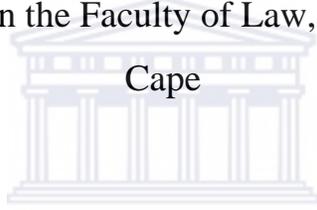


HIV IN THE WORKPLACE- *A Critical Investigation into the present
Legislative Protection afforded to the HIV Positive Employee*

JEROME MARK POGGENPOEL

A Mini-thesis submitted in partial fulfillment of the requirement for the
Degree Magister Legum in the Faculty of Law, University of the Western

Cape

The logo of the University of the Western Cape, featuring a classical building facade with columns and a pediment.

UNIVERSITY of the
WESTERN CAPE

Supervisor: Craig Bosch

NOVEMBER 2006

(i.)

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KEYWORDS

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Automatically Unfair Dismissal

Epidemiological

HIV

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HIV Testing

Infected Employee

Informed Consent

Inherent Requirement of the Job



(ii.)

ABSTRACT

HIV IN THE WORKPLACE- A Critical Investigation into the Present Legislative Protection afforded to the HIV Positive Employee

J.M. Poggenpoel

LLM mini-thesis, Faculty of Law, University of the Western Cape.

In this mini-thesis I examine to what extent our current legislation protects the HIV positive employee against unfair discrimination and dismissal. In doing so, I give a short medical background to HIV/AIDS and introduce HIV discrimination by giving the historical background to HIV related discrimination. From this, the extent of stigmatization against this group is introduced.

I assess the degree of protection by starting with International Conventions and various pieces of South African legislation starting with our supreme law of the land, i.e. the Constitution too the Employment Equity Act (EEA). From this assessment I find that the HIV positive employee is sufficiently protected against unfair discrimination and dismissal. I further critically examine the controversial pre-employment testing provisions of the EEA by sketching developments in pre-employment testing and how it progressed from an allowed and non-regulated system ten years ago to regulated discrimination in the form of the EEA's testing provisions. In doing so, I discuss the interpretive confusions with regard to the Act's testing provisions in order to establish its true meaning.

I then argue that the interpretation should be read in line with the overall objectives of the EEA, which is to remove the inequalities and discrimination entrenched by the apartheid

system and promote a workplace free from discrimination. I also assess the conditions under which an employer can dismiss an HIV positive employee (be it based on inherent requirements, ill-health, disability and operational requirements). I also maintain that although the courts will not sanction substantive and procedurally unfair dismissals, they regard dismissals based on the employer's operational requirements as justified. Such fairness would require that appropriate consultation takes place and alternatives short of dismissal were considered prior to following a procedurally and substantively fair dismissal procedure.

The mini-thesis concludes by mentioning that law alone will not end discrimination (faced by persons that are HIV positive), and identifying a process to work towards, in order to eradicate discrimination against HIV positive employees by removing the stigmatization attached to the disease.



NOVEMBER 2006

(iii.)

DECLARATION

I declare that HIV IN THE WORKPLACE- A Critical Investigation into the Present Legislative Protection afforded to the HIV Positive Employee is my own work, that it has not been submitted before for any examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Jerome Mark Poggenpoel

November 2006

Signed:



(iv.)

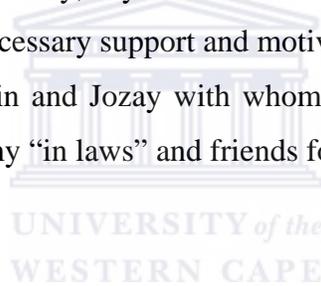
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- I also wish to gratefully acknowledge the guidance and assistance received from my supervisor Craig Bosch without whose assistance I would have been lost.

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Chapter One

Introduction

“At the start of the new century, South Africa probably had the largest number of HIV-infected people of any country in the world...The tragedy is that this did not have to happen. If ever there was a wish to rewind history and to do it differently, this is the case. We find ourselves in a situation that fundamentally threatens the economy and social structure of South Africa, with profound implications for the workplace.”¹

The urgency in finding a cure for the Human Immunodeficiency Virus (HIV)² and the Acquired Immunodeficiency Syndrome (AIDS)³, cannot be emphasized more today. More than two decades after the first South African was diagnosed with AIDS, scientists have been unable to find a medical cure for the disease. This inability to find a cure has resulted in the HIV and the AIDS pandemic reaching extreme and uncontrollable proportions worldwide. Having over 6,5 million⁴ HIV infected individuals, South Africa is regarded as the country which is the most severely plagued by the disease. Of these, more than 6,1 million are in the age group 18 to 64, which is also the group most likely to make up South Africa’s workforce. According to Heywood and Hassan,⁵ “[a] combination of poverty, illiteracy, migrant labour, commercial sex work and disruption to family and communal life has increased the individual’s risk of HIV infection.”

HIV is commonly transmitted through sexual activity by two individuals. It is also spread by means of making contact with the blood of an infected individual or when an infected mother breast-feeds her newborn baby. These restrictive means of transmission therefore limit the spread of the disease and make it almost impossible to contract it through forms of social contact between the HIV positive person and a non-infected individual. Thus, one cannot contract the disease by touching or shaking the hand of an HIV positive employee. One can also not contract HIV by sharing cups or glasses or crockery, hugging

¹ Allan Whiteside & Clem Sunter’s, ‘AIDS: The Challenge for South Africa’ (2000) Human & Rosseau Tafelberg page 1.

² HIV is a virus which attacks and may ultimately destroy the body’s natural immune system.

³ AIDS is the clinical definition given to the onset of certain life threatening infections in persons whose immune system have ceased to function as a result of infection with HIV.

⁴ Nan Eyles, ‘AIDS situation in South Africa’. Finance Week 15th October 2003 at 65.

⁵ Mark Heywood & Fatima Hassan, ‘The Employment Equity Act and HIV/AIDS-A Step in the Right Direction’ (1999) 20 ILJ 845 at 845.

or kissing, using toilet seats, washing facilities or a swimming pool, exchanging money, coughing or sneezing, breathing, being a blood donor, receiving mosquito or insect bites.⁶ The possibility of transmitting the disease within the workplace is thus relatively small with almost no chance of this taking place. The exception to this however, is in the medical profession where instances may arise when contact is made with HIV positive patients' blood, but even then universal precautions are available to prevent this from happening.

AIDS is the final stage of HIV. It is at this point that the HIV positive individual's immune system becomes so defenseless that it is no longer able to fight off infections and diseases. People therefore die from various AIDS related diseases and not from AIDS itself.⁷ Although antiretroviral and other medication has been introduced in the past few years, no significant medical cure has been found for the disease. The contribution of antiretrovirals can however not be overlooked. It must be acknowledged that the use of these antiretroviral medications has assisted in fighting off the disease by building a stronger immune system. By having a stronger immune system the life of the HIV positive person can be significantly prolonged.

A notable characteristic of HIV is that it is not racially, socially or gender based, but finds itself across many communities. Its links to socio-economic conditions can however not go unrecognized.⁸ In saying so, I refer specifically to the predominance of the disease among Blacks in poverty stricken rural communities. The prevalence of the disease is also not limited to rural communities but also present in black townships in the suburbs. HIV can therefore be regarded as a disease of poverty as it is most prominent among the poorest persons. As pointed out by Ngwena,⁹ "[t]he sexual dimension to HIV/AIDS and, more particularly, its early link with marginalized groups such as homosexuals, has furthermore made it the object of unparalleled stigmatization. People living with

⁶ Norman Arendse, 'HIV and AIDS Infected Employees: Some Legal Implications for the Work-place' (1991) 12 ILJ 218 at 219.

⁷ *ibid* 219.

⁸ Nicola Smit, 'HIV/AIDS, equity and labour law' (2001) 2 De Jure 318 at 319.

⁹ Charles Ngwena, 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 SAJHR 513 at 514.

HIV/AIDS (PWAs) attest to a society that has responded to their plight with intense prejudice.” This prejudice has over the past few years extended to the workplace resulting in our courts having to decide on the fairness of such prejudice, which eventually resulted in discrimination.

There can be no question about the impact that HIV/AIDS has on the workplace. It severely impacts on the workplace and also on the employer-employee relationship as a whole. Not only does it have legal implications in the workplace, it also has extreme economic consequences for the employer. This may be as a result of, but not limited to, the failure on the part of the employee to attend work regularly and to contribute productively to the wellbeing of the company as a result of his/her HIV related illnesses.

In the absence of finding a medical cure, employers will be faced with the financial burden attached to having an HIV positive employee in their workplace. According to Stevenson,¹⁰ “[i]t is estimated that by the year 2005 [25%] of the economically active workforce will be HIV positive.” Its impact will mostly be felt by small businesses that are not easily able to replace the HIV positive employee who may have a special skill or occupational responsibility unique to his/her job function. Retraining or employing another employee (to take over the responsibilities of the employee who is no longer able to carry out his/her normal job functions as a result of his/her sickness), will have serious financial implications too the employer’s business.

Although the HIV/AIDS pandemic holds increased financial burdens to the employer, little progress has been made with regard to implementing HIV/AIDS policy in companies. I refer to the facts that at present, not many companies have taken up the fight against HIV and AIDS in their respective workplaces. Only a few major South African companies and institutions have acknowledged the threat of HIV/AIDS and its impact on the workforce by developing policies and initiating training programmes in order to combat the spread of the disease. Sadly however, the majority has turned a blind eye and

ignores the reality of its effect on their companies. In a survey conducted in 2002 for example, Stevenson¹¹ found that, “[0%] of companies surveyed had written policies on HIV/AIDS and only [30%] of companies had embarked on HIV/AIDS training.” Even with legislation and the Code of Good Practice: Key Aspects of HIV/AIDS and Employment of 2000 in place requiring employers to develop such policies, not all companies have gone that far.

The platform for this kind of attitude was set more than a decade ago when employers had no interest in working towards addressing the HIV/AIDS problems in the workplace. They instead focused on developing policies that discriminated against HIV positive employees and limited their access to employment. Trade Unions on the other hand focused on developing broader HIV policies as defence mechanisms against discrimination, instead of making workers aware of the threat that HIV brings to the workplace by training them.

Before the enactment of anti-discriminatory and HIV testing legislation, it was common practice for employers to limit the access of HIV positive applicants to the workplace. As found by Ngwena,¹² in doing so, “[e]mployers have engaged in unwanted and unwarranted HIV testing. Job applicants and employees who were HIV positive have been refused employment, reassigned or dismissed regardless of capacity for work. Such abuses have prompted the need for legal responses.”

Currently, various legislative measures are in places that protect the HIV positive employee against discrimination and unfair dismissal. Consideration must firstly be given to International Laws such as those prescribed by the International Labour Organisation (ILO),¹³ the World Health Organisation (WHO)¹⁴ and the South African Development

¹⁰ Donna Stevenson, ‘Proactive measures required of companies in the fight against HIV/AIDS’. A CHIETA SETA Presentation, 21st May 2002 at 6.

¹¹ Ibid 11.

¹² Charles Ngwena, ‘HIV in the Workplace: Protecting Rights to Equality and Privacy’ (1999) 15 SAJHR 513 at 514.

¹³ The ILO is the United Nations (UN) specialized agency which seeks the promotion of social justice and internationally recognized human and labour rights. It was founded in 1919 and is the only surviving major creation of the Treaty of Versailles which brought the League of Nations into being and it became the first

Community (SADC)¹⁵ Within South Africa, the Constitution of the Republic of South Africa, Act 108 of 1996, which is the supreme law of the land, entrenches the Constitutional right to fair labour practices in the workplace (section 23(1)). The Constitution further provides that no person should be unfairly discriminated against because of his/her HIV status. This fundamental constitutional right emanates from section 9(3) in the Bill of Rights.

Secondly, the Labour Relations Act (LRA), Act 66 of 1995, also regards as unfair discrimination against the HIV positive employee. In terms of section 187(1)(f), a dismissal could be regarded as automatically unfair if the reason for the dismissal is that the employer unfairly discriminated against the HIV positive employee. The Act also prescribes certain remedies in cases of automatically unfair dismissals. In terms of section 193(1) an unfairly dismissed employee may either be reinstated or compensated. The LRA however provides that where the discrimination is based on an inherent requirement of the job,¹⁶ the discrimination will not be regarded as unfair. This is what is provided for in section 187(2)(a). Furthermore, the Code of Good Practice: Key Aspects

specialized agency of the UN in 1946. The ILO formulates international labour standards in the form of Conventions and Recommendations setting minimum standards of basic labour rights; freedoms of association, the right to organize, collective bargaining, abolition of forced labour, equality of opportunity and treatment, and other standards regulating conditions across the entire spectrum of work related issues. www.ilo.org/public/english/about/index.htm

¹⁴ The WHO is the UN specialized agency for health. It was established on 7 April 1948. WHO's objective, as set out in its Constitution, is the attainment by all peoples of the highest possible level of health. Health is defined in WHO's Constitution as a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity. www.who.int/about/en/

¹⁵ The SADC was established in April 1980 by governments of only nine Southern African countries at the time. The objective of the SADC remains relevant and valid as provided for under Article 5 of the treaty. The main objective of SADC is to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration. HIV/AIDS has been singled out as a major threat to the attainment of the objectives of the SADC and therefore it is being accorded priority in the health programme and other relevant sectors. www.sadc.int

¹⁶ The term is identical to that used by the ILO Convention 111 art 1(2). European Directive 76/207/EC, prohibiting sex discrimination, allowed an exception where 'the sex of the worker constitutes a determining factor' of the job: art 2(2). In the United Kingdom the equivalent term is 'genuine occupational qualification', in the United States '*bona fide* occupational qualification' and in Canada '*bona fide* occupational requirement'. Du Toit et al, 'Labour Relations Law: A Comprehensive Guide' (2003) 4th Edition Butterworths at 556.

