for the tests are to assess the prevalence and impact of HIV in the workplace and this aspect will be deemed justifiable after the court has considered the following aspects:

- (i) The employees being tested will receive the necessary pre-and post-test counselling;
- (ii) The outcome of the test whether positive or negative will be kept confidential and not be disclosed to others without that employee's consent;
- (iii) The time period in which the testing will be applicable in the workplace meaning that the testing will not be indefinite; and
- (iv) The testing will not be a blanket approach but will be applicable to certain category or categories of jobs and to certain employees.

In *Irvin & Johnson Ltd v Trawler & Line Fishing Union & other*¹⁰⁴ the court in its conclusion indicated that as the applicant had obtained consent from his employees regarding their testing to determine the prevalence of HIV in the workplace and the fact that the testing was to be voluntary and anonymous, he did not require the authority of the Labour Court and further that the testing did not fall within the ambit of section 7(2) of the Employment Equity Act which prohibits testing of an employee to determine their HIV status unless the testing is justified by the Court.

¹⁰³ Section 9(3) of the Constitution provides that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

¹⁰⁴ *Irvin & Johnson Limited v Trawler & Line Fishing Union and Others* ZALC 105; (2003) 24 ILJ 565 (LC) (17 December 2002).

The Judge indicated further that if his conclusion was arrived at purely on the basis of the anonymous nature of the testing, the applicants reporting regarding the prevalence of the disease would have been slightly different but as the testing was also voluntary there was no need for any adjustments.¹⁰⁵

Item 7.1.4 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment is an extension of section 50(4) of the Employment Equity Act of 1998 in that an employer can approach the Labour Court for authorised testing in the following instances:

- when an employee applies for employment;
- if being HIV negative is a condition of employment;
- when an employer wishes to follow acceptable guidelines before terminating an employee's employment;
- for an employer to be able to engage the employees in their training or staff development programmes; and
- as an excess requirement to obtain employee benefits.

On the other hand, item 7.1.5 of the Code states that employees can be tested for HIV/AIDS (permissible testing) only if the employee has consented to such testing and the test can be done under the following circumstances:

- if it is done as part of the medical services rendered in the work place;
- where an employee has been injured in the workplace and there is potential of that employee being exposed to infected blood or body fluids;
- where an employee who has been exposed to infected blood or body fluids needs to lodge a claim for compensation.
- moreover, permissible testing is only permitted if the following conditions have been met:
 - where it is the employee who voluntarily requests the test;
 - when the testing is done and despite the outcome the results will be kept between the health worker and the employee;

¹⁰⁵ *Irvin & Johnson Limited v Trawler* para 42.

- when it is done at the instance of the employee who will receive pre- and post- test counselling, as required by the Department of Health; National Policy on Testing for HIV; and
- the testing to be done will have to meet the strict procedures of confidentiality and non-disclosure of the employee's HIV status.

It was stated in *Irvin*¹⁰⁶ supra that voluntary testing does not fall within the provision of section 7 of the EEA and therefore does not require authorisation by the Labour Court.

In *Hoffman v SAA*¹⁰⁷ the court pronounced that denying Hoffman employment to work as a flight attendant because he was living with HIV impaired his dignity and constituted unfair discrimination. Under the Employment Equity Act, it is not a criminal offence for an employer to conduct a test in violation of section 7(2) of the Act, however an employee who alleges that his right may have been violated can refer a dispute to the CCMA for conciliation and if the dispute is not resolved then to the Labour Court for determination.¹⁰⁸

Section 4 of the EEA does not apply to members of the National Defence Force, the National Intelligence Agency or the South African Secret Service. Limiting job advancement and other job opportunities for HIV-positive persons can also be a violation of constitutional and statutory rights. These people are entitled to take unfair discrimination disputes to the courts of law but time and cost constraints have often made this exercise untenable. The South African National Defence Force (SANDF) had a policy which denied HIV positive persons employment, deployment, and promotion opportunities. The South African Security Forces Union (SASFU) representing its members went to court to challenge the policy and the court agreed that the policy was in violation of the right to privacy and constituted unfair discrimination. The court ordered SANDF to formulate a new policy.¹⁰⁹

¹⁰⁶ *Irvin & Johnson Limited v Trawler* para 42.

¹⁰⁷ *Hoffman v South African Airways* para 40.

¹⁰⁸ See footnote 2 [2] at page 7 of South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

¹⁰⁹ *SASFU v Surgeon General*, Case No. 18683/07 (ordering the immediate employment of the applicant who was denied employment solely because he was HIV positive). The order of the High Court was re-confirmed on appeal in the case of *Dwenga and Others v Surgeon-General of the South African Military Health Services and Others* (40844/2013) [2014] ZAGPPHC 727 para 24.

Item 10 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment deals with employee benefits in the workplace. Employers should make sure that there is an equitable employee benefits even to the employees with HIV/AIDS. Employers may not unfairly deny HIV/AIDS employees access to employee benefits schemes.

Item 10 provides as follows:

- There should be a fair distribution of employee benefits in the workplace including those employees living with HIV and AIDS.
- Employees living with HIV and AIDS should be treated in the same manner as those employees with other diseases and they should be entitled to employee benefits.
- The medical status of an employee's HIV status obtained from his benefit schemes must be kept confidential and not be used to discriminate against such an employee.
- The employer in the distribution of a medical aid scheme which forms part of an employee's benefit package must make sure that the scheme is not or will not in future discriminate either directly or indirectly against anyone on any one or more arbitrary grounds including HIV.¹¹⁰

3.3 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000

The Promotion of Equality and Prevention of Unfair Discrimination Act of 2000 (PEPUDA) prohibits unfair discrimination and protection of human rights in matters relating to insurance in the workplace. What in effect this means is that employees living with HIV/AIDS should be treated in the same manner as other employees at all times in the workplace.¹¹¹

¹¹⁰ Item 10 of the Code.

¹¹¹ "Technical Assistance Guidelines on HIV and Aids and the World of Work" 2012, at 59. (www.labour.gov.za). (date of use: 12 January 2017).

The following are considered to constitute unfair practices for purposes of insurance services in certain sectors under item 5 of the Schedule to the Act:

- (a) Unfairly preventing provision of an insurance policy to every person by discriminating directly or indirectly against anyone on one or more of the prohibited grounds.
- (b) Unfair distribution of employee benefits, facilities and services in relation to insurance.
- (c) Unfairly discriminating or refusing to grant services to people purely because of their HIV/AIDS status.

Section 34 of the Act deals with directive principles on HIV/AIDS, nationality, socio-economic status, family responsibility and status and it provides that special consideration needs to be given to the inclusion of these grounds in the definition of prohibited grounds by the Minister. This could be considered to be a step in the right direction as it will enforce protection of people living with HIV/AIDS.

It is however disheartening to realise, that the definition of HIV/AIDS in the Act does not create an impression that the legislature intended to dispel the myth surrounding HIV/AIDS as the disease is defined to include the perceived presence of the disease without medical evidence.

HIV/AIDS is defined as follows:

“HIV/AIDS status” includes actual or perceived presence in a person's body of the Human Immunodeficiency Virus (HIV) or symptoms of Acquired Immune Deficiency Syndrome (AIDS), as well as adverse assumptions based on this status.

Workers with HIV related illnesses should not have their employment terminated as long as they are able to carry out their work. If an employee is medically unfit to continue working, he or she should be reasonably accommodated. Medical examination should be confined to the worker's ability to do the work. Being HIV positive should not be a valid cause for termination of employment.¹¹²

¹¹² “Technical Assistance Guidelines on HIV and Aids and the World of Work” 4.

In the case of *Medscheme Ltd v Pillay and Others*¹¹³ the court dealt with reasons relating to dismissal based on ill health and the extent the employer was required to go in reasonably accommodating a sick employee.

The first respondent was dismissed for reasons of incapacity on the grounds of ill health and the applicant followed all the guidelines required before the dismissal. After the dismissal the first respondent felt that she was unfairly dismissed and she took the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) for determination. The Commissioner agreed with her that her dismissal was both substantively and procedurally unfair. The applicant was ordered to reinstate the first respondent with retrospective effect to the date of dismissal.¹¹⁴

The applicant felt aggrieved by this order and took the matter for review to the Labour Court as it felt that the Commissioner failed to take into account material evidence which was presented to him regarding the first respondents incapacity or ill health and the fact that she had been absent from work for a reasonably long time despite the applicant's efforts to reasonably accommodate her.

The Labour Court was called to adjudicate in the review of the matter. The facts of the matter were as follows: The first respondent was employed by the applicant as a call centre agent from September 2000 and her work entailed attending to telephonic enquiries from medical practitioners as well as members of the medical aid operated by the applicant about medical aid claims and benefits.

The first respondent, nine months into her work became ill and was diagnosed as suffering from laryngitis (an inflammation of the voice box from overuse, irritation or infection). As the first respondent worked at the call centre and had to use her voice for most of the time this sort of condition clearly impacted on her work and productivity. She was off work on a number of occasions because of the disease and when she could see that her condition was not improving she requested to be off work for six months from call centre duties or to do back office work or banking.

¹¹³ *Medscheme Ltd v Pillay and Others* (JR 1483/2012) [2013] ZALCJHB 319 (19 November 2013).

¹¹⁴ *Medscheme Ltd v Pillay and Others* para 2.