(See also *Whitehead v Woolworths (Pty) Ltd* (1999) 8 BLLR 862 (LC) where 'inherent requirement' was defined as an 'indispensable attribute' which must relate in an inescapable way to the performing of the job.)

on HIV/AIDS and Employment of 2000 also states, like the LRA, that a dismissal resulting from an employees HIV status is regarded as automatically unfair. It must however be mentioned, that the Code does nothing more than further advance the aims of labour legislation such as the LRA, the Employment Equity Act (EEA), Act 55 of 1998, the Basic Conditions of Employment Act (BCEA), Act 75 of 1997 and the Compensation for Occupational Injuries and Disease Act (COIDA), Act 30 of 1993. It also promotes the idea that training and support, should be provided to the HIV positive employees on the part of the employer and labour organizations.

Thirdly, the EEA is regarded as the most significant piece of legislation (providing for inclusive protection of the HIV positive employee), sets in place more solid anti-discrimination protective measures. It does so by, expressly prohibiting discrimination against employees on the basis of HIV (section 6 (1)). The most substantial contribution in the Act is undoubtedly its provisions on HIV testing which states that an employee cannot be tested without him/her voluntarily consenting to such a test (section 7(1)). The Act furthermore provides that such testing requires the approval of the Labour Court unless anonymous and voluntary (section 7(2)). This can be seen in the cases of *Ex parte Ndebele Mining Company (Pty) Ltd*,¹⁷ *Joy Mining Machinery (a division of Harnischfeger (SA) (Pty) Ltd v NUMSA & Others*,¹⁸ *I & J v Trawler Line Fishing Union and National Certificated Fishing and Others*,¹⁹ and *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood and Allied Workers Union & Others*.²⁰

Fourthly, the Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA), Act 4 of 2000 prohibit discrimination on grounds of race, gender and disability. The Act was primarily enacted to protect members of the National Defence Force (NDF), the National Intelligence Agency (NIA), the South African Secret Service (SS), the South African National Academy of Intelligence (SANAI) and any other person

¹⁷ (LC) 10-07-2001 (case J1466/2001 unreported).

¹⁸ (2002) 4 BLLR 372 (LC).

¹⁹ (2003) 4 BLLR 379 (LC).

²⁰ (2003) 5 BLLR 475 (LC).

not included in the EEA's protection. There are also other pieces of legislation that provide protection for the HIV positive employee. They include the BCEA, the Occupational Health and Safety Act (OHSA), Act 85 of 1993, the Mine Health and Safety Act (MHSA), Act 29 of 1996, the COIDA and the Medical Schemes Act (MSA), Act 131 of 1998.

Some challenges however remain within the enforcement of our legislation, which allows discrimination to continue against the HIV positive employee. This is evident amongst domestic workers²¹ and might even exist in other sectors where employees are too afraid to come forward as they fear further discrimination and stigmatization. Notable also is the fact that some companies still require pre-employment testing, despite legislative provisions prohibiting such practices. This is currently the situation in the South African National Defence Force (SANDF), where the Minister earlier remarked that that all applicants including employees required to work abroad will be subjected to HIV testing. This remark was made despite legislative requirements that only permitted testing once approved by the Labour Court.²² It was also seen in a major company in the retail sector.²³ In the final analysis, what becomes clear is that the present legislation, which includes the Constitution and various Acts, does provide adequate protection to the HIV positive employee. This will be the focus of this research, which will attempt to substantiate whether a need exists for further legislative intervention.

My standard of evaluation will take the following form. In determining whether current protection is adequate, I will compare present legislation with that which existed prior to 1994 before the Constitution, the EEA, the PEPUDA and the Code came into place. It must be mentioned however, that the extent of past protection can primarily be measured

²¹ Claire Keeton, 'Madam told to cough up for firing maid with AIDS' The Sunday Times, 27th June 2004 at 7.

²² See Monare, "Others must share load, Lakota says" The Stare (16-02-2005) 5. Nicola Smit, 'Some observations regarding the occurrence and management of HIV/AIDS in South African workplaces' (2005) 2 TSAR 358 at 367. (See also Liesl Gernholtz, 'HIV in the SADF' AIDS Law Project Press Release 31st October 2003 at 1.

<http://www.alp.org.za>

²³ Journ-AIDS, 'Union Accuses Shoprite-Checkers of Discriminating Against HIV Positive Employees' 23 October 2003 at 1.

<http://www.journ-aids.org/reports/23102003e.htm>

by considering case law of the past. This is however difficult as no workers previously reported such discrimination (or either settled the matter out of court), in order to avoid further discrimination by the broader community. The analysis will therefore be done in the following manner.

Chapter one has introduced the thesis topic and mentioned the overall objective of the thesis. Chapter two will give a brief medical background to HIV/AIDS and sketch the historical background to HIV/AIDS discrimination in the South African workplace. The chapter will also highlight the employer's negative response to HIV positive employees, and the inefficiency of legislation of the past to protect these employees against discrimination and unfair dismissal. Chapter three will review the present legal framework and give an account of existing protection measures being afforded to the HIV positive employee by the different pieces of legislation.

The controversial HIV testing provisions in section 7 (1) & (2) of the EEA will be thoroughly examined in chapter four. Here, its legal position with reference to case law will be explored. Conclusions on its effectiveness will then be drawn after some debate. Chapter Five will examine the circumstances under which an employer may dismiss an HIV positive employee or AIDS sufferer. Here, the extent of the LRA's dismissal provisions will be thoroughly explored and pertinent issues relevant to them will be contested in this chapter. Among these are the responses against automatically unfair dismissals and the appropriate remedies prescribed by legislation. Some reference will also be made to how the real reason for the employees dismissal (be it due to their HIV status or some, other, acceptable, reason) are determined. In the final analysis, outstanding issues will be raised and attempts made to draw conclusions on the extent of legislative protection (afforded to the HIV/AIDS positive employee and whether this protection is adequate. Recommendations will then be made in this regard.

Chapter Two

HIV and Discrimination

*'Illness is the night-side of life, a more onerous citizenship. Everyone who is born holds dual citizenship, in the kingdom of the well and the kingdom of the sick. Although we all prefer to use only the good passport, sooner or later each of us is obliged, at least for a spell, to identify ourselves as citizens of the other place ...'*²⁴

1. A brief medical background to HIV/AIDS in South Africa

The first reported case of AIDS came from the United States in 1981. The report (which was the first of its kind to expose the disease), was first published in June 1981 by the Atlanta-based Centers for Disease Control and Contribution (CDC). In 1982 the disease was named AIDS.²⁵ AIDS was however only reported within South Africa in 1983 by the South African Medical Journal (SAMJ), where two cases of the disease were found among male homosexuals. Furthermore, the pandemic was initially mainly associated with homosexuals, blood transfusion recipients and haemophiliacs during the period 1982 to 1987.²⁶ Once scientists became aware of the disease much more time was spent on finding its causes through scientific and epidemiological research. It was then that French scientist Luc Montagnier identified the HIV virus in 1983.²⁷

AIDS is the final stage of HIV. This means that the individual initially contracts the HIV virus, which develops into AIDS. This takes place as the immune system becomes more and more defenseless and unable to fight off illnesses resulting from a weak immune system. The HIV virus manifests itself in the male and female's bodily fluids such as, semen and blood and it is the exchange of these fluids that usually spread the disease from one individual to another. According to the National Institute of Allergy and Infectious Disease (NIAID)²⁸, it is most commonly spread through having unprotected sex with an infected individual. This takes place by spreading the virus through the lining

²⁴ Susan Sontag, 'Illness as Metaphor and AIDS as its Metaphors' (1993) Picador USA Publishers at 3.

²⁵ Abdool Karim, 'HIV/AIDS in South Africa' (2005) 1st Edition Cambridge University Press at 32.

²⁶ Ibid at 33.

²⁷ Tony Barnett & Alan Whiteside, 'AIDS in the Twenty-First Century: disease and globalisation' (2002) 1st Edition Palgrave Macmillian Publishers at 29.

²⁸ Office of Communication and Public Liaison National Institute of Health. 'HIV Infection and AIDS: An Overview' Bethesda March 2005 at 1.

of the vagina, vulva, penis, rectum, or mouth during sexual contact. HIV can only be transmitted in one of the following ways: A person making contact with infected blood, through contaminated needles (commonly spread among infected drug users using the same needles) and mother to child transmissions (during pregnancy or birth and through breast feeding by the HIV positive mother). It can also be spread through the use of contaminated medical or other instruments, such as dental equipment, syringes and tattoo needles. This can however be avoided by sterilization of these instruments.²⁹

HIV cannot be transmitted through contact of a person's saliva. Furthermore, no evidence has also been found by scientists that it can be spread through sweat, tears, urine, or feces. The same can be said about the spread of the virus through physical contact such as the sharing of food utensils, towels and bedding, swimming pools, telephones, or toilet seats. Transmission can also not take place through being bitten by insects such as mosquitoes or bedbugs.³⁰

It is also internationally accepted that HIV cannot be contracted by any other means, other than those expressed above. It is therefore unlikely that the disease will spread among employees in the workplace. The courts have also at times held that exposure to the virus does not result in natural contraction. In other words, a person may have had sexual intercourse with an HIV positive individual but may not have contracted the disease. Furthermore, being HIV positive does not necessary result in an individual ending up with AIDS.

According to the South African Law Commission (SALC),³¹ “[s]cientists are as yet uncertain of the precise position. There is apparently reasonable consensus that 45-50% of infected persons will develop AIDS after 10 years. For the rest it is likely that they will contract the HIV virus alone. It has also been estimated that between 65-100% of infected

²⁹ Tony Barnett & Alan Whiteside, ‘AIDS in the Twenty-First Century: disease and globalisation’ (2002) Palgrave Macmillian Publishers at 40.

³⁰ Office of Communication and Public Liaison, National Institute of Health. ‘HIV Infection and AIDS: An Overview’ Bethesda March 2005 at 2.

³¹ South African Law Commission, ‘Second Interim Report on all Aspects Relating to AIDS’ Pre-employment Testing (1998) Project 85 at 7.

persons will develop the disease within 16 years.” The progress of the HIV virus is currently as follows. Three stages have been identified before the employee finally reaches the AIDS level. They are the initial and acute stages, and the popular asymptomatic phase preceding AIDS.

- Acute HIV infection: The acute seroconversion illness arises approximately two weeks after one has contracted the HIV virus and develops an illness similar to flu. This illness is however temporary as it disappears after a short while.
- Asymptomatic carriers’ stage: This stage, which allows a person to work without any health interferences, occurs after the acute seroconversion stage. During this period the virus remains inactive but builds itself in the system.
- AIDS Related Conditions (ARC): This stage becomes visible any time between a few months and 15 years after contracting the virus. It is during this stage that a person develops symptoms such as night sweats, weight loss, persistent diarrhoea, dry cough, vaginal infection, skin rashes and leads to a decline in his/her productivity at work.
- AIDS: AIDS being the final stage of HIV deteriorate due to the person not receiving any medical treatment against the virus. Such individual’s health then deteriorates and leads to them eventually suffering from full-blown AIDS. The symptoms associated with this final stage include infections of the liver, lungs and bowel (which could lead to fatal diseases like pneumonia); unusual skin markings, chronic diarrhoea, depression, thrush of the mouth, recurring bouts of sexually-transmitted diseases (like hepatitis B, toxoplasmosis headaches, weakness and confusion), possible deterioration of the brain, and memory loss.³²

An important factor worth mentioning is that instances arise where signs of the illness are only diagnosed when the individual has already reached the AIDS level. It can therefore not be taken for granted that a person should go through the commonly known stages before ultimately dying of AIDS. Whereas the initial contracting phase places no severe

³² Matthew Grossett, ‘Discipline and Dismissal –A Practical Guide for Managers’ (1999) 2nd Edition Thompson Publishers at 123.

burden on the employer or employee, it is the ARC phase that has serious financial implications on the employer's business.

Appreciation should be given to medical scientists who are continuously in search of a cure for the dreaded pandemic. The role of antiretroviral drugs can also not go unrecognized. Although no cure has yet been found for AIDS, the use of antiretroviral drugs has substantially assisted in managing the disease to the extent that it strengthens the HIV infected person's immune system and, at the same time, prolongs the life of those infected. According to Grossett,³³ "[t]he most effective drug in 1999 was azidothymidine (AZT), which is classified as an antiviral drug and was approved, for use in March 1987. The Burroughs Wellcome Company in the United States was the first to market AZT under the trade name Retrovir, and the brand of Zidovudine. However, AZT merely slows down the reproduction of the HIV virus and is hence a treatment (which prolongs the life of HIV positive persons), but not a cure (cure against death arising from AIDS), for AIDS."

Although the contribution of antiretroviral drugs cannot go unrecognized, a concern that should be noted is that of the expense associated to obtaining these drugs. In South Africa, the situation is made worse by the fact that access to these drugs is not readily available to the poor. Unlike the case of South Africa, governments in various industrialized countries such as Britain and Australia³⁴ have taken it upon themselves to supply these drugs free of charge to HIV positive employees and their broader communities. In these countries, the supply of these drugs is made possible by state subsidized medication.

Within Africa however, Botswana seem to be the only country which has taken up the responsibility of providing free and accessible antiretroviral medication to the countries HIV- infected people. Their treatment campaign named MASA, the Setswana word for "dawn", which was launched in January 2002, was initially targeted at four population

³³ *ibid* 123.

groups namely, pregnant women with AIDS, HIV positive child in-patient, HIV-positive people with TB, and adult in-patients with AIDS.³⁵

Much controversy has however been sparked as a result of the South African government's refusal to supply antiretroviral drugs freely. For some time now, many progressive HIV/AIDS support groups such as the Treatment Action Campaign (TAC)³⁶ has been challenging government to supply these drugs. These challenges included mass protests and marches by the TAC and its supporters. The effect of such petitions and mass protest marches seems to have paid off. This can be seen in recent developments in the government's health policy which makes provision for free antiretroviral drug distribution at local hospitals throughout South Africa. Although progressing at a very slow pace, free antiretroviral drugs are now a reality.

2. Developments in HIV/AIDS Discrimination

HIV/AIDS discrimination is the result of (false) myths and misconceptions about the nature of the disease. Much of what is said about the disease is taken in a negative light by almost all individuals not infected by HIV. This negativity is as a direct result of a lack of understanding and awareness regarding the disease. I refer specifically to the fact that the broader South African community is not yet aware that the disease is spread in a very limited way. Furthermore its historical link with homosexual groups in particular has created further misconceptions about how the disease is spread. A popular misconception that developed during the early nineties was that HIV/AIDS were only contracted and spread by homosexuals. It is this ignorance about the disease that has resulted in the prevalence of discriminatory practices against HIV/AIDS sufferers.³⁷

³⁴ Charles Ngwena, 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 SAJHR 513 at 513.

³⁵ Fredricksson, J & Kanabus, J, 'HIV & AIDS in Botswana' 2 January 2007.

³⁶ The TAC was launched on 10 December 1998, International Human Rights Day. Its main objective is to campaign for greater access to treatment for all in South Africa, by raising public awareness and understanding about issues surrounding the availability, affordability and use of HIV treatments. TAC campaigns against the view that AIDS is a 'death sentence'. www.tac.org.za/about.htm

³⁷ Zenwil Lacob, 'HIV Discrimination and Privacy in the Workplace' (1996) June De Rebus 396 at 396.

Ngwena³⁸ notes that, “[t]o some, AIDS is a kind of nemesis visited upon those who have traded caution for hedonistic sexual pleasure. Compassion has tended to be reserved only for the ‘innocent victims’ such as those who are infected through blood transfusion and birth. People living with HIV/AIDS (PWAs) have been ascribed a pariah status and have been subjected to abuses of human rights in most walks of life, including the workplace.”

2.1 Past responses by employers to HIV/AIDS infected employees

Workplace based HIV discrimination has been around for more than a decade. According to Ngwena,³⁹ “[t]here is sufficient evidence to show that HIV-related discrimination is practiced on a significant scale.” Employers’ contributions to this discrimination were very much visible during the period 1990 to 1997. Specific reference is made to the actions of employers (who at that time instituted discriminatory policies), that subjected employees to outright discrimination, stigmatization and rejection if found to be HIV positive.

Common inclusions into such policies were pre-employment HIV testing provisions. Many employers made use of such practice in both the private and public sector. This was despite strong evidence existed suggesting that such practice does not in any way curb the spread of the disease in the workplace.⁴⁰ Among those employing such practices were the Pretoria and Bloemfontein City Councils, the Department of Correctional Services (DCS), the SADF and the South African Police Services (SAPS). So too, did the major South African airline group South African Airways (SAA) who changes their pre-employment testing provisions in its recruitment policy after the *Hoffmann* case. This is evident from the case of *Hoffmann v South African Airways (SAA)*.⁴¹ Furthermore, all the above including departments such as the SAPS have subsequently ended such

³⁸ Charles Ngwena, ‘HIV in the Workplace: Protecting Rights to Equality and Privacy’ (1999) 15 SAJHR 513 at 514.

³⁹ Ibid 517.

⁴⁰ Sue Albertyn & Dan Rosengarten, ‘HIV and AIDS: Some Critical Issues in Employment Law’ (1993) 9 SAJHR 77 at 79.

⁴¹ 2001 (1) SA 1 (CC).

recruitment practices in 1997 when the government proclaimed such practices illegal by prohibiting it.⁴²

HIV discrimination was usually applied for reasons not directly related to the employee's status in order to avoid accusations of discrimination on the part of the employer.⁴³ This practice was also made easy by the fact that no statutory prohibition on testing existed at the time. I refer specifically to the fact that the Unfair Labour Practice (ULP) provisions of the previous Labour Relations Act (LRA), Act 28 of 1956, did not apply to prospective employees and placed HIV-positive applicants in an even more vulnerable position. A further shortcoming of the Act was its exclusion of certain classes of employees, most notably domestic servants and teachers at universities. This also made it difficult for them to seek recourse at the Industrial Court.

Furthermore, the common law also failed in protecting prospective employees.⁴⁴ At most, it provided for short notice periods in cases of HIV positive employees. Other than that, no protective measures were in place for prospective HIV positive applicants. This was also mainly due to the generally accepted common law rule, which held that an employer was free to accept or employ any person. In other words, it was the employer's prerogative and right to employ whomever it wished and this right extended to that of discriminating against prospective employees on any grounds.⁴⁵

The following protective measures applied to those HIV positive employees that were employed. "Cameron, Cheadle & Thompson submit that the 'catch-all unfair labour practice prohibition found in para (o) of the 1988 unfair labour practice definition against acts which prejudice an employee's opportunities or work security and reinstates its position of primacy by the 1991 amendments should be construed so as to outlaw discrimination on all arbitrary bases such as marital status, sexual preference or

⁴² Charles Ngwena , 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 SAJHR 513 at 517.

⁴³ Sue Albertyn & Dan Rosengarten , HIV and AIDS: Some Critical Issues in Employment Law' (1993) 9 SAJHR 77 at 79.

⁴⁴ Ibid 84.

⁴⁵ Ibid 85.

orientation or age.”⁴⁶ In other words, employees had a right not to be dismissed, demoted or discriminated against based on their HIV status. The Act thus created some protection in the form of anti-discrimination measures, which could be regarded as an ULP. The nature of HIV/AIDS discrimination and the stigmatization attached to it has however caused reluctance on the part of employees to take their cases to the Industrial Court.

According to Arendse⁴⁷, “[a]lthough unfair labour practices involving HIV and AIDS employees have been brought up, none has gone the distance for various reasons.” Some of these include the following. Firstly, the difficulty attached to proving that the employer acted unfairly against an employee because of his or her HIV status. Employers commonly dismiss or demote employees on grounds not easily identified with discrimination, and in this way hide their true motive for taking such actions. Secondly, the stigmatization attached to HIV created fear among those persons. The fear, coupled with the general stigmatization tendencies of the community has meant that no employee was prepared to pursue the matter at the Industrial Court. It is therefore clear from the above discussion that the jurisdiction of the Industrial Court with regard to HIV/AIDS dismissals remained untested.

Although some employers adhered to the rules (laid down by international institutions such as the ILO and the WHO, which prohibited HIV testing), the majority refused to do so and continued with discriminatory practices. According to Albertyn,⁴⁸ Holding⁴⁹, [w]ho conducted a study on employer attitudes to HIV-positive employees, found that ‘only a small minority of companies, comprising larger employers [had] accepted that they have a real reason to respond to AIDS.’

According to Albertyn,⁵⁰ Holdings findings at the time were that:

⁴⁶ Norman Arendse, ‘HIV and AIDS Infected Employees: Some Legal Implications for the Work-place’ (1991) 12 ILJ 218 at 223.

⁴⁷ Ibid 223.

⁴⁸ Ibid 85.

⁴⁹ Diane Holding, ‘AIDS, A Corporate Reaction’ (1991) 4 Boardroom 10-12.

- ❑ Almost a third of those interviewed admitted that they would discriminate against HIV positive colleagues if pressurized by fellow employees to do so;
- ❑ Up to 45% of employers had no regard for employees right to privacy and would breach their confidentiality;
- ❑ Ten percent of companies interviewed would use testing as a means of excluding HIV Positive applicants;
- ❑ Up to 65% of companies would refuse HIV positive applicants access to employment and that as little as 35% of companies made progress in implementing HIV/AIDS programmes in their workplaces.

The result of this survey clearly indicated employer's attitudes towards HIV-positive employees at that time. In a survey similar to that of Holding, conducted in 1995,⁵¹ it was found that the discriminatory practice of pre-employment testing was still very much the practice of most South African employers. So too were the findings of the SALC in September 1998.

3. The urgent need for law reform

As noted above, "employers had engaged in unwanted and unwarranted HIV testing, job applicants and employees who were HIV positive have been refused employment, reassigned or dismissed regardless of capacity for work."⁵² Extensive stigmatization combined with discrimination became the common practice not only within the employment arena but also in communities in general. Cases of dismissal and transfers, as well as fragrant breaches of confidentiality, were reported to human rights lawyers. The failure on the part of legislation and the Industrial Court of the time to effectively and adequately deal with these abuses could clearly be seen. According to Albertyn,⁵³ the need for urgent reform has been explained as follows:

⁵⁰ Sue Albertyn, & Dan Rosengarten, 'HIV and AIDS: Some Critical Issues in Employment Law' (1993) 9 SAJHR 77 at 85.

⁵¹ Bradley Silver, 'Blood in the Pool-AIDS and Employment Benefits' (A Research Report compiled in the course of LLB III, University of the Witswatersrand) 1995.

⁵² Charles Ngwena, 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 SAJHR 513 at 514.

⁵³ Sue Albertyn & Dan Rosengarten, 'HIV and AIDS: Some Critical Issues in Employment Law' (1993) 9 SAJHR 77 at 85.

- ❑ “The current legislation in both private and public sectors is woefully inadequate;
- ❑ There is a need to pro-actively challenge bigoted attitudes and prejudices about HIV/AIDS in the workplace at least;
- ❑ HIV/AIDS policies and/or codes need to be encouraged and indeed will continue to serve a very useful purpose, for example in educating people about the disease, but they fall short of providing effective protection against discrimination of people with HIV and AIDS;
- ❑ Given that the effectiveness of most education programmes (including those for HIV and AIDS) only become apparent over a period of time (months, if not years), we cannot wait for peoples’ attitudes to change;
- ❑ The suggested law reform is not prescriptive. Indeed, it reinforces and gives effect to HIV/AIDS policies for programmes and codes of practice;
- ❑ Because HIV/AIDS affects the whole of the working population, and all classes of employees in all sectors, effective law reform needs to extend its protection to as many working people as possible.”

Although HIV/AIDS activists such as Albertyn, Arendse and Cameron, have called for urgent labour law reform from as early as 1988, it was only after the enactment of the 1996 Constitution, the LRA and most importantly the EEA, that real law reform was realized. The later introduction of the Code and the PEPUDA also improved the rights of workers to equality and fair labour practices in the workplace and limited the employer’s powers to randomly discriminate against HIV positive employees. Furthermore, these newly enacted legal provisions improved protection against unfair discrimination and dismissal to not only current employees but also job applicants.

These much needed and long overdue amendments to the previous LRA, including the new legislation, are important as it closes the gaps with regard to inefficiencies of the previous legislation to adequately protect the HIV positive employee against discrimination, ULP and dismissal. Although these Acts are regarded by many as substantial progress towards improving the fundamental rights of HIV positive employees, the question however remain: do they really achieve this purpose? If indeed

so, to what extent do the new legislation provisions protect the employee? The extent of this protection will be examined in more detail in chapter five. What will now follow is a review of the general legal framework with regard to HIV.

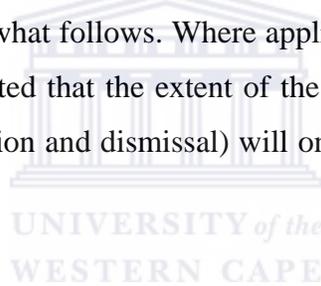


Chapter Three

1. HIV/AIDS legal framework

Due to the inability of previous legislation to adequately protect applicants and employees (against unfair discrimination and dismissal based on their HIV status), there was a dire need for law reform. Besides International Laws emanating from the ILO and the WHO, several other pieces of South African legislation provides protection for the HIV positive employee today. These include *inter alia* the Constitution, the LRA, the EEA (which deals specifically with HIV discrimination), the PEPUDA, and the Code. So too does the BCEA, OHSA, MHSA, COIDA and finally the MSA also protect the HIV positive employee.

The impact of the different pieces of legislation on the protection of the HIV positive employee will be examined in what follows. Where applicable, reference will be made to cases. It should however be noted that the extent of the enforcement of such legislation (in claims of unfair discrimination and dismissal) will only be more thoroughly explored in chapters four and five.