She continued to be off work because of her condition and was now left with 12 days sick leave. She was advised that because of the nature of the applicants work, there was really not sufficient back office work available.

Despite having few days left of her sick leave, the first respondent continued to take time off work and she ended up exhausting all her sick leave and she requested special leave which was granted. The applicant held discussions with the first respondent on how to possibly accommodate her and it was re-iterated that back office work was unavailable. She was told to use her 16 days annual leave and that further leave would be unpaid. A possibility of medically boarding was explored and it was concluded that if all the means of accommodation by the applicant proves unsuccessful incapacity proceedings would follow. The applicant agreed to pay for the first respondent's major employment condition contribution and it was recorded that as soon as she was certified ready by the doctor to resume her work she would be welcomed back.¹¹⁵

After all the means to accommodate the respondent were fully explored and none of them were viable, she was dismissed. The Judge in quoting another Judge in the matter of *Independent Municipal and Allied Trade Union on behalf of Strydom v Witzenberg Municipality and Others* said the following:¹¹⁶

“I must mention that I have no doubt in my mind that permanent incapacity arising from ill-health or injury is recognized as a legitimate reason for terminating an employment relationship and thus an employer is not obliged to retain an employee who is permanently incapacitated if such employee's working circumstances or duties cannot be adapted. A dismissal would under such circumstances be fair, provided that it was predicated on a proper investigation into the extent of the incapacity, as well as a consideration of possible alternatives to dismissal.”¹¹⁷

The employer should not endure the hardship of accommodating an employee who is clearly not fit to work.

¹¹⁵ *Medscheme Ltd v Pillay and Others* para 5-9.

¹¹⁶ *The Independent Municipal and Allied Trade Union obo Anton Strydom v Witzenburg Municipality, The South African Local Government Bargaining Council and Piet van Staden n.o.* Case no CA 08/08 para 7.

¹¹⁷ *Medscheme Ltd v Pillay and Others* para 69.

3.4 International law

The Constitution requires the courts to consider international and foreign law when interpreting the Bill of Rights.¹¹⁸ In terms of section 2 of the Constitution, the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. The Constitution provides for international law in sections 231 to 233. The relevant provisions of these sections will be discussed below.

Human rights instruments established by international law protect all persons without any distinction for example based on race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The protection is considered to also extend to the rights and freedoms of all persons living with HIV/AIDS.¹¹⁹

Sections 231 to 233 of the Constitution deal with international agreements. The signing of these agreements is the responsibility of the national executive. It should also be noted that international agreements bind the Republic only after they shall have been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3) of section 231— which provides that an international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

Section 39(1) (a)-(b) of the Constitution provides that when interpreting the Bill of Rights, every court tribunal or forum must consider international law. Customary international law is also law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

¹¹⁸ Section 39 of the Constitution.

¹¹⁹ Javier Vasquez *Human Rights & Health, Persons Living with HIV/AIDS 2*.

In *Hoffmann v South African Airways*, the Constitutional Court used international and regional law to support its decision to strike down discrimination on the basis of HIV status in employment. The court stated the following:

“South Africa has ratified a range of anti-discrimination Conventions, including the African Charter on Human and Peoples’ Rights. In the preamble to the African Charter, member states undertake, amongst other things, to dismantle all forms of discrimination. Article 2 prohibits discrimination of any kind. In terms of Article 1, member states have an obligation to give effect to the rights and freedoms enshrined in the Charter. In the context of employment, the ILO Convention 111, Discrimination (Employment and Occupation) Convention, 1958 prescribes 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. Apart from these Conventions, it is noteworthy that item 4 of the SADC Code of Conduct on HIV/AIDS and Employment, formally adopted by the SADC Council of Ministers in September 1997, lays down that HIV status ‘should not be a factor in job status, promotion or transfer. It also discourages pre-employment testing for HIV and requires that there should be no compulsory workplace testing for HIV.’¹²⁰

Even though South Africa ratified a range of anti-discrimination Conventions it took the country a considerably long time to implement some of these resolutions because of the political instability which prevailed at the time. Despite South Africa being a member state of Southern African Development Community (SADC) and the SADC Code of conduct on HIV/AIDS and Employment in 1997, South Africa only laid down the law that HIV status should not be a factor in job status, promotion or transfer in the matter of *Hoffman v SAA* supra in the year 2000.

The Judges made the following remarks:

“People who are living with HIV must be treated with compassion and understanding. We must show ubuntu towards them. They must not be condemned to “economic death” by the denial of equal opportunity in employment. This is particularly true in our country, where the incidence of HIV infection is said to be disturbingly high.”¹²¹

¹²⁰ *Hoffmann v South African Airways* para 51.

¹²¹ *Hoffmann v South African Airways* para 38.

The SADC Code provides guidance for employers and employees on the rights of people living with HIV at work in particular in relation to discrimination in gaining and maintaining employment. The SADC Code states that a person's HIV status should not be a factor in job status, promotion or transfer but that those should be based on existing criteria of equal opportunities based on merit and capacity to perform the work¹²². The Code prohibits the dismissal of workers based on HIV status and provides that all HIV-positive employees should continue their work for as long as they are medically fit to do so¹²³. The SADC Code requires countries to provide alternative employment for employees without prejudice to their benefits if they are unable to perform their specific job as a result of medical reasons¹²⁴. Lastly the Code also prohibits compulsory workplace testing and requires that all testing be voluntary, done by a suitably qualified person in a health facility with informed consent, and pre- and post-test counselling.¹²⁵ This is also a position in South Africa as evidenced by the Judgements made in a number of reported cases.

3.4.1 Application of international law

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.¹²⁶

In *Joy Mining Machinery v NUMSA*¹²⁷, the Labour Court explained that the Employment Equity Act, should be interpreted—

“in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (111) concerning Discrimination in Respect of Employment and Occupation.”¹²⁸

¹²² Item 3.2 of the ILO Code of Practice on HIV/AIDS and the World of Work (United Nations Geneva 2001) (ILO Code).

¹²³ Item 4.8 of the ILO Code.

¹²⁴ Item 5.2 (j).

¹²⁵ Item 5.2(l).

¹²⁶ Chapter 14, sections 232-233 of the Constitution.

¹²⁷ *Joy Minings v Numsa* para 16.

¹²⁸ *Joy Minings v Numsa* para 16.

The Republic of South Africa has enacted legislation dealing with HIV/AIDS that is consistent with international law. The International Labour Organisation (ILO) has introduced the Code of Practice on HIV/AIDS and the World of Work. Although the International Labour Organization Code of Practice on HIV/AIDS and the World of Work is not binding on the Labour Court, but as part of an international law (standards), it forms an important part of South African law.

The Code provides employers, trade unions and employees with useful guidelines. It provides for the way and means of among other things how employees living with HIV/AIDS can be protected from compulsory testing, disclosure of their status and unfair dismissals resulting from their HIV status. Protection is against both real and perceived unfair discrimination in employment matters.¹²⁹ It further protects employees' right to privacy and the right not to be tested for reasons related to recruitment or retention of employment.¹³⁰

The International Labour Organisation Code of Practice on HIV/AIDS and the World of Work applies to:

- (a) all employers and workers (including applicants for work) in the public and private sectors; and
- (b) all aspects of work, formal and informal.¹³¹

The ILO Code also refers to reasonable accommodation which is defined as:

Any modification or adjustment to a job or to the workplace that is reasonably practicable and will enable a person living with HIV or AIDS to have access to or participate or advance in employment.¹³²

This is also the position in terms of schedule 8 of the Labour Relations Act 66 of 1995 wherein employers are expected to find ways to help HIV/AIDS employees to be able to continue with their employment.

¹²⁹ Abel Jeru Mbilinyi "Protection against unfair dismissal of employees living with HIV/AIDS in the workplace: A comparative study" (LLM Dissertation Unisa 2008) 46-47.

¹³⁰ Abel Jeru Mbilinyi "Protection against unfair dismissal of employees living with HIV/AIDS in the workplace 46.

¹³¹ Item 3.1 of the ILO Code of Practice on HIV/AIDS and the World of Work (United Nations Geneva 2001).

¹³² Item 3.2 of the ILO Code of Practice on HIV/AIDS and the World of Work.

The ILO Code is based on the following ten key principles,

- A workplace issue.
HIV/AIDS is a workplace issue because it affects the workforce, and because the workplace can play a vital role in limiting the spread and effects of the epidemic.
- Non-discrimination
There should be no discrimination or stigma against workers on the basis of real or perceived HIV status - casual contact at the workplace carries no risk of infection.
- Gender equality
More equal gender relations and the empowerment of women are vital to preventing the spread of HIV infection and helping people manage its impact.
- Healthy work environment
The workplace should minimize occupational risk, and be adapted to the health and capabilities of workers.
- Social dialogue
A successful HIV/AIDS policy and programme needs cooperation and trust between employers, workers, and governments.
- No screening for purposes of employment
Testing for HIV at the workplace should be carried out as specified in the Code, should be voluntary and confidential, and never used to screen job applicants or employees.
- Confidentiality
Access to personal data, including a worker's HIV status, should be bound by the rules of confidentiality set out in existing ILO instruments.
- Continuing the employment relationship
Workers with HIV-related illnesses should be able to work for as long as medically fit in appropriate conditions.
- Prevention
The social partners are in a unique position to promote prevention efforts through information, education and support for behaviour change.

- Care and support
Workers are entitled to affordable health services and to benefits from statutory and occupational schemes.