2. The relevant legislation

(a) *International Laws*

HIV discrimination in the workplace is not only regarded as unfair but also goes against various International Conventions on discrimination which has been adopted by the ILO. The ILO has laid down a general standard in respect of discrimination in Article 2 of Convention 111 of 1958. The most significant and contributory protection afforded by the ILO which prohibits discrimination is Convention 100 of 1951, (which contributes towards Equal Remuneration) and Convention 111 of 1958, (which prohibits Discrimination in Respect of Employment).⁵⁴ Furthermore Article 5 of Convention 158 of 1982 also describes dismissal regarded as automatically unfair.

⁵⁴ ILO Conventions 100 of 1951 and 111 of 1958. www.ilo.org/public/english/about/index.htm

These Conventions, describing Minimum Standards Prescribed by the ILO, act as guidelines with regard to the minimum labour standards to countries that have ratified them. South Africa is one of the countries that have ratified a number of ILO Conventions after its re-acceptance by the ILO in 1994. Ratification simply means that all countries accepting the ILO Conventions are expected to include these minimum labour standards within their national labour legislation. In addition, it is also expected from them to report to the ILO Committee on the effect and application of the Conventions within their countries.⁵⁵

The application of these international laws can clearly be seen within South African labour legislation such as the LRA, which notes that the Act should give effect to the obligations incurred by the Republic as a Member State of the ILO (section 1(b)). It can also be seen in the EEA which prescribes that the Act must be interpreted in compliance with international law obligations of the ILO Convention 111 concerning Discrimination in respect of Employment & Occupation (section 3(d)). So to does section 2(b) of the BCEA. Furthermore, the ILO Code of Practice on HIV/AIDS and the World of Work of 2001 also describes as its objective the presentation of guidelines on addressing the world's AIDS epidemic by promoting the idea of prevention, management and mitigation, care and support of the infected and most importantly, the elimination of stigma and discrimination on the basis of real or perceived HIV status.⁵⁶

The SADC in September 2001 endorsed the Codes that were instituted by organizations such as the ILO and the WHO on HIV/AIDS in the workplace. The Code of Conduct on HIV/AIDS in the Workplace in SADC came as a direct result of the adoption and endorsement of the international standards promoted by the above organs over the years. The SADC Code recognizes the threat that HIV/AIDS has not only in the world of work but to the broader community. It further places a responsibility on all member states to address the disease (by means of education and preventative measures), rather than

⁵⁵ ILO Conventions 100 of 1951 and 111 of 1958. www.ilo.org/public/english/about/index.htm

⁵⁶ ILO Code of Practice on HIV/AIDS www.ilo.org/public/english/protection/trav/aids/activities/index.htm

discrimination against the HIV positive employee.⁵⁷ It can therefore be seen that International Law also have a huge effect on the prohibition of discrimination against the HIV positive employee and further prohibits unfair dismissals as can be seen in Article 5 of Convention 158 of 1982.

(b) The Constitution

The Constitution has in place provisions that protect not only South Africans in general,⁵⁸ but also all employees in the workplace. This can be seen in section 23(1) which provides for the right to fair labour practices. This right and the rights mentioned below are entrenched in Chapter Two of the Constitution being the Bill of Rights, which promotes the values of human dignity, equality and freedom.

With regard to the protection afforded to the HIV positive employee it must be mentioned that the Constitution, unlike the EEA, does not provide any specific or explicit protection. The Constitution does however contain the right to equality (section 9), the right to dignity (section 10); the right to privacy (section 14); the right to bodily and psychological integrity (section 12(2)); the right to freedom of expression and to impart information freely section 16(1)); the right to choose a trade, occupation, and profession freely (section 22); and the right to fair labour practices (section 23(1)). All these fundamental rights provide the HIV positive employee and AIDS sufferer with some form of Constitutional protection. This can be seen in section 9(3), which provides that no person may be discriminated against directly or indirectly because of their disability or HIV status). Furthermore, the Constitution with its dignity provision in section 10, 'requires' that employee's human dignity should be protected. This can be achieved by not allowing an employer to force any employee to be subjected to HIV tests which will affect his/her human dignity. Section 12 (1) also provides for the guarantee of the employees' bodily and psychological integrity.

⁵⁷ The Code of Conduct on HIV/AIDS in the Workplace in SADC. <http://www.sadc.int>

⁵⁸ See for example, section 11 which provides for the right to life, section 26 which provides for the right to housing and section 27 which provides for the right to health.

The most relevant section in the Constitution applicable to HIV testing is the right to privacy in section 14. It protects the employee against his/her HIV status being disclosed freely by the employer to other persons or by his medical practitioner to the general public.⁵⁹ This right also prohibits employers from putting in place policies that enforce such testing on employees. It should however be noted that all these rights are subject to the limitations clause of the Constitution which provides that all rights may be limited in terms of laws of general application to the extent that the limitation is reasonable and justifiable taking into account factors such as the nature of the right; importance and purpose of limitation; its nature and extent; the relation between limitation and purpose; and finally, whether there is a less restrictive means of achieving this right (section 36).

Furthermore, the responsibility of entrenching these constitutional rights and supervising their application under the limitations clause principally rests with the Constitutional Court. Only this institutional authority may determine whether any right should be subjected to the limitations clause. It can therefore be said that although our Constitution does provide some form of protection to the HIV positive employee, it does so only in a limited sense. The extent of this constitutional protection will be explored in chapter four, where a closer examination of this provision previously decided in the context of HIV/AIDS will be looked at.

It should not be forgotten though that until recently, the Constitution seemed inactive in providing adequate protection to the HIV positive employee. This was due to the fact that all HIV/AIDS cases previously 'subjected to' the Commission for Conciliation, Mediation and Arbitration⁶⁰ and Labour Court never appeared before the Constitutional Court. Previous Constitutional Court cases were also not examined within the context of the workplace but society in general⁶¹. Notably, it was only in *Hoffmann v South African*

⁵⁹ South African Law Commission (1998) 109.

⁶⁰ The CCMA is an independent body (section 113 of the LRA) established by law to carry out a range of dispute resolution and prevention functions (section 115 of the LRA). The CCMA's vision is to promote social justice and economic growth through the transformation of workplace relations.

<http://www.ccma.org.za>

⁶¹ See *President of the Republic of South Africa v Hugo* 1997 6 BCLR 708 (CC) and *Prinsloo v Van Linde* 1997 6 BCLR 759 (CC).

*Airways (SAA)*⁶², in which the Constitutional Court was called upon to interpret and apply the constitutional provisions. The court held that Hoffman was unfairly discriminated against, as his dignity was impaired. It however, failed to pay much attention to the constitutional rights relating to equality, dignity, privacy and fair labour practices. The court merely touched upon the justifiability of the discrimination against *Hoffmann* and refused to go into the other broader constitutional principles as outlined above.

Furthermore, according to the SALC,⁶³ the practice of HIV testing is not prohibited by the Constitution in any way. What the Constitution however does is prohibit unfair discrimination on the basis of race, sexual orientation, and disability. This means that the constitution does not condemn the practice totally, but is merely opposed to the practice of discrimination that results from the testing. What follows from the *Hoffmann* case is that unfair discrimination against HIV positive employees is prohibited. Smit⁶⁴ is however of the view that, the courts objection to HIV discrimination does not mean that it disapproves of employers' refusal to employ HIV positive employees. In other words, a refusal to employ HIV positive employees could be justified on objective and satisfactory grounds such as the nature and size of the undertaking, the nature of the job, and the present and medium term condition of the applicant. It can therefore be gathered that total protection for the HIV positive employee is not guaranteed at all times. This is especially so when the HIV positive employee is permanently incapacitated due to his/her HIV status.

This is especially the case where an employer can provide evidence that not maintaining the HIV positive employee within the company's employ is linked to an inherent requirement of the particular job. Such a decision will also be justified if the decision to dismiss is due to reasons relating to incapacity or operational requirement reasons.⁶⁵ Such

⁶² *2001 (1) SA 1 (CC)*.

⁶³ South African Law Commission, 'Second Interim Report on all Aspects Relating to AIDS' Pre-employment Testing (1998) Project 85 at 140.

⁶⁴ Nicola Smit, 'HIV/AIDS, equity and labour law' (2001) 2 De Jure 318 at 329.

⁶⁵ Business rationale alone is not sufficient to suggest non-employment or further employment of an HIV positive employee.

a decision must however be preceded by the use of all reasonable and alternative measures within the company and followed by a fair procedure prior to the decision to dismiss the HIV positive employee. This is also what our High Court and Constitutional Courts require as can be seen in the *Hoffmann* case.

(c) *The LRA*

Like the EEA, the LRA can be regarded as one of the key pieces of legislation that promote equality and fair labour practices in the workplace. It also promotes those Constitutional provisions (section 23(1)) aimed at promoting fair labour practices in the workplace.⁶⁶ In doing so, the Act aims to promote and give effect to the fundamental labour right in the Constitution which provides that every employee has a right not to be unfairly discriminated against on any of the grounds stipulated in section 9 of Chapter two of the Constitution. Furthermore, the Act expressly protects all employees against any form of unfair labour practice relating to promotion, training and advancement (section 186 (2)(a)). Notably, the LRA does not apply to the (NDF), (NIA), (SS) and (SANIA) (section 2(a)-(d)). These classes of employees however have recourse to the PEPUDA and the Constitution.

In terms of section 187(1)(f) of the LRA, unfair dismissal on the basis of disability or arbitrary grounds constitutes an automatically unfair dismissal. In other words, any discrimination against an employee resulting in the employee being dismissed because of his/her HIV status may be regarded as an automatically unfair dismissal. However, it is often debated whether HIV/AIDS can be regarded as a disability and whether it should be covered by section 187(1)(f). The extent of protection against unfair discrimination based on arbitrary grounds or disability will be explored at length in chapter five. Some debate around HIV/AIDS as a disability will also be explored.

Furthermore, the Act provides that where discrimination is based on an inherent requirement of a particular job, the discrimination will not be regarded as unfair (section

⁶⁶ Charles Ngwena, 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 SAJHR 513 at 530.

187(2). Just what the term inherent requirement of the job means will also be discussed at length in chapter five, where an attempt will be made in finding its real meaning.

Currently however, employers are still trying to behave in a manner that is non-compliant with these legislative provisions for their own benefit and interest. I refer particularly to the fact that at present, HIV positive employees are still subjected to unfair discrimination and dismissal. This is reflected in the spate of disputes lodged to the Commission for Conciliation, Mediation and Arbitration by the Domestic Workers Union (DWU) on behalf of domestic employees who were forced to undergo HIV tests and were subsequently dismissed because of their HIV status. These disputes were however resolved at Conciliation by means of financial settlement.⁶⁷ These unfair dismissals have therefore not led to any reported cases.

(c) The EEA

According to Ngwena,⁶⁸ “[t]he new EEA is better known for introducing to the workplace a radical, if not controversial, legislative regime for affirmative action. However, a less publicized but no less significant dimension to the Act is, inter alia, its explicit proscription of HIV-related discrimination and unlawful HIV testing in the workplace.” The Act that was essentially legislated to introduce an affirmative action regime primarily purposed with eradicating inequalities and discrimination in the workplace also includes anti-HIV discrimination provisions. In doing so, the EEA in section 6 and section 7, provides for the much-needed legislative intervention and protection so long desired by those previously discriminated against because of their HIV status. It also fills a vacuum where legislation such as the LRA could not provide sufficient protection against HIV related discrimination, unfair labour practice and dismissal in the workplace. Where no previous legislation had in place measures aimed at protecting the HIV positive employees, the EEA now does so.⁶⁹

⁶⁷ Claire Keeton, ‘Madam told to cough up for firing maid with AIDS’ *The Sunday Times*, 27th June 2004 at 7.

⁶⁸ Charles Ngwena, ‘HIV in the Workplace: Protecting Rights to Equality and Privacy’ (1999) 15 SAJHR 513 at 531-532.

⁶⁹ Mark Heywood & Fatima Hassan, ‘The Employment Equity Act and HIV/AIDS-A Step in the Right Direction’ (1999) 20 ILJ 845 at 849.

The Act explicitly provides that no person may unfairly discriminate against an employee or applicant for employment in any employment policy or practice due to his or her HIV status (section 6(1)). By including this section, the legislator aims to make employers and the general community aware of HIV and does so by entrenching the rights of those living with HIV not to be discriminated against.⁷⁰ This is helpful as it assists in eliminating the stigmatization attached to HIV/AIDS and develops a society that is conscious and open-minded towards aspects of HIV. Furthermore, the significance of this section and the EEA itself is that, unlike the LRA, it not only protects current employees but also job applicants. Section 6(1) also improves on the legislative shortcomings of the past, which made it difficult for employees and job applicants to lodge a dispute at the Industrial Court when being discriminated against or refused employment as a result of their HIV status. Thus, the EEA's definition of employee includes not only current employees but also applicants for employment.⁷¹

Although the EEA prohibits discrimination it should be noted that it will not be regarded as unfair if it results from the 'inherent requirements of the job' (section 6(2)(b)). The employer can therefore discriminate (against the HIV positive employee and job applicant on this basis), in terms of section 6(2)(b) of the Act.

Where the LRA protected HIV positive employees only against unfair discrimination and dismissal, the EEA now prohibits also HIV testing. In terms of section 7, an employer may not apply any form of medical testing on an employee without the permission of the Labour Court. This is principally understood to mean that any form of medical testing is prohibited without firstly obtaining permission from the Labour Court. This understanding has however been disputed as can be seen in the current case law on HIV testing. Whereas one school of thought⁷² believes that all workplace based HIV testing

⁷⁰ Charles Ngwena, 'HIV in the Workplace: Protecting Rights to Equality and Privacy' (1999) 15 SAJHR 513 at 532.

⁷¹ See for example Hoffmann case discussed supra.

⁷² Heywood, M & Joni, J, 'Judgment on Section 7(2) of the EEA Creates uncertainty regarding HIV testing in the workplace' (2002) 23 ILJ 670 at 674.

requires the approval of the Labour Court others⁷³ hold a contrary view in this regard. Does this then mean that employee initiated tests does not need the approval of the Labour Court? Does anonymous testing also need the approval of the Labour Court? The extent of such anti-discrimination and testing protection will thoroughly be explored in the chapter that follows.

(d) PEPUDA vs the EEA

PEPUDA came into being as a result of the need to promote the right to equality to all South African citizens as advanced by section 9 of our Constitution. More significantly, to provide those in the workplace with legislation that would prevent or prohibit unfair discrimination and promote the achievement of equality. It also gives effect to section 9 of the Constitution, which promotes the right to fair labour practices. The Act further aims to put in place measures to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech and to provide for matters connected therewith. The Act also improves and advances the right to equality by placing special emphasis on the promotion and advancement of those groups that were disadvantaged by the past apartheid regime (section 2). Furthermore, the Act, like the EEA, provides that measures must be taken to redress previously disadvantaged South African and that legislation must be in place to prevent any further unfair discrimination.

What makes PEPUDA such a significant piece of legislation is the protection it provides to those previously excluded from the ambit of the LRA and EEA. The PEPUDA which substantially alters the position of those previously excluded from the ambit of the above Acts, specifically now provide for members of the (SADF), the (SS) the (NIS) and the (SANAI). This therefore means that PEPUDA, also referred to as the Equality Act, now has anti-discrimination measures in place for EEA excluded groups such as the unemployed in addition to the four excluded groups mentioned above (section 5(1)). Generally speaking, it includes protection to anybody not covered by the EEA (section 5(3)). Furthermore, what makes the Act significantly different to the EEA (besides the

⁷³ Ibid 675.

fact that it includes in its protection groups such as the unemployed) is its provision which prohibits hate speech (section 10). It is therefore possible for those protected in terms of the EEA to specifically use the Equality Act for the purpose of lodging an application on hate speech or any other discrimination category not covered by the EEA.

Both the EEA and the Equality Act has in place provisions for listed and unlisted grounds. In terms of the Equality Act, the listed grounds includes race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth (sections 7-12). The unlisted grounds include amongst other, HIV/AIDS status, socio-economic status, nationality, family responsibility, and family status (section 34). The Act also has in place similar provisions such as section 6(2) of the EEA, which indicates what would be regarded as justifiable discrimination (section 14). An important difference between PEPUDA and the EEA is its exclusion of HIV testing provisions. I refer specifically to the fact that the Act makes no provision for the prohibition of HIV testing in the workplace.

The Act also makes it possible for those excluded from the EEA and LRA and who previously had to approach the Constitutional Court to now approach the Equality Court in the event of discrimination taking place. These employees can therefore lodge their complaints through the Equality Court by making use of the Act. Through its implementation, the Act recognizes the state's responsibility to promote and achieve equality (section 24(1)).

(e) The Code of Good Practice on Key Aspects on HIV/AIDS and Employment

The Code of Good Practice on Key Aspects of HIV/AIDS and Employment of 2000 came into operation on the 1st of December 2000.⁷⁴ The Code came into existence as a result of the need to provide guidance (to employees, trade unions and employers), on how they should go about addressing HIV/AIDS in the workplace by developing and

implementing policies and programmes that promote educating employees about HIV/AIDS.

The Code's main focus is that of promoting a working environment free from discrimination against HIV positive employees and the promotion of effective and appropriate ways to manage HIV in the workplace. The Code does however not impose any obligations over and above those contained in the EEA and the LRA. Section 203(3) of the LRA does specify that "any person interpreting or applying this Act must take into account any relevant code of good practice", and employers are encouraged to use it to develop, implement and refine HIV/AIDS policies and programmes.

The Code's primary objective is to set out guidelines for employers, employees and trade unions to implement policies so as to ensure individuals infected with HIV are not unfairly discriminated against in the workplace. These policies include the following:

- ❑ Creating a non-discriminatory work environment;
- ❑ Dealing with HIV testing, confidentiality and disclosure;
- ❑ Providing equitable employee benefits;
- ❑ Dealing with dismissal; and
- ❑ Managing grievance procedures ;(section 2(1) (i-v)
- ❑ The Code wishes to achieve these by working in conjunction with the Constitution and all the relevant legislation which provides for: (section 5(1)).
- ❑ The prohibition against discrimination on the basis of an employee's HIV status (section 6(1) of the EEA)
- ❑ The prohibition of HIV testing without the permission of the Labour Court (section 7(2) of the EEA)
- ❑ The limitation on the right to dismiss contained in section 187(1) of the LRA
- ❑ The obligation on an employer in terms of section 8 of the Occupational Health and Safety Act to provide, as far as is reasonably practicable, a safe working environment.

⁷⁴ The Code came into operation after notice was given by the Minister of Labour MMS Mdlalana on the advice of the Commission for Employment Equity in terms of section 54(1)(a) of the EEA and by

- ❑ The entitlement to benefits in terms of section 22(1) of COIDA
- ❑ The requirements relating to sick leave in the BCEA
- ❑ The prohibition against unfair discrimination against members of a registered medical aid scheme on the basis of their state of health (section 24(2)) of the Medical Scheme Act.)

The Code further recognizes that “all employees with HIV or AIDS have a right to privacy in terms of both common law and section 14 of the Constitution.”⁷⁵ From this flows the right of employees not to inform their employers that they are HIV positive and their employer’s duty not to make this public, if informed indirectly. The Code also recommends that every workplace should develop a policy in order to ensure that employees affected by HIV are not unfairly discriminated against in employment policies and practices.⁷⁶ In conclusion, the Code also aims to reinforce the ILO guidelines, conventions and recommendations with regard to HIV.

(f) The BCEA

The BCEA provides that all employees are entitled to a minimum period of paid sick leave per annum. The minimum number of days prescribed by the Act is one day per month cumulating into 36 days in a three year cycle in terms of section 22. This means that an employee will be entitled to a minimum amount of 12 days sick leave for the first year of service. The number of sick days granted by many institutions in the public sector and companies in the private sector may be more than the minimum prescribed days, as required differ in companies as by legislation .In many large company’s, trade unions have negotiated better sick leave provisions that may be double the minimum prescribed amount. Smit⁷⁷ furthermore notes that “[a]n employee will be entitled to use his/her paid sick leave, annual leave and unpaid sick leave during periods of illness and an employer will only be able to dismiss him/her due to incapacity if and when the absence of the employee becomes unreasonably long.”

NEDLAC in terms of section 203(1)(a) of the LRA.

⁷⁵ Ibid S 5(3-10).

⁷⁶ Ibid S 15(1)(1).

⁷⁷ Nicola Smit, ‘HIV/AIDS, equity and labour law’ (2001) 2 De Jure 318 at 321

When assessing whether benefits should be provided to the employee cognizance must be taken of illnesses that an employee obtained whilst carrying out his/her work related responsibilities.⁷⁸ This could include HIV related infections that was acquired during the performance of ones' job responsibility. The health care sector serves as a typical example here.⁷⁹

(g) The OHS Act and the MHS Act

Section 8(1) of OHS Act and sections 2(1) and 5(1) of the MHS Act place an obligation on all employers to provide a safe and reasonably secure working environment for all its employees. The interpretation of this requirement has always been understood as one whereby the employer takes steps to ensure that risks of occupational injury are eliminated.

In the context of HIV, this could be understood as employers having the responsibility of providing an HIV transmission free environment in their respective workplaces. Grossett⁸⁰ however notes that, “[t]his may be construed as a loophole for dismissing an employee who is known to be suffering from AIDS or who is HIV positive. It is however, highly unlikely that the courts will allow such action.”*the*

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Although minimal transmission risk in the workplace is predicted by the Code, one cannot overlook the threat of transmission of bodily fluids resulting from an occupational accident.⁸¹ A common scenario that comes to mind is the possibility of the patient being exposed to HIV by the medical professional. This may occur during the process of an operation requiring full body contact between the doctor and patient. In other words, the patient can contract the virus as a result of exposure to the HIV positive surgeon's bodily fluids, during the course of the operation as a result of cutting procedures.

⁷⁸ Nicola Smit, 'HIV/AIDS, equity and labour law' (2001) 2 De Jure 318 at 321

⁷⁹ I refer specifically to HIV infections obtained by employees whilst conducting operations or any medical duties on patients.

⁸⁰ Matthew Grossett, 'Discipline and Dismissal-A Practical Guide for Managers' (1999) 2nd Edition Thompson Publishers at 130

⁸¹ Nicola Smit, 'HIV/AIDS, equity and labour law' (2001) 2 De Jure 318 at 321.

Therefore, discrimination resulting from a refusal to allow the medical professional from operating on patients due to his/her HIV status could thus be justified in instances where patients are threatened by a high possibility of being infected. Determining factors may include the possibility of exposure and the degree of risk involved. International safety measures or standards can however play a role in eliminating this kind of risk. It would therefore be unfair to discriminate against the medical professional who is not involved in operations that contain a degree of risk. They can in any event apply universal safety measures by using gloves and sterilized products, which removes the risks involved.

(h) COIDA

Medical professionals are equally at risk of contracting the disease from patients (during the course of an operation), as patients are at risk of contracting HIV from medical professionals. This risk is not widely acknowledged by health authorities or employers of medical professionals. These professionals are merely protected or guaranteed limited compensation by the COIDA.

In terms of section 22(1) of the Act, an employee may apply for compensation in the event of her or him acquiring an injury during the course of carrying out their workplace responsibilities. It is therefore likely that a medical professional or employee as such may claim compensation due to infection being obtained as a result of a workplace injury. While HIV infections are not deemed a scheduled occupational disease, health care workers who can prove that they had been infected with HIV in an accident which occurred during the course of their duties, can instigate a claim against COIDA. Benjamin⁸² points out that “[t]he meaning of “accident” in the Act is broader than the popular understanding of the term and includes any unplanned or unforeseen occurrences and need not occur at a single instance.”

Although the Act clearly defines what an accident is, certain requirements have to be met in order for an employee to successfully claim compensation for a work related injury. Whilst health care workers are exposed to needle stick injuries (which clearly fall within

⁸² Paul Benjamin, ‘AIDS, workplace compensation and social security’ (1993) 9 SAJHR 123 at 125.

the definition of an occupational injury), they will be unsuccessful in claiming compensation if they do not adhere to the Act's requirements.⁸³ Among the requirements stipulated in the Act is that the health care worker must be able to show that he or she was HIV negative prior to the accident. According to Smit,⁸⁴ "what makes this even more problematic, it is submitted, is the requirement that confirmation should be provided (as far as reasonably practicable), that the source to which the employee was exposed in the workplace was indeed HIV-infected. It is quite evident that privacy and other constitutional considerations will come into play here".

Furthermore, this must be shown by having an HIV test immediately after the exposure which must be followed by another test three months later in order to show that sero-conversion has taken place. All this is necessary to prove that a needle stick injury was indeed the manner in which the employee became HIV positive and not through other means such as sexual intercourse. Needle stick injuries furthermore require proof that the patient was HIV positive for a successful claim of compensation.⁸⁵

Whilst testing has to be carried out immediately in order to make a successful claim, an accident need only be reported within 12 months in order to have a right to claim in terms of the Commission for Occupational Health and Safety.⁸⁶ Whilst the Act clearly outlines the procedures and makes provisions for compensation in the event of health care employees becoming infected in the course of their duties, no one has been successful in claiming compensation. This places a question mark on the effectiveness of the Act to accommodate the HIV positive employee.

(i) MSA

Discrimination and prejudice attitudes towards HIV positive persons were (similar to other areas of the South African society) a common trend in the medical aid profession when it came to accepting the status of HIV positive individuals. The previous medical

⁸³ *ibid* 125.

⁸⁴ Nicola Smit, 'Some observations regarding the occurrence and management of HIV/AIDS in South African workplaces.' (2005) TSAR 2 358 at 368-369.

⁸⁵ *ibid*

regulations allowed for large exclusions of the HIV positive employee and made almost no provision for coverage of the HIV positive employee under medical aid schemes. If indeed provisions were made, it was subjected to testing before acceptance or a lower degree of cover compared to the normal standards applied. Much of the exclusionary attitudes on the part of medical aid schemes can be blamed on the lack of medical research, proper data and actuarial evidence about the affordability of the treatment. This has, however, substantially changed as many medical aid providers have introduced minimum HIV/AIDS benefits. With this in mind, one cannot help but question the sudden change in previously exclusionary attitudes.⁸⁷

One needs to look no further than section 186(2)(a)) of the LRA, which guarantees equity in employment provisions by regarding as an unfair labour practice ‘any unfair act or omission that arises between the employer and employee involving...the provisions of benefits.’⁸⁸ The same anti-discriminatory provision provided for in the LRA, which prohibits discrimination against HIV positive employees has been included in the amendments to the MSA..⁸⁹ This simply means that the Act requires medical aid schemes to accommodate the HIV positive employee in its provision of providing medical benefits to its members. Furthermore it may not prohibit employee’s membership to the scheme because of HIV status. And secondly, it may not discriminate against a member by giving him/her a lesser benefit too that of other members because of his or her HIV status.