The ten principles of the ILO Code were adopted by SADC of which South Africa is a member state in the form of SADC Code on HIV/AIDS and Employment on HIV/AIDS and Employment. However, note should be taken that the ILO Code is not a Treaty which means that it is not legally binding on member states.¹³³

In 2007, the International Labour Organization's member states decided that as the ILO Code was not legally binding and was susceptible to abuse, the time had come to raise the response of the world of work to HIV and AIDS to a different level through the development and adoption of an international labour standard.

The ILO Recommendation Concerning HIV and AIDS and the World of Work 200 of 2010¹³⁴ was adopted in 2007. The Recommendation reflects the need to strengthen workplace prevention efforts and to facilitate access to treatment for persons living with or affected by HIV and AIDS.

Following the adoption of the ILO Recommendation Concerning HIV and AIDS and the World of Work South Africa as a member state noticed that it was lacking behind in its fight against HIV/AIDS in the workplaces and the country decided to review its HIV/AIDS policies to be in line with the ILO Recommendation. The revised Code, Recommendation Concerning HIV and AIDS and the World of Work, 2010 seeks to deal extensively with HIV/AIDS as a workplace issue and to assist employers and employees in the management of HIV/AIDS and the most common opportunistic infection associated with HIV being TB and STIs in the workplace. The Code is applicable to all spheres of the working environment whether formal or informal sectors and in the public or private sectors.¹³⁵

¹³³ Abel Jeru Mbilinyi "Protection against unfair dismissal of employees living with HIV/AIDS in the Workplace" 47.

¹³⁴ Recommendation Concerning HIV and AIDS and the World of Work, 200 of 2010.

¹³⁵ Preamble to the Government Gazette No 35435 dated 15 June 2012 of the Employment Equity Act, 55 of 1998; South African Code of Good Practice on HIV and AIDS and the World of Work.

The Code of Good Practice on HIV and AIDS and the World of Work was promulgated in 2012 by the Department of Labour under the Employment Equity Act 55 of 1998¹³⁶. This Code deals specifically with HIV and AIDS as a workplace issue and how to reduce HIV related stigma and the unfair discrimination relating to the disease.

To be on par with the ILO Recommendation 200, the preamble of this Code puts more emphasis on its commitment to the protection of human rights for all workers without discrimination based on gender to broaden the scope of all the employees involved in the world of work.

The work environment should be safe and healthy, in order to prevent transmission of HIV in the workplace. This is also the position in South Africa according to section 8 of the Occupational Health and Safety Act 85 of 1993.

¹³⁶ Code of Good Practice on HIV and AIDS and the World of Work, 2012.

CHAPTER 4: PROTECTION OF EMPLOYEES LIVING WITH HIV/AIDS IN OTHER COUNTRIES: A COMPARATIVE STUDY

4.1 Introduction

This chapter looks at how other countries namely the Netherlands, the United States of America, United Kingdom and Mozambique are dealing with the protection of employees living with HIV/AIDS as compared to South Africa.

4.2 The Netherlands

The Netherlands has a concentrated HIV epidemic, that is, a low prevalence of HIV infection in the general population but a higher prevalence in specific sub-populations. The disease affects six risk groups being men having sex with men (MSM), drug users (IV), migrants from HIV endemic countries, young people, sex workers and their clients and people living with HIV/AIDS. For each risk group the country has made one Non-Governmental Organization (NGO) responsible for coordinating the HIV prevention programme targeted at one risk group. The NGO's receive funding from the government. This shows how much the country is willing to prevent the spread of the disease.¹³⁷ South Africa can learn from the Netherlands by having organizations that target and deal specifically with a certain group of people affected by HIV/AIDS to prevent people going to one particular area like clinics to get ARVs. The government of the Netherlands not only provides funds to the department of health to deal with HIV/AIDS as is the case in South Africa, but the Ministry of Health, Welfare and Sport (VWS), the Ministry of Education, Cultural Affairs and Science (OCW), municipal governments, health insurers, the Council for Medical and Health Research (ZonMw) and the Aids Fonds receive national funding. There are also sources of funding from the private sector, such as pharmaceutical companies and other multinationals. The epidemic in the Netherlands is primarily fuelled by transmission among MSM. Since 2011 there has been a decreasing trend in the annual number of new HIV diagnoses to approximately 900-1,000 new diagnoses in recent years. As of December 2014, 17,905 persons living with HIV in the Netherlands were known to be retained in care.

¹³⁷ "The Netherlands and Parts of the Dutch Kingdom in the Caribbean", Ungrass Country Progress Report. 2016 and HIV Policy in the Netherlands 2.

Of these 94% had started combination antiretroviral therapy (ART), and of these 92% had suppressed viraemia¹³⁸ to below the level of quantification at the time of their last available HIV-RNA measurement.¹³⁹

The legal framework within which the fight against HIV and other STIs takes place in the Netherlands are as follows:

- Infectious Diseases Act (IW): Infectious Diseases Act (IW): the issue of HIV testing arises where the interest of the public health is at stake and the use of force by the government to force people to do tests is only justified if there is imminent danger in the life or health of other persons. This Act protects the public health by preventing or containing outbreaks of infectious diseases and to determine the effectiveness of vaccination programmes. The government goes to an extent of limiting the freedom of movement for people with infectious diseases but not taking away the individual's right to privacy.¹⁴⁰
- The Public Health and Prevention Act (WCPV): applies to all the municipalities or town councils at the local level to look into its implementation and incorporating same in their municipal health departments and to prevent infectious disease such as tuberculosis (TB), HIV/AIDS and STIs.¹⁴¹ Preventative measures are to be renewed every four years.
- Special Medical Procedures Act (WBMV): because of the complexity of the HIV/AIDS disease and the fact that at the moment it is not yet curable it was decided that the disease will be treated at dedicated institution being HIV treatment centres and 22 hospitals.
- The Care Institutions Quality Act (WKZ) 1996: places a duty of care on the institutions and for them to make sure that they offer quality and reliable care for their patients.

¹³⁸ It is a medical condition where viruses enter the bloodstream and they then have access to the rest of the body.

¹³⁹ "The Netherlands and Parts of the Dutch Kingdom in the Caribbean"2.

¹⁴⁰ "The Netherlands and Parts of the Dutch Kingdom in the Caribbean"1.

¹⁴¹ "The Netherlands and Parts of the Dutch Kingdom in the Caribbean"1.

- The Individual Health Care Professionals Act (BIG): the institution should take care of its patients and failure to do such will result in the institution being sued for professional and medical negligence.
- The Population Screening Act (WBO) prohibits screening of individuals to determine their HIV status.
- The Medical Treatment Contract Act (WGBO) regulates the relationship between patients and caregivers and their rights to HIV prevention and access to treatment.
- The Medical Examinations Act (WMK) prevents employers from subjecting prospective employees to an HIV/AIDS test to determine their status before they can be considered for employment.
- Public Health Act (GW) deals with accessible and affordable health care system.¹⁴²

Article 1 of the Constitution of the Netherlands states that all persons shall be treated equally. Discrimination on the grounds of religion, belief, political opinion, race, or sex or on any other grounds whatsoever shall not be permitted. Article 11 states that the government is responsible for the promotion of Public Health.¹⁴³ Articles 1 and 9 of the Constitution of the Netherlands is similar to section 9 of the Constitution of the Republic of South Africa and it implies a general prohibition of discrimination on grounds of health thereby making compulsory HIV testing unlawful.¹⁴⁴

In the Netherlands an employer wishing to dismiss an employee for being HIV positive must obtain authorization from the Regional Employment Directorate. This body has refused to permit the dismissal of an HIV positive hospital worker who had been on sick leave for three months¹⁴⁵.

¹⁴² "The Netherlands and Parts of the Dutch Kingdom in the Caribbean"2.

¹⁴³ "The Netherlands and Parts of the Dutch Kingdom in the Caribbean" 2.

¹⁴⁴ David Goos *Organizing Aids Workplace and Organizational Responses to the HIV/AIDS Epidemic* 133.

¹⁴⁵ David Goos *Organizing Aids Workplace and Organizational Responses to the HIV/AIDS Epidemic* 134.

In South Africa there is the Health Professions Council of South Africa (HPCSA)¹⁴⁶ which can be utilized by employers to monitor employees and to advise them if they are fit to continue to work.¹⁴⁷ In terms of section 17(3) of the Public Service Act 103 of 1994 an employee who has been absent from work for a period of one calendar month is deemed to have been discharged for misconduct only if the employer does not know where the employee is.¹⁴⁸

South Africa can also follow what the Netherlands has done by legalizing prostitution¹⁴⁹ in order to reduce the spread of the disease. This will help South Africa in that prostitutes (sex workers) will do their work with ease and they will not be afraid to approach the health institutions for condoms and to do HIV testing and counselling.

4.3 The United States of America

The United States of America (USA) has a number of statutes meant to protect employees affected and infected by the HIV/AIDS virus. In May 1986, the USA Federal Government accused an employer of illegal discrimination against a person with AIDS for the first time. A hospital had dismissed a nurse and refused to offer him an alternative job. This was seen as a violation of his civil rights.¹⁵⁰

In America the Disabilities Act of 1990 (ADA) prohibits discrimination on the basis of disability in the workplace. However, it should be noted that the ADA only covers businesses that employ 15 or more people and is applicable at all levels of employment decisions. The courts have already ruled that people are protected from both real and perceived HIV status.¹⁵¹

¹⁴⁶ The Council regulates the health professions in the country in aspects pertaining to registration, education and training, professional conduct and ethical behaviour, ensuring continuing professional development, and fostering compliance with healthcare standards.

¹⁴⁷ Health Professions Council of South Africa (HPCSA).

¹⁴⁸ David Goos *Organizing Aids Workplace and Organizational Responses to the HIV/AIDS Epidemic* 134.

¹⁴⁹ Prostitution in the Netherlands accessed from http://en.wikipedia.org/wiki/Prostitution_in_the_Netherlands (date of use: 22 June 2017).

¹⁵⁰ Pear Robert "US files first AIDS discrimination charge", *The New York Times* (1986, 9th August) accessed from <http://www.nytimes.com/1986/08/09/us/us-files-first-aids-discrimination-charge.html> (date of use: 20 February 2017).

¹⁵¹ Workplace ``HIV AT WORK`` accessed at <http://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/your-legal-rights> (date of use: 20 February 2017).

Legally, an employer can request medical documentation that an employee is eligible to receive the protection afforded under the ADA or the New York Human Rights Law. Thus requesting a reasonable accommodation might entail disclosing that you are HIV-positive.¹⁵² South Africa only requires the employer to provide reasonable accommodation to the employee by investigating all alternatives short of dismissal in accommodating the employee's disability without the employee disclosing his HIV status.¹⁵³

The States Governments of the United States of America are working together with over 100 million workers and their employers to fulfil the mission of the USA's Occupational Safety and Health Administration, 1970 (OSHA) which is to save lives, prevent injuries, and protect the health of the workers who are covered by the Act.

There is also the Family Medical Leave Act of 1993 (FMLA) which applies to private-sector employers with 50 or more employees within 75 miles of the work site. The Act provides that if a person qualifies for protection under the Family Medical Leave Act, he or she can take leave for serious medical conditions or to take care of a family member with a serious medical condition including HIV/AIDS. In terms of the Act a qualifying person has 12 weeks of job protection and unpaid leave during any 12-month period.¹⁵⁴ In South Africa employees are protected by section 22(2) of the Basic Conditions of Employment Act 75 of 1997 which entitles employees who are sick (including those who are infected with HIV/AIDS) to a paid sick leave. In the United States of America, the Health Insurance Portability and Accountability Act, 1996 (HIPAA) addresses some of the barriers to healthcare a person may face if he or she is living with HIV. If a person has group health coverage, HIPAA protects him or her from discriminatory treatment by insurance providers.¹⁵⁵ This is also the case in South Africa where there is the Medical Act Scheme Act 131 of 1998 which provides that an HIV positive person cannot be prevented from joining a medical aid scheme.

¹⁵² The Law And The Workplace, The Rights of HIV-Positive Employees accessed from <http://www.thebody.com/content/art30954.html> (date of use: 22 February 2017) 2.

¹⁵³ Item 11 (a), (b), (i) – (ii): Code of Good Practice: Dismissal.

¹⁵⁴ Workplace ``HIV AT WORK`` accessed at <http://www.aids.gov/hiv-aids-basics/just-diagnosed-with-hiv-aids/your-legal-rights> (date of use: 20 February 2017) 1.

¹⁵⁵ Workplace ``HIV AT WORK`` 1.

The Health Insurance Portability and Accountability Act (HIPAA) allows small companies to be able to give their employees cover should they lose or leave their group health coverage by providing individual coverage.¹⁵⁶

The USA through its President's Emergency Plan for AIDS Relief (PEPFAR) has been providing significant monetary assistance to South Africa's fight against HIV/AIDS since 2004.¹⁵⁷ However, since President Donald Trump took office at the beginning of 2017 this assistance is under threat as he has promised to cut off the funding and to start promoting the interests of American people.

The ignorance of the disease did not emanate only from South Africa but it is clear that the United States of America also did not fund the treatment and the research efforts of the disease. Society in both the United States of America and South Africa adopted a hostile attitude towards HIV/AIDS during the discovery of the epidemic, however, in the USA people have become increasingly more compassionate than in South Africa due to its developed judicial system. There is a view common in South African society, placing the blame on the victim of HIV/AIDS. Unfortunately, this view makes it difficult for patients to seek treatment for fear of losing respect in the community. Thus progressive views have yet to emerge.¹⁵⁸

In the case of *Doe v District of Columbia and Others*, the court relied heavily on the medical evidence of an infectious diseases specialist and an expert in infection control in reaching its decision that being HIV-positive did not *de facto* render an employee incapable of performing a fire-fighter's duties. HIV-related discrimination against a fire-fighter was found to be unjustified.¹⁵⁹

¹⁵⁶ Pear Robert "US files first AIDS discrimination charge"1.

¹⁵⁷ The U.S. President's Emergency Plan for AIDS Relief 6.

¹⁵⁸ "HIV/AIDS in South Africa and the United States: A Comparative Essay" accessed from <https://my.vanderbilt.edu/f13afdevfilm/2013/12> (date of use: 29 April 2016).

¹⁵⁹ *John Doe v District of Columbia and Others*, 796 F. Supp. 559 (1992) 569.

4.4 The United Kingdom

In the United Kingdom there is no obligation on employees to inform their employers about their HIV status except in certain professions, for example in surgery or dentistry where there is a risk of exposure to bodily fluids or blood. In some jobs, workers may actually face the risk of HIV infection through accidental direct exposure to infected blood, for example some healthcare workers and laboratory technicians, mainly as a result of an accident with a needle/syringe.¹⁶⁰

This is also the position in South Africa except for the fact that there is no obligation on all the employees to tell their employers about their HIV status in all the professions without any exceptions.

The availability of antiretroviral therapy (ART therapy) in the UK means that most people who are HIV positive will not become too ill to work. However, if HIV becomes symptomatic, that is, where the person starts suffering from related infections, it may be necessary to disclose HIV status as the person may require time off work due to illness or may require certain adjustments to be made to their job role, hours of work, in order to allow them to continue working.

In South Africa, the government also provides antiretroviral treatment/drugs to those who are infected with HIV. The most important thing to do from the employer's perspective is to ensure that a person suffering from HIV is not discriminated against in the workplace. People living with HIV are legally protected from discrimination in the workplace and during recruitment under the United Kingdom's Equality Act 2010 which prohibits the use of pre-employment health questionnaires before the offer of a job has been made.¹⁶¹

¹⁶⁰ "HIV and discrimination in the workplace-Health4work" accessed from <http://www.health4work.nhs.uk/blog/2012/04/hiv-and-discrimination-in-the-workplace>, at 1 (date of use: 22 February 2017).

¹⁶¹ "HIV and discrimination in the workplace" 1.

In the UK if an employee suffering from HIV becomes too ill to continue with their work, employers should try to find alternative work that may be more suitable. However, employers are not legally-bound to create more suitable employment if there is nothing available in the organisation or if no reasonable adjustments can be made to the role to permit the person to continue working. In this case, as with any other illness, the employer is entitled to terminate the employee's employment.¹⁶² In South Africa employers are expected to find ways to help the employee to be able to continue working, the so called "reasonable accommodation".¹⁶³

In the UK case of *John F Phelps v Field Estate Company*¹⁶⁴, an HIV-positive plaintiff kept his condition a secret from fellow employees and supplied his employer with a false medical note. After being fired for performance problems, he filed a suit under Employee Retirement Income Security Act (ERISA)¹⁶⁵.

The Congress in passing ERISA decided to prohibit employers from discharging or otherwise discriminating against employees for the purpose of interfering with their right to claim benefits under an employee plan.¹⁶⁶

The court in the case of *John F Phelps* supra dismissed the claim, and ruled that management retained the right to terminate services of all employees who are performing below standard, including those with HIV. Further the Judge described the plaintiff as "manipulative and secretive" and suggested that the law should not protect employees who withhold information about medical illness from their employers.¹⁶⁷ However, it does not look like the court was making a blanket approach as every case has to be decided on its own merits. The plaintiff's termination of employment in this matter was not made until more than fourteen months after the first disclosure concerning his medical condition. He had no apparent signs or symptoms of illness from AIDS before he was fired.

¹⁶² "HIV and discrimination in the workplace" 2.

¹⁶³ Item 11 (a), (b), (i) – (ii): Code of Good Practice: Dismissal.

¹⁶⁴ *John F. Phelps, Plaintiff-appellant, v. Field Real Estate Company, Bank Western, Western Capital investment Corporation* U.S. Court of Appeals for the Tenth Circuit - 991 F.2d 645 (10th Cir. 1993) April 16, 1993. Rehearing Denied Sept. 10, 1993.

¹⁶⁵ The Employee Retirement Income Security Act (ERISA) regulates employee welfare benefit plans, whether funded or self-insured. Such plans include medical, surgical, and hospital benefits, as well as benefits in the event of sickness, accident, disability and death.

¹⁶⁶ William F. Banta *AIDS in the Workplace Legal Questions and Practical Answers* (Lexington Books, 1993 - Business & Economics) 57.

¹⁶⁷ *AIDS in the Workplace Legal Questions and Practical Answers* 57.