The Act further guarantees the protection of the HIV positive member by disqualifying any medical aid scheme from registration unless the Medical Aid Council is satisfied that the medical scheme does not or will not unfairly discriminate directly or indirectly against any person or on one or more arbitrary grounds including race, gender, marital status, ethnic or social origin, sexual orientation, pregnancy, disability and state of health. Over and above the guarantee against discrimination, section 67(1)(g) also guarantees a basket of minimum benefits that all schemes must provide to its members. Clearly then,

⁸⁶ Paul Benjamin., ‘AIDS, workplace compensation and social security’ (1993) 9 SAJHR 123 at 125.

⁸⁷ Mark Heywood & Fatima Hassan, ‘The Employment Equity Act and HIV/AIDS-A Step in the Right Direction’ (1999) 20 ILJ 845 at 852.

⁸⁸ Ibid 853.

the amendments can be regarded as a substantial improvement to the benefits of HIV positive employees.⁹⁰

3. The Degree of protection

While the main focus of this chapter was that of considering the significance of various pieces of legislation and its discrimination protection provisions against HIV positive employees, it also explored other rights not directly related to them. Among these examined were medical provisions, occupational health and safety provisions and the area of compensation, which HIV positive employees are entitled to. What becomes clear from the discussions above is that not only international laws emanating from the ILO, the WHO and the SADC, but also the Constitution contribute extensively towards the protection of HIV positive employees. More specifically, sections 14 (which contain the right to privacy), section 9 (which contain the right to equality) and section 23(1) of the Constitution, (which contains the right to fair labour practices), place the previously disadvantaged HIV employee in a better position and lessen the chances of unfair discrimination. Notably, the Constitution does not prohibit the practice of HIV testing that usually results in the practice of discrimination. It only prohibits the practice of discrimination itself that result from such testing.

The LRA also affords the HIV positive employee protection (in the form of its automatically unfair dismissal provisions) and provides that no employee shall be unfairly discriminated against on the basis of their HIV status in dismissal (section 187 (1)(f). What also flows from this is the right not to be unfairly dismissed unless procedural and substantive requirements are met (section 186 (1). The BCEA also provides protection to employees in the form of sufficient entitlement to sick leave (section 22), annual leave (section 20) and unpaid sick leave (section 23) provisions during their absence as a result of HIV related illnesses. An employer will therefore only be able to dismiss the employee due to incapacity if and when the absence of the employee becomes unreasonably long.

⁸⁹ *ibid.*

⁹⁰ Nicola Smit, 'HIV/AIDS, equity and labour law' (2001) 2 *De Jure* 318 at 321-322.

The EEA, (which prohibits unfair discrimination against the employee), can be regarded as the most progressive legislation as it significantly assists the employee. The Act also prohibits HIV testing without the approval of the Labour Court (Section 7 (2)). When such approval can be avoided will be discussed in more detail in the chapter that follows. Furthermore, the Code of Good Practice on Key Aspects of HIV/AIDS, although not legislation as such, could be regarded as a platform for the prohibition of unfair labour practices against the HIV positive employee. It also assists in putting in place policies and programmes that promotes a workplace free from HIV discrimination.

Whilst OHSA can be seen as a loophole to dismiss HIV positive employees because of the employers principle responsibility of providing a safe working environment for employees (section 8 (1)), it is highly unlikely that our courts will support such actions. COIDA, which provides for compensation due to injuries arising from work responsibilities, does not assist the HIV positive employee much because of the difficulty associated with proving work related HIV infection. Thus far, no one has been successful in claiming compensation. Furthermore, the MSA with its prohibition on discrimination also substantially improves the rights of the HIV positive employee as it guarantees a right to membership of a registered medical aid. It also removes the limitation previously placed on the HIV positive employee with regard to benefits.

Finally, the PEPUDA, like the EEA, can also be regarded as a significant piece of legislation as it substantially improves the rights of those excluded from the EEA and LRA. What makes it exceptionally different to the EEA is its inclusion of just about anybody including the unemployed. In addition, provisions are also made (in the Act for those protected by the EEA, to use PEPUDA in instances where such employees wish), to lodge a dispute regarding unlisted forms of discrimination such as hate speech. The Act has all the protective provisions (if not more), of the EEA. It does however not have any HIV testing provisions included in the Act. In conclusion then, what develops from this discussion is that all the above legislation contribute towards the promotion of fair labour practices towards the HIV positive employee and the prevention or prohibition of unfair discrimination and dismissal against them. Although there are shortcomings with regard

to the enforcement (small in nature), It is submitted that these Acts sufficiently protect the HIV positive employee against unfair discrimination and dismissal. This can clearly be seen from the Constitutional Court judgment in *Hoffmann*.



Chapter Four

1. HIV Testing and the Law

“A policy of excluding employees on the basis merely of an HIV-positive test result is a self-defeating one, both from the point of view of the operation of a corporation such as [South African Airways] and also from the perspective of the national interest in epidemiological containment and management . Where HIV testing may be warranted by the nature of the work performed, such testing should be undertaken with a view to the function of monitoring and facilitation of health, rather than as the basis for exclusion.”⁹¹

A theme that runs throughout this thesis is the everyday practice of discrimination against HIV positive employees within the workplace. This discrimination mainly resulted from the practice of “HIV testing”⁹² (commonly referred to as pre-employment testing) and not from screening for epidemiological⁹³ reasons. A fine line however exists between HIV testing and testing or screening for epidemiological purposes. The latter form of testing would be justified where a large undertaking required the information in order to apply the most appropriate education and financial measures in order to avoid the further spread of HIV. If carried out under complete anonymity and with the consent of the employee and/or their representative trade union it would find no disfavour.⁹⁴

HIV testing or pre-employment testing on the other hand found a lot of disfavour with employees and their representative trade unions. Their disfavour towards such testing was due to them regarding it, as unjustified especially considering the fact that those subjected to such tests have productive and healthy lives ahead of them. Such testing has also found disfavour from the Ministers of Health of the European Community who could find no justification for pre-employment testing of job applicants to determine their HIV status.⁹⁵

⁹¹ Reported by Professor Brian Williams on Case No. 1916/99, “A v South African Airways.” <http://www.concourt.gov.za/courtrecords/2000/saa/hoffman17.pdf>

⁹² HIV testing refers to the taking of a medical test to determine a person’s HIV status. This may include written or verbal questions inquiring about previous HIV tests; questions related to the assessment of “risk behaviour” (for example questions regarding sexual practices, the number of sexual partners or sexual orientation); and any other indirect method designed to ascertain an employee’s or job applicant’s HIV status.

⁹³ Screening for Epidemiological reasons refers to the study of disease patterns, causes, distribution and mechanisms of control in society.

⁹⁴ Edwin Cameron, ‘AIDS-Some Problems in employment law’ (1991) 12 ILJ 2 193 at 207-208.

⁹⁵ Ibid 203.

The practice of subjecting applicants for employment to pre-employment testing by prospective employers however continued in South Africa. This chapter will therefore, firstly briefly introduce the legal position on HIV testing prior to the EEA being enacted. What will then follow is some examination on past testing case law. Some discussion on recent debates around the EEA's anti-discrimination provisions will also be examined and conclusion drawn on the real meaning of those provisions.

2. The legal position on HIV testing prior to the enactment of the EEA

Although the practice of pre-employment testing infringed on employees and job applicants constitutional right to fair labour practices, (and was in conflict with the principles advocated by the ILO and WHO), no law preventing such practice existed within South Africa. Although some employers have accepted international principles on HIV and pre-employment testing, many have engaged in unwarranted and unnecessary testing. This was mainly due to the fact that legislation such as the LRA did also not have in place provisions prohibiting pre-employment testing. All it did was prevent discrimination based on one's HIV status but allowed employers to freely apply HIV testing policies on both employees and job applicants.⁹⁶

A major problem with the LRA of 1956 was that it excluded job applicants from its protection. Applicants could therefore not seek recourse through the Act if they were unfairly discriminated against. The Act also excluded those employed in the (NDF), (NIA), and (SS). Another shortcoming with the Act was its exclusion of certain sectors of the workforce such as Domestic workers, Farm workers and Teaching Professionals were from its ambit of protection. This therefore left an open door to employers in these sectors to implement any discriminatory recruitment policies no matter how unfair.

Furthermore, the Constitution was the only legislation that provided some degree of protection at the time. Firstly, with its right to equality provision (section 9) the Constitution placed the previously disadvantaged HIV positive employees in a better

⁹⁶ No instances of HIV discrimination was however presented to the CCMA or Labour Court as employees feared further discrimination that could result from the stigma attached to being HIV positive.

position and prevented unfair discrimination against them.⁹⁷ It further does so with its right to privacy (section 14) and right to bodily integrity provisions (section 12(2)). Although the Constitution has its limitations with regard the application of these rights, it substantially protects the employee. More specifically, it served as the primary legislation prior to the enactment of the EEA when there was no prohibition against pre-employment testing. By doing so, it developed jurisprudence that prohibits such practice and now also assists us in interpreting the context in which the EEA prohibits HIV testing. The role of the SALC in the enactment of the EEA will now briefly be touched on.

3. The EEA with its prohibition on HIV testing is enacted

The enactment of the EEA was a direct result section 9 of the Constitution which resulted in the SALC's motivation for the need for statutory intervention, and resulted from deliberations and inputs from all stakeholders within the business sector and progressive organizations such as trade unions and HIV conscious non-governmental institutions. Having evaluated the concerns and suggestions for alternative action to legislative intervention the Commission⁹⁸ remained of the opinion that "[s]tatutory intervention is necessary to promote the public interest aim of maintaining otherwise healthy person's with HIV in productive employment, and to protect the rights of person's with HIV in the workplace. Such intervention, whatever form it may take, will however have to take into account the primary concerns of respondents regarding AIDS exceptionalism and costs and will have to fit the framework of existing and proposed labour legislation."

Once final contributions were made by all the appropriate stakeholders regarding the prohibition on pre-employment testing, the Commission was faced with two options. They could firstly put in place a special statute dealing with HIV which prohibit HIV testing or they could endorse the Department of Labour's (DOL) proposal that makes provision for the incorporation of anti testing (pre-employment testing) section in the

⁹⁷ See for example *Hoffmann v SAA* 2001 (1) SA 1 (CC).

⁹⁸ South African Law Commission 'Second Interim Report on all Aspects Relating to AIDS' (Pre-employment Testing) (1998) Project 85 at 154.

final EEA.⁹⁹ The Commission then finalized the contribution report and made it into a final recommendation by the commission. This report was eventually submitted to parliament on the 28th of August 1997 and motivated the need for legislative intervention by law to prohibit the practice of pre-employment testing.

Whilst the majority of respondents reacted positively to the Commission's recommendations on legislative prohibition of pre-employment HIV testing, there were the minority who were mainly representatives of the business sector who were apposed to the recommendations and forwarded their objection to the prohibition. Rationales in support of conducting HIV testing prior to employing an applicant for employment derives from the common law right of employers to decide who to employ. In terms of this common law right, which promotes the principle of freedom of association and freedom of contract, intrusion into such rights cannot easily be justified.¹⁰⁰

Despite strong and rational arguments by the minority of opponents, there were also well founded and strongly supported arguments presented by proponents that supported legislative prohibition of pre-employment HIV testing. In an attempt to accommodate the strongly argued position of AIDS Exceptionism, the Commission chose the recommendations of the Department of Labour, which had recommended an integrated Employment Equity Bill. This Bill was promulgated and subsequently enacted in the form of the EEA. A brief examination of past case law on HIV resting will now be discussed. I will then thoroughly examine the present legal position on HIV testing in an attempt to settle the debate around the EEA's HIV testing provisions.

4. A brief examination of case law on HIV testing

The fact that not much case law with regard to HIV testing existed has already been mentioned. It was only after the enactment of the EEA with its testing provisions that case law could be developed on the application of the EEA's testing provisions. Before this period, we relied heavily on guidance from the Supreme Court, Appellate Division

⁹⁹ *ibid* 154.

¹⁰⁰ *Ibid* 32.

and later the Constitutional Court in shaping anti-HIV testing and discriminatory jurisprudence. What will now follow is a brief examination of how the, Labour Court, High Court and the Constitutional Court interpreted the EEA's HIV testing provisions in recent cases.

(i) *Hoffmann v South African Airways (SAA)*¹⁰¹

This landmark case marked the start of developments in labour law jurisprudence on testing. It also created a platform for employee's to raise their objections against discrimination and indicate to employers that HIV discrimination is unacceptable and will not be tolerated by our courts. It further entrenched the constitutional principles of equality and dignity as promoted by our Constitution. Notably, this case is an example of jurisprudence that came into existence prior to the enactment of the EEA, which reflected the inadequacy in our subordinate such as the LRA in protect employees and job applicants from unfair discrimination arising from their HIV status. The facts of the case were as follows:

The applicant had applied for employment as a flight attendant with SAA. His application was successful to the extent that it passed all the initial stages, but was subsequently rejected when his medical examination revealed that he was HIV positive. As a result, SAA refused to employ him as a flight attendant. The applicant then challenged SAA's decision not to employ him on the basis that their refusal to employ him was an infringement on his right to fair labour practices, dignity, privacy and equality.