In the UK, many employee concerns related to AIDS have been channelled through trade union representation and reflected on the following three dimensions of union policy:

- protection from discrimination for members who may become infected with HIV or develop AIDS;
- measures to limit the possibility of members contracting the virus through their work; and
- the provision of information to members concerning the facts about AIDS in order to prevent ignorance damaging employment relationships and to help members contribute effectively to the resolutions of any problems that arise in the work place.¹⁶⁸

4.5 Mozambique

The Mozambique: Law 5 of 2002 which has now been repealed was a very interesting Act as its purpose was to establish general principles aimed at guaranteeing protection of employees and job applicants against being discriminated on the basis of being or suspected of being HIV positive or suffering from AIDS. Its objective was to specifically address issues relating to HIV/AIDS and the world of works.¹⁶⁹ It applied, to all the entire workforce including domestic workers.¹⁷⁰ The Mozambican Act also prohibited employers from requiring workers or job applicants to take an HIV test without their consent.¹⁷¹ It prohibited the testing for HIV by employers in order to determine if the employee is eligible for training courses or promotions. Employees living with HIV enjoyed the right not to disclose their HIV status in or outside of the workplace.

¹⁶⁸ William F. Banta *AIDS in the Workplace Legal Questions and Practical Answers* 57.

¹⁶⁹ Marie-Claude Chartier "Legal initiatives to address HIV/AIDS in the world of work, Specific AIDS laws" (The ILO Programme on HIV/AIDS and the World of Work: Research and Policy Analysis) 2005, 4.

¹⁷⁰ Section 2 and 3 of the Mozambique Act: Law 5 of 2002.

¹⁷¹ Section 4 Mozambique Act: Law 5 of 2002 as amended. This is still the case under Law No. 19/2014 except that the penalty has been reduced from 50 minimum wages to 15 and 30 wages.

Health care professionals whether from the public or private sector were prohibited from disclosing the status of those employees who are infected with HIV.¹⁷² This is the position in South Africa as employees are entitled to their right to privacy as enshrined in section 14 of the Constitution of the Republic of South Africa, 1996. An employer cannot disclose the status of the employee who has been diagnosed with HIV/AIDS without the employees' consent as this may lead to discrimination and legal actions may be taken against the employer by the affected employee.

The Mozambican Employment Law¹⁷³ entitled employees to guaranteed medical assistance if they became infected with HIV in the workplace at the cost of the employer. Employers in the laboratory services, medical clinics, and health sectors were required to take necessary protective measures to avoid HIV transmission in the workplace.¹⁷⁴ In South Africa item 8 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment obliges the employer to protect the employees from the risk of exposure to HIV transmission in the workplace.

The Act also provided for reasonable accommodation to help workers to be able to continue working despite their HIV status. If the employees become too ill to work, employers in this country (Mozambique) would be entitled to dismiss such an employee.¹⁷⁵

The Act gave an employer the responsibility to reasonably accommodate an employee who is medically not fit to continue with his work as a result of being infected with HIV or AIDS.¹⁷⁶

An HIV positive employee could be absent from work and this will be deemed justifiable.¹⁷⁷ Employees who are dismissed solely because of their HIV status are deemed to have been unfairly dismissed in terms in the Mozambican Employment Law. Unfairly dismissing an employee in terms of section 12 of the Act not only entitled such an employee to compensation but to reinstatement.¹⁷⁸

¹⁷² Section 4 and 5.

¹⁷³ (Law No. 23/2007, of 1 August 2007).

¹⁷⁴ Section 8.

¹⁷⁵ Section 9.

¹⁷⁶ Section 9 and 10.

¹⁷⁷ Section 11.

¹⁷⁸ Section 12.

The Act provided for sanctions against its transgressors. Compensation was doubled if an employee was unfairly dismissed. Job applicants, who were not hired at work for being HIV positive, were entitled to compensation equivalent to six months' salary corresponding to the position applied for. Employers in conjunction with competent service providers shall make HIV/AIDS information, prevention and counselling services available at their workplaces.¹⁷⁹

Employees living with HIV shall abstain from behaviour which might put other employees at risk of contamination. Anyone who violated the provisions of section 4 of the Mozambique Act was liable to a fine.¹⁸⁰

Anyone who violated the confidentiality provided for in sections 5 and 11 of this Act was also liable to a fine, if a more severe penalty was inappropriate.¹⁸¹

The Mozambique: Law 5 of 2002 has since been repealed by the Law on Individual Protection of Employees and Job Applicants Living with HIV and AIDS ("Law No. 19/2014") which establishes the rights and duties of those living with HIV and AIDS and provides measures necessary for prevention, protection and treatment related to the pandemic. Law No. 19/2014 further repeals Law No. 12/2009 of 12 March and any contradictory legislation, or legal instruments which previously regulated matters related to HIV and AIDS. Law 19/2014 extends, and offers greater protection of the rights of employees and job applicants living with HIV/AIDS and regulates their respective obligations. It is clear that there is a huge effort being made to ensure greater protection and respect for the dignity of those living with HIV/AIDS particularly for job applicants and workers who often find themselves in a vulnerable position in employment relations. The employer is obliged among other things to establish policies and programmes to prevent and combat HIV and AIDS in the workplace and to take out health insurance which, among other aspects, covers infection of workers with HIV and AIDS during their employment.¹⁸²

¹⁷⁹ Section 13 and 14.

¹⁸⁰ Section 16

¹⁸¹ Section 15 and 16.

¹⁸² César Vamos Ver, Changes to the Legal Regime Governing Protection for Employees and Job Applicants Living with HIV and AIDS (Newsletter by SAL & Caldeira Advogados, Lda. is a member of DLA Piper Africa Group, an alliance of leading independent law firms working together in association with DLA Piper across Africa) 2.

It should be noted that while Mozambique has legislation that deals specifically with HIV/AIDS related matters South Africa currently does not have any such legislation. Protection of employees living with HIV/AIDS in this country is still dealt with in various statutes.

4.6 Conclusion

The South African government's initial response to the epidemic was significantly lacking due to poor political leadership, AIDS denialism and failure to provide comprehensive AIDS treatment and prevention programmes. This situation led to large scale protest by civil society and the international community.

By 2008 the government recognised the need to change course. Over the years, South Africa has become a model for comprehensive HIV/AIDS management.¹⁸³ However, South Africa has not achieved some of the targets it set for itself relating to outcomes such as employment, income levels, and life expectancy.

When compared to South Africa, the Netherlands considers prevention a priority area. While South Africa has a sophisticated infrastructure, a well-developed private sector and a stable macro-economy, the high prevalence of HIV/AIDS indicates that all the aforementioned countries being the Netherlands, the United States of America, and the United Kingdom and Mozambique objectives relating to prevention of HIV/AIDS have progressed. Realizing the severity of the HIV/AIDS pandemic as a local and global health emergency as well as a development emergency, the current Minister of Health, Dr Aaron Motsoaledi moved quickly to implement effective measures to combat the epidemic.¹⁸⁴ It would appear that South Africa is playing catch up with the developed countries such as United States of America when it comes to HIV/AIDS prevention and management. Society in both the United States of America and South Africa adopted a hostile attitude towards HIV/AIDS during the discovery of the epidemic, however, in the USA people have become increasingly more compassionate than in South Africa due to its developed judicial system.

¹⁸³ Maria Joachim and Michael Sinclair, Ministerial Leadership in Health, Harvard School of Public Health "Reflections on Ministerial Leadership: HIV/AIDS Policy Reform in South Africa" 2013, 2.

¹⁸⁴ Maria Joachim "Reflections on Ministerial Leadership: HIV/AIDS Policy Reform in South Africa" 3.

The government of the Netherlands unlike government of South Africa not only funds the Department of Health to deal with HIV/AIDS but also the private sector to curb the scourge of the disease.

In the Netherlands an employer cannot dismiss an employee for being HIV positive without getting authorization from the Regional Employment Directorate. South Africa can establish a body similar to that of the Netherlands to avoid and prevent the dismissal of HIV positive employees by employers without following proper procedures of consultations as the forums that are already in place are not adequately protecting the workers. In most instances the plight of the workers is only attended to when there has been a violation of their rights or a dismissal.

In the United Kingdom there is no duty on employees to divulge their HIV status to their employers except in certain professions such as surgery and dentistry where there is a risk of exposure to bodily fluids or blood. In South Africa no employer can compel an employee to tell them their HIV status in any profession. Both South Africa and the UK provide ARVs to people infected with HIV.

Mozambique promulgated Law No. 19/2014 the objective of which is to specifically address issues relating to HIV/AIDS and the world of works. In South Africa the Employment Equity Act of 1998 refers to HIV as one of the prohibited grounds on unfair discrimination instead of the Act dealing specifically with HIV as the Mozambique Act does.

All the countries considered above have put in place initiatives to address the problem of HIV/AIDS by passing laws aimed at addressing discrimination and abuse of human rights law in the workplace.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1 General

HIV/AIDS has evolved such that if the protection of employees living with the virus is not strengthened soon enough, the importance of addressing the stigma and related discrimination will be worthless. The total number of people living with HIV in South Africa was estimated to be approximately 5, 51 million in 2014 and for adults aged 18–49 years, an estimated 16, 8% of the population is HIV positive.¹⁸⁵

The Government of the Republic of South Africa and its stakeholders should intensify its efforts to make sure that the protection of the rights of people living with HIV and AIDS become one of its core values and that appropriate legislation and regulations are enacted to eliminate all forms of discrimination against people living with HIV/AIDS. South Africa must ensure that those measures in place (despite them not being adequate) are strengthened and enforced to make sure that they are respected, protected and followed for the full enjoyment of people living with HIV/AIDS.

The prevalence of HIV/AIDS is threatening productivity and stability in economies and organisations worldwide. Poor health resulting from HIV/AIDS can also severely affect a household and the livelihood of its members. Other household members are likely to spend time devoted to caring for the ill, and less time for productive activities or education. This can have long-term effects on a household, contributing to a deeper cycle of poverty. Illness and death of household members lead not only to tragedy for the family and long-term labour shortages, but also to the loss of life skills normally passed on by parents to their children. In most cases women have to shoulder a disproportionate burden of providing care and support to people living with HIV and AIDS in their own families and the wider community. Children, in particular, girls, are often removed from school to look after those that are ill or to supplement household productivity and income. This is where policy and institutional programmes should play an important role in dealing with problems and adverse conditions caused by the pandemic.¹⁸⁶

¹⁸⁵ Statistical Release P032-Mid- year population estimates 2014, available on www.statssa.gov.za (date of use: 15 April 2016).

¹⁸⁶ "Introduction to health and HIV & AIDS-Eldis" accessed from <http://www.eldis.org/go/topics/resource-guides/livelihoods-and-social-protection/health> (date of use: 22 February 2017).

In many cases, however, management, employees, shareholders and other stakeholders are not cognisant of the full impact of the disease. Many employees are unaware of the programmes and policies on HIV and AIDS. Available information regarding corporate action on HIV/AIDS is inconsistent and incomplete. This makes it difficult to compare and benchmark corporate performance on HIV/AIDS and to verify the accuracy of reported information.

It is submitted that any form of discrimination against people living with HIV/AIDS constitutes a violation of their human rights¹⁸⁷, to among others dignity and equality. On the other hand, any unfair treatment relating to employment or promotion of an employee living with HIV/AIDS will amount to unfair labour practice and will contravene section 23(1) of the Constitution which guarantees everyone the right to fair labour practices. It should also be noted that unfair labour practices in terms of the Labour Relations Act of 1995 include among others any unfair act or omission that arises between an employer and an employee, involving unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee or relating to the provision of benefits to an employee.¹⁸⁸

It is clear that employees living with HIV/AIDS still experience unfair labour practices in the South African workplaces. These include practices such as pre-employment HIV testing and dismissals due to one being HIV positive or having the disease. Employees affected are also afraid to approach the CCMA or labour courts for fear of victimisation, discrimination and the stigma attached to the disease.¹⁸⁹

The protection of employees living with HIV/AIDS cannot be considered to be adequate. The problem is with employers who mistreat and discriminate against such employees as soon as they know their status. Employees should not be dismissed from employment just because they are living with HIV/AIDS. Such employees must receive the same treatment as those without the virus and should only be dismissed for fair reasons such as misconduct and incapacity.¹⁹⁰

¹⁸⁷ David Goos *Organizing Aids Workplace and Organizational Responses to the HIV/AIDS Epidemic* 9.

¹⁸⁸ Section 186 (2) of the Labour Relations Act 66 of 1995.

¹⁸⁹ "AIDSbuzz: Rights and HIV" 1.

¹⁹⁰ Item 11 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

It should be noted however, that employers can still be justified in dismissing an employee or in denying a job applicant the job if they can show that the nature of the job requires someone who is HIV negative. In other words, the employer must show that being HIV negative is an inherent job requirement.¹⁹¹

Employees are by law not under any obligation to disclose their HIV status unless that status affects their ability to perform their duties or do their job as expected. Thus a person who is living with HIV/AIDS cannot be denied a job on the basis of being HIV positive or living with the virus as long as that person can perform his or her duties and does not pose any risk to others.¹⁹²

5.2 Summary and Recommendations

HIV/AIDS can bring about reduced productivity in the workplace as the employee's ability to work effectively is reduced by the illness. In South Africa the Code of Good Practice on Key Aspects of HIV/AIDS and Employment provides that employees suffering from HIV and AIDS must be able to continue to work and that when they are unable to proceed to work as a result of ill health, procedures or guidelines relating to dismissal for incapacity must be initiated.¹⁹³

South Africa has made the accessibility of antiretroviral treatment easy so that people who are HIV positive should not become too ill to work. The rights of employees living with HIV/AIDS are protected by various pieces of legislation which include the Constitution of the Republic of South Africa, 1996, Labour Relations Act 66 of 1995, Basic Conditions of Employment Act 75 of 1997, Compensation for Occupational Injuries and Disease Act 130 of 1993, Mine Health and Safety Act 29 of 1996, Employment Equity Act 55 of 1998, Occupational Health and Safety Act 85 of 1993 and Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000. Those who are terminally ill and are therefore considered to be disabled, qualify for a disability grant in terms of the Social Assistance Act 13 of 2004.

¹⁹¹ ``Your rights at work`` accessed from <http://section27.org.za> at 169 (date of use: 13 February 2017).

¹⁹² Item 7.2.1 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

¹⁹³ In terms of item 11.2 of the Code an employer is permitted to dismiss an employee who has become too ill to perform their current work. This can only be done after the employer has followed acceptable guidelines regarding dismissal for incapacity.

Even though employees living with HIV/AIDS have rights as entrenched in the Constitution such rights may be limited only in terms of law of general application to the extent that the limitation is reasonable taking into account that no right including those enjoyed by employees living with HIV/AIDS are not absolute.¹⁹⁴

The Labour Relations Act 66 of 1995 which was enacted to govern labour relations in South Africa does not specifically refer to HIV/AIDS as a prohibited ground of discrimination. This is the case even though the Act has gone through many amendments over the years.

The provisions of the Act are not preventative in nature as the employee has to first be dismissed or be treated unfairly for the Act to be applicable. The deterrence of the employer from dismissing employee living with HIV is very minimal as there are very few employees who are willing to take on their employers for fear of victimization or at times losing the case and having to pay the costs. Unfair labour practices are still being endured by employees living with HIV/AIDS. In the Netherlands an employer is obliged to get authorization from the Regional Employment Directorate before an HIV positive employee can be dismissed. As already indicated the Health Professions Council of South Africa (HPCSA) can play a similar role. It is well known that in South Africa very few matters relating to HIV/AIDS reach the courts of law to be adjudicated upon. The HPCSA can be used exclusively to deal with HIV/AIDS related cases.

As indicated in Chapter 3 there is some form of protection given to employees living with HIV/AIDS even though such protection is not adequate. The Compensation for Occupational Injuries and Diseases Act 61 of 1993 was in relation to employees with HIV/AIDS promulgated to help companies from being sued and to save costs of litigation. This Act does not provide any form of protection to employees with HIV/AIDS but deals with the benefits which such employees can receive if they can prove that they were infected with HIV as a result of occupational exposure to infected blood or bodily fluid. Further employees lose their rights to claim for compensation if an accident is not reported to the employer or Compensation Commissioner within a period of one year of exposure.

¹⁹⁴ In terms of section 7(3) of the Constitution of South Africa, 1996.

The Basic Condition of Employment Act 75 of 1997 deals with sick leave for all employees covered by the Act which also include those living with HIV/AIDS. In the case of *Medsheme Ltd v Pillay and Others* supra the employer was justified in dismissing the employee who took excessive sick leave. In *casu* the first respondent had no more leave available and still took such until dismissed. Employers with employees living with HIV/AIDS can make it difficult for employees who have run out of leave by making working conditions unbearable as the employer is not obliged to retain an employee who is permanently ill to continue working. Even though the employer is obliged to accommodate an employee whose sick leave has been exhausted¹⁹⁵ as to how far the employer is willing to do such is a bit difficult as the employer has to worry about production and on rare occasion worry about the wellbeing of an employee. The South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment (the Code) in its definition of “reasonable accommodation” only refers to people living with HIV/AIDS but does not indicate as to up to what stage of the disease is the employer supposed to continue with the accommodation.¹⁹⁶ The employer must not endure the hardship of accommodating an employee who is clearly not fit to work.

Section 2(1) of the Mine Health and Safety Act 29 of 1996 should be read together with section 8 of the Occupational Health and Safety Act 85 of 1993 as they both compel the employer to create a safe working environment for all employees including those living with HIV/AIDS.

Under the Medical Scheme Act 131 of 1998 no scheme should discriminate against people living with HIV/AIDS. All medical aid schemes in South Africa do not discriminate against people living with HIV except that just like any other person there is an exclusion for any pre-existing conditions which a person might have to disclose for the medical aid to be able to cater for that persons needs and to avoid a dispute when a claim is lodged for non-disclosure. There is a three-month general waiting period for all healthcare costs. This means that a person will not be covered by the medical scheme during the first three months of their membership whether they are HIV positive or not.

¹⁹⁵ *Medsheme Ltd v Pillay and Others* 13. This was the position in this case until the employee was dismissed and the Judge agreed with the employer that the leave taken was excessive.

¹⁹⁶ “Reasonable accommodation” according to the glossary of the South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment (the Code) means any modification or adjustment to a job or to the workplace that is reasonably practicable and will enable a person living with HIV or AIDS to have access to or participate or advance in employment.

These people, however, are still required to pay the monthly contribution. An HIV positive person is treated like any other person.