SAA however responded by saying that their policy refusing employment of HIV positive applicants for the position of flight attendant was not intended to discriminate against HIV positive person's. It was merely intended to adhere to its employment policy that required all flight attendants to be "[f]ree of any congenital or acquired abnormalities."¹⁰²

¹⁰¹ (2000) 21 ILJ 892 (W).

¹⁰² At 896 Para 8.1G

The policy also exist for the purpose of protecting the well being of SAA as the company spends as much as R30 000 on providing training to each flight attendant. It therefore believed that such a contribution entitles them to at least have attendants in their employ for a ten-year period.¹⁰³

The court found nothing wrong with SAA's policy, which was aimed at ensuring the health and safety of its passengers and crew members. The court approved the medical testing of job applicants as such testing was in the interest of the operational requirements of the business.¹⁰⁴ This was also true, as the policy was not only directed at infected employees but also generally instituted to ensure the detection of any disability risk towards flight attendants. Notably however is the fact that the policy did not exclude HIV positive applicants from employment.¹⁰⁵

I cannot agree more with Rycroft who is of the view that the High Court in the Hoffman decision was not reliant on objective and legal grounds. The judgment totally disregards the different stages of the HIV virus and assumes that all HIV positive people should be treated the same. In deciding so, it had no regard for the progression of disease, which has a role to play in deciding whether to employ an HIV positive applicant.¹⁰⁶ When one considers the very important fact that the virus is manageable through the use of antiretroviral drugs which play a role in improving the quality of and length of the HIV positive employee's life, any disregard of such factors is clearly unfair. This is more importantly so, as the failure on the court to distinguish between the various stages of the disease "[s]ubstantially prejudices a person who could be managing his/her illness effectively."¹⁰⁷

A further assumption made by the court is that discrimination against HIV positive employees may be justified because of commercial rationale. The court justified this

¹⁰³ At 901 Para 17.

¹⁰⁴ At 892 Para D.

¹⁰⁵ At 892 Para E-F.

¹⁰⁶ Alan Rycroft, & Ronald Louw, 'Discrimination on the basis of HIV: Lessons from the Hoffmann Case' (2000) 21 ILJ 856 at 858.

¹⁰⁷ *ibid* 858-859.

statement on the basis that SAA's competing airline company adopted a similar employment policy, which provided for the exclusion of HIV positive applicants into the position of flight attendants. It further argued that ignoring factors such as its competitor's business practices would be to its disadvantage and would have serious commercial consequences to SAA's business.¹⁰⁸ To this I argue similarly to Rycroft, that discrimination against prospective HIV positive employees can never be justified on the basis of some competitive airline company having such a policy.¹⁰⁹

Finally, this decision taken in favour of SAA fails in providing an appropriate constitutional reasoning. The applicant raised four grounds on which his constitutional rights have been infringed and Hassan J treated the last three very summarily, which is far from acceptable considering the potential violation of constitutional rights. With regards to the right to equality, he justified the discrimination by merely repeating SAA's arguments relating to safety, medical and operational reasons. As a result, this judgment provided a constitutional analysis that simply relied on unproved assumptions, and refused to deal with the rights to dignity, privacy and fair labour practice individually, on the basis that they operate solely as reinforcements to the equality claim. Thus the relevant rights cannot be compartmentalized, or separated, from each other.

(ii) *Hoffman v South African Airways (SAA)*¹¹⁰

Hoffmann subsequently appealed to the Constitutional Court against the decision of the High Court. The judgment delivered by Ngcobo J on the 28th of September 2000, focused on two questions. They were firstly, whether SAA's refusal to employ HIV positive persons as flight attendants went against the provisions in Chapter 2 of the Constitution. Appropriate relief had to be decided on by the court, if that practice was found to be unconstitutional.

Hoffmann's appeal to the Constitutional Court was primarily based on SAA's refusal to employ him as flight attendant, which he regarded as unconstitutional. The refusal

¹⁰⁸ Ibid 860.

¹⁰⁹ *ibid.*

according to Hoffmann was clearly unfair discrimination and went against his constitutional right to equality, human dignity and fair labour practices. The applicant therefore requested that the court instruct SAA to employ him as flight attendant.¹¹¹

To the allegation of discrimination on its part, SAA argued that its policy, which made provision for the exclusion of HIV positive persons as flight attendants, was justified on medical grounds.¹¹² Based on the evidence produced in the form of an affidavit by SAA's medical expert Professor Barry David Schoub, HIV persons who have reached the immunosuppression stage were prone to medical, safety and operational hazards asserted. "[T]he assertion made by SAA were therefore not only not true of persons who are HIV positive but they were also not true of Hoffman."¹¹³

It held that nothing in its health condition prevents an asymptomatic HIV positive person from carrying out the responsibility of flight attendant and that any hazards to which immuno-competent flight attendants may be exposed to can be changed by counseling, monitoring, vaccination and the administration of the appropriate antibiotic prophylaxis if necessary.¹¹⁴

The court also considered the allegation made by *Hoffmann* of SAA's refusal to employ him as flight attendant went against his constitutional rights namely, his right to equality, human dignity and fair labour practices. To this the court responded by saying that as Transnet was a statutory body subject to the control of the state it was bound by the provisions of the Bill of Rights in our Constitution. And as such, they were therefore expressly prohibited from discriminating unfairly against any person in terms of the Constitution.¹¹⁵ It went further by adding that at the heart of the prohibition is the recognition in our Constitution of the right of all human beings regardless of their

¹¹⁰ 2001 (1) SA 1 (CC).

¹¹¹ At 4 Para 6.

¹¹² At 4 Para 7.

¹¹³ At 6 Para 8.

¹¹⁴ At 13 Para 15.

¹¹⁵ At 16 Para 23.

position in society, to be treated with dignity and that such dignity is immediately impaired once unfair discrimination takes place.¹¹⁶

Focusing on *Hoffmann*, the court further held that our history has shown that HIV positive persons who constitute a minority in society has always been and is still very much prejudiced because of their HIV status. This status has also placed them in a disadvantaged position and has very much accounted for constant discrimination against them on the part of employers and/or the general community.¹¹⁷ It continued by highlighting the fact that such stigmatization which results in an assault on the dignity of HIV positive persons is even worse when occurring in the employment context. This is because it denies such individuals the right to employment and a right to earn a living. There was therefore no doubt on the mind of the court that discrimination had taken place and that such discrimination by SAA was as a result of *Hoffmann's* HIV status. The Constitutional Court could also find no justification for such discriminatory action as “[n]either the purpose nor the objective medical evidence justified such discrimination.”¹¹⁸

In conclusion, the court took cognizance of the fact that SAA did not test its current employed flight attendants. It regarded this practice as unfair as the company allowed them to stay within its employ as flight attendants regardless of the possibility of them being HIV positive.¹¹⁹ Finally, the court held that although “[c]ommercial rationale were important considerations that had to be taken note of when employing individuals, it could never approve of stereotyping and prejudice creeping in under guise of commercial interest.”¹²⁰ They further held that, not even the need to promote the health and safety of passengers and flight attendants could justify discrimination against the HIV positive employee.¹²¹

¹¹⁶ At 18 Para 27.

¹¹⁷ At 20 Para 28.

¹¹⁸ At 21 Para 29.

¹¹⁹ At 23 Para 31.

¹²⁰ At 25 Para 34.

¹²¹ At 27 Para 35.

*(iii) Ex Parte- Ndebele Mining Company (Pty) Ltd*¹²²

In this first unreported case since the enactment of the EEA with its pre-employment HIV testing prohibitions [section 7(2) and section 50(4)], the Labour Court was approached by Ndebele Mining Company with a request to conduct voluntary HIV testing on its present and future employees. They approached the Labour Court after receiving the advice of an HIV specialist who informed them that the permission of the Labour Court was required to apply pre-employment HIV testing. They therefore approached the court to condone the test they already carried out without knowledge of the above EEA requirements. They did this after they counselled and tested 41 of their 47 employees with their consent.

The company had previously provided educational and training programmes on HIV to its staff complement and had discussions with the employees whereby it inquired into the possibility of adopting HIV testing at the expense of the employer with the employees consent and permission. They invested in a process whereby a trained medical practitioner would advise employees on lifestyle adaptation in order to accommodate their HIV status. The testing would also be used to assess the impact that it would have on the employer's business so that medium and long-term contingency planning could be made. The Labour Court granted an order condoning the former test and ordered that future tests could be carried out subject to certain conditions.

The court furthermore stated the need for an employer to obtain permission for carrying out HIV testing even if the employee consents. The court also held that it would not easily grant permission for HIV testing even if the employee consented, but that proof will have to be provided. In terms of this judgment it seems that section 7(2) is to be interpreted strictly and literally.

¹²² (LC) 10-7-2001 (case J1466/2001 unreported).

(iv) *Rand Water Board v SA Municipality Workers Union & Others*¹²³

Similar to the *Ndebele* case above, the employer also sought condonation for pre-employment testing already carried out by the employer without the prior permission of the Labour Court. The only difference between the two court orders is that in the order granted in favour of Rand Water Board, the court imposed conditions for conducting the tests in compliance with section 50(4) of the EEA, whereas the conditions imposed by the court in the *Ndebele* case was drawn from the National Policy on Testing of the Department of Health. The conditions are however similar in nature and set some form of president and developed principles that were to be used in future HIV cases (that followed).

(v) *Joy Mining Machinery (a divisions of Harnischfeger (SA) (Pty) Ltd v NUMSA & Others*¹²⁴

In this judgment which was the first in which the court was approached by an employer for permission to carry out HIV testing, prior to actually conducting the testing itself (*as opposed to the cases in Ndebele Mining and Rand Water Board where the employers only applied for condonation of tests that had already been conducted*) the following was learned. The employer, Joy Mining Machinery (a division of Harnischfeger (SA) (Pty) Ltd) that employed around 800 employees approached the Labour Court for its approval of the company's intention to conduct HIV testing on its workforce. Similarly to the *Ndebele Mining* condonation mentioned below, the company had the approval of the majority union and most of its employees who fully supported such testing. The company however decided to play things safe and abide by the legislative requirements as laid out in section 7(2) of the EEA by applying to the Labour Court for permission to conduct such testing, despite having the full support of most employees to conduct HIV testing.¹²⁵

The Labour Court subsequently considered the application and gave permission for such testing to be carried out by the employer – through the use of a private consultant on the

¹²³ (LC) (case no J158/02 31st January 2002).

¹²⁴ (2002) 4 BLLR 372 (LC).

¹²⁵ At 392 Para D

employees. It also gave guidelines on the manner in which the anonymous and voluntary testing should take place by using the guidelines as set out in section 50(4) of the EEA for HIV testing that is carried out with the approval of the Labour Court. It also approved the testing of employees by setting strict conditions under which such HIV testing should take place.¹²⁶

Before making a decision on whether or not to grant such testing the court relied heavily on section 7(2) of the EEA which read that ‘testing of an employee to determine that employee’s HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50(4).’ The court however noted that the Act was not very helpful, as it gave no guidance on what was to be regarded as ‘*justifiable*’ or the ‘*subjective*’ criteria that should be used by the court when determining whether an employer requested HIV testing should be granted. It noted that all that the Act in fact did was set the conditions under which such court approved testing should take place.¹²⁷ The failure on the part of the Act to define what is meant by justifiable when having to grant permission for an order permitting HIV testing has left us no option but to place this responsibility within the hands of the courts. It is therefore the responsibility of the courts to objectively consider the relevant facts before them and decide the justifiability of a request to conduct testing.

The court sought further guidance on what is meant by justifiable in the Code of Good Practice: Key Aspects of HIV/AIDS and Employment of 2000. The Code introduces many general considerations with regard to HIV and AIDS but as the name says, it is only a code which aims to guide employers and trade union on how to manage HIV/AIDS within the workplace. The Code repeats what is stated in section 7(2) of the EEA with regard to the prohibition on HIV testing without the permission of the Labour Court in section 7(1)(1) but also has a somewhat contradictory provision in section 7(1)(2) which questions the constitutionality of the employee’s right to waive the protection afforded by the EEA by employee initiated HIV testing.

¹²⁶ At 392 Para G-J.

¹²⁷ At 395 Para B.

The court further highlighted that the main purpose of the prohibition is to protect the employee who, because of his/her subordinate nature may at times be forced to undergo HIV testing or face some penalty by the employer. It also emphasised that although employees freely consented to have an HIV test conducted on them, it was still the Labour Court's responsibility to provide permission for such a test to be carried out. The court acknowledged and accepted that they can in no way deprive or prevent an employee from engaging freely in an HIV test as the purpose of section 7(2) is not to ban HIV testing totally. All it intended was to prohibit such testing without the permission of the Labour Court that is left with the function of ascertaining whether the employee consented or volunteered for such testing.¹²⁸

According to Grogan,¹²⁹ "if this is so, the right protected by section 7(2) of the EEA is not the right of employees not to be forced to undergo such tests, or the right of employees to be protected against disclosure of their HIV status. It is a right enjoyed by employees generally not to be subjected to an HIV test without the consent of the Labour Court. To secure these objectives, the Act forces employers to approach the Labour Court to justify any test, rather than adopting the normal method of allowing the people whose rights are threatened to approach the court for a restraining order."