The Employment Equity Act 55 of 1998 (EEA) is the only piece of legislation that specifically prohibits unfair discrimination based on one's HIV status. In reality employees are still discriminated based on their HIV status. The fact that an employer can still approach the Labour Court to obtain authorisation for testing clearly defeats the Legislature's measures to protect people with HIV/AIDS. Another pitfall is that the Employment Equity Act does not make it a criminal offence for an employer to conduct a test in violation of section 7(2).

Section 2(b) of the EEA provides that it is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job. Article 2 of the ILO Convention 111 of 1958 also provides that any distinction based on inherent requirement of a job shall not be deemed to be discrimination.¹⁹⁷ This Convention has since been ratified by South Africa through the Recommendation concerning HIV and AIDS and the World of Work 200 of 2010 and the Code of Good Practice on HIV and AIDS and the World of Work which was introduced by the Department of Labour under the Employment Equity Act of 1998. This Code deals specifically with HIV and AIDS as a workplace issue. In the matter of *Independent Municipal Allied Workers Union & Another v City of Cape Town*¹⁹⁸ the Labour Court noted that the inherent requirement of a job required a policy of individual assessment rather than a blanket ban.

The Constitution of South Africa is the supreme law of the Republic and any law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled. The relationship between the Constitution and a statute implementing one of its provisions translates into a rule which the Constitutional Court has had occasions to emphasise in several recent court judgements.

¹⁹⁷ *Whitehead v Woolworths (Pty) Ltd* para 35. This decision was overturned on appeal in *Whitehead v Woolworths (Pty) Ltd* 2000 (21) ILJ 571 (LAC).

¹⁹⁸ *Independent Municipal and Allied Trade Union and Another v City of Cape Town* (LC521/03) [2005] ZALC 10; [2005] 10 BLLR 1084 (LC) (18 July 2005) para 110.

In *SANDU v Minister of Defence and Others*¹⁹⁹ it was put as follows:

“Where legislation is enacted to give effect to a constitutional right, a litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.”

In *Minister of Health and Another v New Clicks SA (Pty) Ltd and Another*²⁰⁰, the Constitutional Court had added the following important points:

“Where a litigant founds a cause of action on such legislation (i.e. legislation giving effect to a constitutional right), it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.”

Despite this, the courts have remained willing to entertain claims of unfair discrimination by employees brought directly in terms of the Constitution instead of the Employment Equity Act.²⁰¹

The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 deals mostly with unfair discrimination in the workplace, especially with things like insurance. This means that an employee with HIV/AIDS must be treated in exactly the same way as all the other employees in the organisation in all matters. Real or perceived HIV status is not a valid cause for termination of employment. Medical examination should be confined to the workers' ability to perform the work. This Act protects those government employees working in the military and intelligence services who were previously not covered.²⁰²

It is submitted that the legislative protection of employees living with HIV/AIDS in South Africa is not adequate because even though there is legislation which is available to protect such people the majority of people infected by the virus still do not disclose their status to their employers for fear of discrimination and victimization.

¹⁹⁹ *SANDU v Minister of Defence and Others* 2007 5 SA 400 CC, 2007 (8) BCLR 863 CC para 55.

²⁰⁰ *Minister of Health and Another v New Clicks SA (Pty) Ltd and Another* 2006 (2) SA 311 CC; 2006 (1) BLLR 1 (CC) 437.

²⁰¹ Ockert Dupper and Christoph Garbers *Equality in the Workplace, Reflections from South Africa and Beyond* 1ed (2009) 151.

²⁰² Abel Jeru Mbilinyi “Protection against unfair dismissal of employees living with HIV/AIDS in the Workplace” 34.

The International Labour Organisation (ILO) of which South Africa is a member has issued the Code of Practice on HIV/AIDS and the World of Work which provides for preventative, mitigating and management measures of HIV/AIDS in the workplace and of which the employer, trade union representative as well as employees have to adhere to reduce HIV related stigma, unfair discrimination, promotion of confidentiality and disclosure amongst those infected with HIV/AIDS, prevent mandatory HIV testing (unless of course getting authority from the Labour Court) and dismissal based solely on HIV status.²⁰³ South Africa only laid down the law that HIV status should not be a factor in job status, promotion or transfer in the year 2000. The ILO has made and continues to advocate protection of employees living with HIV/AIDS as one of its principles is that HIV/AIDS is a workplace issue as it affects the workforce and because the workforce can play a vital role in limiting the spread and effects of the pandemic. Any international law is not law in the Republic if it is inconsistent with the Constitution. Section 36 of the Constitution provides that no law may limit any right entrenched in the Bill of Rights.

The Code of Good Practice on HIV and AIDS and the World of Work²⁰⁴ is well decorated with ways and means of preventing unfair discrimination of HIV/AIDS employees in the workplace such that item 5.2 of the Code provides that HIV/AIDS is a workplace issue and it must be treated like any other serious illness or condition in the workplace. If this Code can be followed to the core, South Africa would not be having any cases of unfair discrimination based on HIV/AIDS reaching the CCMA or the courts of law. Item 7.7.5 of the Code provides that if an employee alleges unfair dismissal for HIV, he or she should refer the matter to the CCMA within 30 days of dismissal. The referral of the matter to the CCMA is also contained in the Code of Good Practice on key aspects of HIV/AIDS and Employment and the Employment Equity Act 55 of 1998²⁰⁵. The referral of a dispute to the CCMA is quite a lengthy process and the aggrieved party has to notify the other party and should also make attempts to resolve the dispute before referring the matter.

²⁰³ Abel Jeru Mbilinyi "Protection against unfair dismissal of employees living with HIV/AIDS in the Workplace" 46.

²⁰⁴ Item 5.2 of the Code of Good Practice on HIV and AIDS and the World of Work.

²⁰⁵ Item 7.7.5 of the Code.

Being dismissed as a result of HIV/AIDS is very traumatic and will take each and every dismissed employee more than 30 days to come to terms with what has just happened to them. An HIV/AIDS positive employee is within the 30-day period or even if given more than 30 days still relishing the thought of losing his or her job and the thought of taking on a former employer is the last thing on the employee's mind. The employee's lack of resources to take the employer to court and other factors such as standing in court to tell everyone that you are HIV positive are what stops most of the employees from taking such matters to court.

It is submitted however, that even though employees are not obliged to disclose their HIV status, they should be encouraged to do so in order for the employers to be in a position to provide the necessary support to such employees and to adjust the work of the employee accordingly should the employee become ill and not be able to cope with the conditions of the work that he or she is doing.

Note should be taken however, that an employer may not be expected to endure undue hardship in making continuous work possible for an employee who is clearly too sick to continue working. In such a case the employer can dismiss such an employee after taking into account the employee's incapacity, the nature of the incapacity, the length of time the employee has been sick and the effect this will have on other employees.²⁰⁶

If an employee is to be dismissed because of HIV/AIDS, the Code of Good Practice on Dismissal provides guidelines on dismissal for incapacity arising out of ill-health and injury. An employer must establish if the employee's ill health is of a permanent or temporary nature as follows:

- If the employee's ill health or injury is of a temporary nature, but the employee is likely to be absent from work for an unreasonably long time, the employer should investigate all alternatives short of a dismissal. When considering alternatives, factors such as the nature of the job, seriousness of the illness, possibility of making use of temporary employees and period of absence should be taken into account;

²⁰⁶ Item 10 of the Code of Good Practice on Dismissals: Incapacity: Ill health or injury.

- In the case of permanent ill health or injury, the employer should consider the possibility of securing alternative employment or ways of accommodating the employee's disability;
- The employee should be afforded the opportunity to state his or her case in response to an investigation into his or her medical incapacity and to be assisted by a fellow employee or trade union representative;²⁰⁷

There is some glimmer of hope in that the employer cannot just dismiss an HIV positive employee without following the guidelines. As to how many employers do follow those guidelines remains a mystery as employees continue to lose their jobs when they are dismissed unfairly without following due processes. It is submitted that as long as HIV/AIDS remains a taboo many employees will continue to suffer the stigma and discrimination in the workplace.

Even though the employer cannot deny a person living with HIV/AIDS employment, there are instances where the employer is permitted to do so, for example if a person is clearly too ill to work and where not having HIV/AIDS is an inherent job requirement.

Exclusion or preference made on the basis of HIV status, real or perceived, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation will constitute unfair discrimination. However, distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof may not be deemed to be discrimination.²⁰⁸

²⁰⁷ Item 10 (1-3) of the Code.

²⁰⁸ Johann Scheepers "Code of Good Practice: 'Equal Pay for Work of Equal Value'– Glossary of Legal Terms, Words & Phrases" accessed from <http://www.labourguide.co.za/equal-pay-for-workof-equal-value> (date of use 22 February 2017).

According to the ILO as many as 36 million of the 39 million people living with HIV are in some form of productive activity.²⁰⁹ These include general employees and managers. HIV/AIDS affects businesses through failing productivity causing costs to escalate and the market to react negatively. Businesses has a responsibility to tackle this pandemic head-on but this should not delay or take away the main purpose of the business which is profit making.²¹⁰

The South African Business Coalition on Health & AIDS (SABCOHA) on HIV and Business Overview shows that if companies invest in the prevention and treatment programmes for HIV-positive employees this can lead to a reduction in the financial burden of the company by as much as 40%.²¹¹

As already indicated in Chapter 2 above the impact of HIV/AIDS differs from one company to another and that the mining, metals processing, agriculture and transport sectors are mostly affected by the pandemic. Companies in these sectors have now implemented HIV/AIDS awareness programmes to fight the disease.²¹²

It is clear that lower productivity coupled with a number of issues being absenteeism, vacant posts created by the sickness or demise of the HIV/AIDS employee, the retraining and rehiring of workers, reduced productivity due to staff inexperience or illness, loss of morale among employees and poor labour relations are the main issues affecting a number of companies when it comes to HIV and AIDS.

HIV/AIDS is affecting the business sector by lowering productivity. On the other hand, it affects families and communities by creating child-headed homes. Children drop out of school to fend for themselves or their siblings after the death of the breadwinner at home. Unemployment increases and this puts a strain on the economy as the government has to try and cater for the family which has lost a breadwinner.

²⁰⁹ "HIV & Business Overview" accessed from <http://www.sabcoha.org/case-study>, at 1 (date of use: 21 February 2017).

²¹⁰ "HIV & Business Overview" 1.

²¹¹ "HIV & Business Overview" 1.

²¹² "HIV & Business Overview" 1.

Every worker spends most of their time in the workplace and this is the environment in which the employer can make sure that existing policies and programmes are implemented and applied effectively to protect employees living with HIV/AIDS. All forms of communications in the workplace can be utilized to make sure that the HIV/AIDS policies and programmes are known by each and every employee.²¹³

HIV/AIDS has an impact on how the markets behave in general and this has had an effect on how consumers behave. A healthier labour force impacts on consumer spending habits and this boosts the economy. Companies should ascertain that the health of their employees is prolonged by the implementation of their HIV/AIDS programmes and the easy availability of Antiretroviral Treatment (ARVs). Prolonging the lives of their employees has other benefits attached to them including:²¹⁴

- Those companies whose HIV/AIDS policies are so powerful that they have received international recognition in how they deal with prevention of the disease.
- Every company is taking an initiative in the fight against HIV/AIDS.
- Employer and employee relationship has improved because of the policies and programmes being implemented to deal with HIV and AIDS.
- Proactive decision by the business sector in dealing with HIV/AIDS has led to prevention of industrial conflicts as every employee is now in a position to know and deal with the disease.
- The co-operation by the employer and employee in the implementation and strengthening of HIV/AIDS programmes can also benefit other areas in the workplace.

All people living with HIV or AIDS have the legal right to privacy. Employees are therefore not by law obliged to disclose their HIV status to their employer or to other employees.²¹⁵

²¹³ "HIV & Business Overview" 1.

²¹⁴ "HIV & Business Overview" 4.

²¹⁵ Item 7.2.1 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

HIV positive people should be encouraged to disclose their status so as to create openness, acceptance and support within the workplace, including:

- (i) encouraging persons openly living with HIV/AIDS to conduct or participate in education, prevention and awareness programmes;
- (ii) encouraging the development of support groups for employees living with HIV or AIDS; and
- (iii) ensuring that persons who are open about their HIV/AIDS status are not unfairly discriminated against or stigmatised.²¹⁶

The most effective ways of reducing and managing the impact of HIV/AIDS in the workplace is through protection, development and application of HIV/AIDS Workplace policy programmes which aim to prevent or reduce new HIV infections.

The programmes should consist of condom distributions, awareness, education and training and creating a non-discriminatory environment. Through this, employers, trade unions and government can contribute towards efforts to prevent and control HIV/AIDS in the workplace.

The Code of Good Practice on HIV and AIDS and the World of Work as well as the South African Code of Good Practice on Key Aspects of HIV/AIDS and Employment serves as guidelines for employers to implement comprehensive gender sensitive HIV/AIDS workplace policies and programmes. The Codes are in no way protecting the rights of employees living with HIV/AIDS as same only sets out guidelines (which may or may not be followed) for employers and trade unions to implement so as to ensure that people who are HIV positive are not unfairly discriminated against in the workplace.²¹⁷ Thus the Codes if not implemented will not serve their purpose. The question is whether employers are even aware of the Codes. Items 12.1 to 12.3 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment refer to the grievance procedures which should be followed by the employers, but the question is whether they ever follow it.

²¹⁶ Item 7.2, 7.2.1, 7.2.2 and 7.2.3 of the Code.

²¹⁷ Item 2.1 of the Code.

Every court case referred to in this study was held in an open court and it is clear that there was no privacy and confidentiality of the complainant nor the proceeding held in camera (in private).²¹⁸ Item 7.6 of the Code of Good Practice on HIV and AIDS and the World of Work²¹⁹ also refers to grievance procedures to be followed but same is silent on whether the employer should ensure the proceedings are held in private.

Everyone is entitled to a safe working environment, non-discrimination on the basis of race, gender, sex and sexual orientation, benefits, compensation and management of HIV/AIDS in workplace.²²⁰

Studies and knowledge about HIV have shown that for half of the people who contract the disease, it takes more than a decade to develop AIDS. With medical treatment, many of them can manage the infection as a chronic, long-term condition, similar to many other diseases such as cancer. A supportive work environment is needed to reduce the impact of the pandemic and to provide support for employees who are living with HIV/AIDS so that they can continue to be productive.²²¹

An extended life expectancy and having a policy in place to address HIV can bring many benefits for HIV positive persons. This means that more people will continue working. Employers who offer employees proactive education programme about HIV can minimize loss of productivity and human resource due to the pandemic. Because of the rapid spread of the disease it is noted that the workplace will have more people who are infected or affected by the virus and the number of potential employees will also be small.

HIV/AIDS workplace programmes should be created to teach employees about the disease. This should be done to create an environment wherein the employee living with HIV/AIDS can work without any fear, discrimination or prejudice.²²²

²¹⁸ Items 12.1 to 12.3 of the Code provide as follows: Employers should ensure that employees with HIV/AIDS are aware of their rights and the remedies available to them in an event of a breach. They must create an awareness and understanding of the grievance procedures should develop special measures to ensure the confidentiality of the complainant and proceedings are held in private.

²¹⁹ Items 7.6.1 to 7.6.4 of the Code provide that the employer must make grievance procedures easily accessible to address unfair discrimination relating to HIV in the workplace and when all internal dispute have been exhausted and remains unresolved any party may refer the matter to the CCMA within six months.

²²⁰ Item 8.1 of the Code as well as section 6(1) of the Employment Equity Act 55 of 1998.

²²¹ Item 2.2 of the Code.

²²² "HIV & Business Overview" accessed from <http://www.sabcoha.org/case-study>, at 3 (date of use: 21 February 2017).

It is essential that an environment be created in which an employee living with HIV/AIDS is able to divulge his or her status voluntarily without fear of discrimination or retribution. Such environment will assist management not only to support the employee where possible, but importantly also to manage the human resources implications.²²³

Companies should be given some form of an incentive for having workplace policies in order to encourage them to make sure that HIV/AIDS employees are not unfairly discriminated.

On the other hand, Mozambique has Law No.19/2014 which deals specifically with HIV/AIDS in the workplace. This Act provides sanctions against its transgressors. It should be noted that South Africa unlike Mozambique does not have a piece of legislation that deals specifically with HIV/AIDS. However, South Africa has provisions in various statutes that refer to protection of people living with HIV/AIDS and a Code of Good Practice which provides guidelines to be followed to ensure that people living with HIV/AIDS are not discriminated against in the workplace. It is submitted that South Africa still does not offer adequate protection to people living with HIV/AIDS as there is a serious need for the country to have legislation that specifically deals with the issue similar to Mozambique. This piece of legislation must introduce harsher punitive legal measures that must be taken against those who fail to respect or protect the rights of people living with HIV/AIDS.

In the United States of America and in the United Kingdom employees are obliged to disclose their HIV status in certain professions like surgeons, dentistry, emergency room nurse, laboratory technicians or where there is a risk of exposure to body fluids or blood. South Africa may have been ineffective in containing HIV/AIDS at the start of the pandemic but the country as compared to the United States of America and the United Kingdom has made commendable inroads with its endeavours to stop or curb the spread of the disease and discrimination in the workplace without the employees being forced to disclose their HIV status in any of the professions.

²²³ David Dickson "Managing HIV/AIDS in the workplace" 21.

South Africa through the Compensation for Occupational Injuries and Diseases Act 130 of 1993 goes to an extent of compensating employees infected with HIV as a result of an occupational exposure to infected blood or body fluids.²²⁴

In the context of HIV/AIDS related discrimination, there is an obligation on the government to respect and ensure that its laws, policies, and practices do not directly or indirectly discriminate based on HIV or AIDS status. The obligation to protect requires the government to take measures that prevent HIV/AIDS related discrimination by third parties, and the obligation to fulfil requires it to adopt appropriate legislative, budgetary, judicial, promotional, and other measures that address HIV/AIDS related discrimination and that compensate those who suffer such discrimination.²²⁵

Finally, it is submitted that it should not be the cause of the illness that should worry the employer, but the effect of the illness on the employees' ability to do the work.

²²⁴ Chapter VII, section 65 of the Compensation for Occupational Injuries and Disease Act 130 of 1993 read together with Item 9.1 to 9.2 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

²²⁵ Miriam Maluwa, Peter Aggleton, and Richard Parker "HIV- And AIDS-Related Stigma, Discrimination, And Human Rights: A Critical Overview" (The President and Fellows of Harvard College is collaborating with JSTOR to digitize, preserve, and extend access to Health and Human Rights) accessed from www.jstor.org .JSTOR is a digital library of academic journals, books, and primary sources (date of use: 31 March 2017).

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