(vi) *I & J v Trawler Line Fishing Union and National Certificated Fishing and Others*¹³⁰

In the above case, the applicant who employed more than 1100 workers in its trawling division wished to arrange for the voluntary and anonymous HIV testing of these employees. It attempted this by seeking an order declaring that the test in question does not fall within the ambit of section 7(2) of the EEA. Alternatively, the applicant sought an order that the testing was justifiable as contemplated in section 7(2), subject to certain conditions set out in their notice of motion. The applicant also had the full support from both the representative trade unions, Trawler & Line Fishing Union and the National

¹²⁸ Page 398 Para C-J.

¹²⁹ John Grogan, 'Licensing HIV tests-Consent is the key' Employment Law (2002) 18 EL 20 at 21.

¹³⁰ (2003) 4 BLLR 379 (LC).

Fishing & Allied Workers Union who both filled notices of non-opposition to the employer's HIV testing requests. Notably, this kind of support for HIV testing was also seen in the *Joy Mining Machinery* case above.

The applicant believed that he required information on HIV prevalence in its workforce to assess the potential impact thereof on its workforce; to enable the applicant to engage in appropriate manpower planning so as to minimize the impact of the HIV/AIDS mortalities and related conditions on its operation; to enable it to put in place adequate support structures to cater for the needs of the employees living with it; and to facilitate the effective implementation of proactive steps to prevent employees from becoming infected.

The court eventually came to the conclusion that anonymous testing does not need the approval of the Labour Court.¹³¹ Its reasoning was based on its interpretation of section 7(2) of the EEA which prohibits HIV testing. This reasoning seems justified, as the core reason for the insertion of section 7(2) in the EEA was to curb discrimination resulting from HIV testing. And since anonymous testing does not have the above effect it should not be subjected to the Labour Court's approval. Such testing does however need the consent of the employee.

The court considered whether voluntary testing needed the approval of the Labour Court. It compared voluntary testing to involuntary or compulsory testing where employees are forced to subject themselves to HIV tests or face some penalty as a result of their refusal to subject to such a test. It found that unlike in the case of involuntary testing forced upon employees, it could see no reason why voluntary testing that had the full consent and was done with the permission of the employee or even better, initiated by the employee should be subjected to the Labour Court's approval. The courts decision was thus the correct one. It also consideration of the Code, which promoted the idea of voluntary testing by employees in order to determine their HIV status. With many uncertainties

¹³¹ *I & J v Trawler Line Fishing Union and National Certificated Fishing and Others* (2003) 4 BLLR 379 (LC) at 20 Para 42.

regarding the interpretation of section 7(2) of the EEA due to its legal drafting, it was hoped that this case settled the debate on the EEA's interpretation of section 7(2). This was however not so. It required further fine-tuning and deliberation in the *PFG Building Glass*¹³² case that followed.

(vii) *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood and Allied Workers Union & Others*¹³³

In *PFG Building* the employer requested from the Labour Court that a declaration be made that anonymous and voluntary testing of its employees did not fall under section 7(2) of the EEA. In doing so, it requested that the court declare that it did not need the approval of the Labour Court for the purpose of performing anonymous and voluntary testing on its employees. The court considered the request in the broader constitutional context by addressing fundamental principles such as *inter alia* the constitutional right to privacy (section 14), the right to bodily integrity (section 12(2)(b)), the right to dignity (section 10) and the limitations in which these rights operate in terms of the Constitution (section 36)

Pillay J then noted that when dealing with HIV testing in the workplace, “the core rights affected are the rights everyone has to bodily and psychological integrity, which include:

- (1) the right to security in and control over their body (section 12 (2)(b));
- (2) the right not to be subjected to medical or scientific experiments without the informed consent.”¹³⁴

Pillay J also mentioned that by Section 14, the right to privacy also impacts on the HIV positive employees when faced with testing.¹³⁵

¹³² *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood & Allied Workers Union & others* (2003) 24 ILJ 974 (LC).

¹³³ (2003) 5 BLLR 475 (LC).

¹³⁴ At 982 Para 9A.

¹³⁵ At 982 Para 12E.

The judge further note that the right to privacy deserves more than superficial treatment in the context of HIV testing. Therefore, the right has to be very carefully balanced against countervailing rights such as the right to information.¹³⁶ Apart from the right of the employee, other rights such as the right to choose their trade and occupation or profession freely also come to the fore to the advantage of the employer.

Such a right would therefore allow an employer to engage in testing employees for HIV in order to successfully pursue its business interests. Furthermore, Pillay J also conveyed that the limitation that section 7(2) of the EEA places on employees right to bodily integrity by allowing testing to take place with the permission of the Labour Court, complies with the Constitution¹³⁷

The court also looked at the meaning of the term “justifiability” and the requirements set out in section 50(4) of the Act that relates to testing that was granted the approval of the Labour Court. Here Pillay J also considered the conditions under which testing would be justifiable although not initially called upon to do so, as she was only expected to interpret the true meaning of section 7(2). In concluding, Pillay J held that, because the purpose of the EEA is to achieve equity in the workplace, the testing may not be in any way discriminatory. However, the justifiability of testing for HIV is not limited to determining whether it is equitable or not. Nor is section 7(1)(b) of the EEA the springboard for determining justifiability for such tests.¹³⁸

Pillay J was of the view that in determining the justifiability of HIV testing, one must not only consider the limitation placed on testing in terms of section 7(1)(b) of the EEA, but also ensure that it complies with the constitutional limitations. Much emphasis was however placed on the importance of consent when considering voluntary testing with the consent of the employee being a key consideration in cases of voluntary testing. Therefore, similarly to the *Irvin & Johnson* case the court once again placed enormous emphasis on the consent of the employee and the fact that anonymous testing should have

¹³⁶ Ibid.

¹³⁷ At 987 Para 36.

the employee's permission. The court however went much further by reiterating that anonymous testing alone does not fall outside section 7(2) of the EEA, but that there must be voluntary consent in the true sense. In other words, the employee should give his/her permission freely and be fully aware of the purpose of the test and the conditions under which it will take place.

The court further conveyed that once an employee has freely and voluntarily consented to take an HIV test, the Labour Court may not in any way interfere in the employee's decision to have an HIV test conducted on him/her. Such interference would go against an employee's constitutional right in terms of section 12(2), which provides that an employee is entitled to provide consent for medical tests to be conducted on themselves.¹³⁹ The court however placed emphasis on the fact that where the test is not totally voluntary and with the true consent of the employee, the Labour Court's approval is needed. It is therefore hoped that whatever uncertainties prevailed after the *Irvin & Johnson* case have been removed by this judgment.

5. The present legal position on HIV testing

What will now follow is a brief examination of the legal position and some discuss around the most controversial issues relating to testing. The EEA substantially contributes towards the protection of the HIV positive employee. Without the EEA's explicit anti-discriminatory (section 6) and anti-testing provisions (section 7), HIV positive employees would still be in its previously vulnerable position. Although much credit must be given to the Act, it was however not totally free from shortcomings. This was seen in the recent interpretational confusion and debates regarding its testing provisions (section 7(2)).

¹³⁸ At 987 Para 37.

¹³⁹ At 993 Para 71.

In terms of section 7 (1) of the EEA, medical testing of an employee is prohibited unless-

- (a) legislation permits or requires the testing; or
- (b) it is justifiable in the light of medical facts, employment conditions, social policy, the fair distribution of employee benefits or the inherent requirements of the job.

Section 7(1) does however not substantially apply to the HIV positive employee. The more relevant and explicit section providing more protection is section 7(2). This section essentially prohibits the testing of an employee to determine his/her HIV status unless such testing is determined to be justifiable by the Labour Court in terms of section 50(4) of the Act. Section 7(2) therefore places an explicit prohibition on employers to test any employee without the permission of the Labour Court.

This could therefore be understood to mean that before any employer who wishes to perform an HIV test on any individual employee's or group of employee's, he must first seek permission from the Labour Court. This is the message that the court conveyed in both the earlier cases of *Ndebele*¹⁴⁰ and *Rand Water Works*¹⁴¹ and the latter *Joy Mining*¹⁴² case. The question however, is whether this is really what is meant by section 7(2). Notably, other case law reflects a different opinion. This does not necessarily mean that it is the correct opinion or interpretation of what is meant by section 7(2) of the Act. I will therefore explore the two schools of thought on the interpretational debate and draw a conclusion in this regard in settling the debate.

For now, it can be said that commentators on the one side,¹⁴³ strongly believed that all HIV testing, whether anonymous and consented to still needed the approval of the Labour Court as was decided in the *Joy Mining* case . Those on other side,¹⁴⁴ however had a contrary interpretation understood by them to mean that anonymous and voluntary testing

¹⁴⁰ *Ex Parte -Ndebele Mining Company (Pty) Ltd* (LC) 10-07-2001 (case J1466/2001 unreported)

¹⁴¹ *Rand Water Board v SA Municipal Workers Union & others* unreported decision of the Labour Court (case J1466/2001 10 July 2001)

¹⁴² *Joy Mining Machinery (a division of Harnischfeger (SA)(Pty) Ltd v NUMSA & others* (2002) 4 BLLR 372 (LC)

¹⁴³ Heywood, M & Joni, J, 'Judgement on Section 7(2) of the EEA Creates uncertainty regarding HIV testing in the workplace' (2002) 23 ILJ 670 at 674.

¹⁴⁴ *Ibid* 675.

does not need the approval of the Labour Court as was decided in the two most recent cases of *I & J*¹⁴⁵ and *PFG*¹⁴⁶.

Apart from prohibiting HIV testing, section 7(2) mentions that such testing must be found to be *justifiable* by the Labour Court in terms of the criteria mentioned in section 50(4) of the Act. The Act does not however give clarity on what is meant by justifiable or the criteria the court should use when having to decide whether the testing of employees for the purpose of determining their HIV status is fair. All it does is describes the conditions under which such testing should take place. Clarity was however in the PFG judgment where Pillay, J held that, “this term must be interpreted not only in the light of the factors set out in relation to medical testing in general in section 7(1)(b), as held in *Joy Mining Machinery v National Union of Metalworkers of SA*,¹⁴⁷ but also in light of section 36 of the Constitution. Accordingly, she held that the justifiability of any individual case of testing must be determined in terms of the limitations clause in the Constitution.¹⁴⁸

5. (a) The Anti-discriminatory provisions in the EEA

A further incorporation into the EEA is its prohibition of unfair discrimination. In terms of section 6(1), no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds, including amongst other, their HIV status. This prohibition not only protects employees from discriminatory attitudes and behaviors on the part of fellow employees and employers. It also now makes it much easier for them to pursue HIV discrimination claims through the Labour Court. This is therefore a major improvement on the position that prevailed prior to the enactment of the EEA.

Although this protection is provided for in section 6(1) of the EEA, it is however not unfair to discriminate against an HIV positive employee on the basis of an ‘inherent requirement of the job’. The concept of inherent requirement of the job has thus far not

¹⁴⁵ *I & J v Trawler Line Fishing Union and National Certificated fishing and Allied Workers Union* (LC) case C1126/2002

¹⁴⁶ *PFG Building Glass (Pty) Ltd v CEPPAWU & Others* [2003] 5 BLLR 475 (LC)

¹⁴⁷ (2002) 23 ILJ 391 (LC).

been the subject of many Labour Court cases. The first and well known case that explored the meaning of this term was that of *Whitehead v Woolworths*,¹⁴⁹ where the Labour Appeal Court analyzed the true meaning of this term when applied in instances of recruiting job applicants. The extent of the use of this concept for the purposes of excluding an HIV positive employee from employment was previously examined in the popular case of *Hoffman v South African Airways (SAA)*.¹⁵⁰ Here, the court was forced to consider the extent of or application of ‘inherent requirements’ of the job as a defence against discrimination in the context of HIV.

6. Conclusion

This chapter examined the developments in pre-employment HIV testing by showing how it developed from a non-regulated practice to that of the current prohibition being imposed. It highlighted how, substantially good progress has been made towards protecting the HIV positive employee through the use of the SALC. This can be seen in the implementation of effective prohibition legislation. Whilst the LRA’s protection provisions were also explored, examination of the Constitution and the EEA was more relevant to understanding the extent of HIV protection.

Notably however, the EEA did not come without its shortcomings. Although the Act provides for a prohibition on discrimination and unlawful or unjustified HIV testing on employees, some uncertainties still remained. One area that fell short of proper definition is the meaning of the term “justifiability”. This failure sparked debate as to the interpretation of this term. According to Cohen,¹⁵¹ “A direct relationship will need to be established between the identified purpose of the testing and the actual tests concluded”.

Furthermore, these debates have already been explored above and need no further examination. The recent *Irvin & Johnson* and *PFG Building* judgments however seems to shed more light on the controversial issues explored above by giving clearer guidance on the issues.

¹⁴⁸ Heather Schooling, ‘Voluntary HIV testing of Employees’ (2003) 12 CLL 85 at 87.

¹⁴⁹ (1999) 8 BLLR 862 (LAC).

¹⁵⁰ (2000) 21 ILJ 892 (W).

In the *Irvin & Johnson* case, the learned judge held that in his opinion the legislation that required employers to obtain permission from the Labour Court before conducting HIV testing did not apply to voluntary testing. In the case of *PFG Building Rodgers J's* decision that the anonymous nature of the testing is highly relevant was concurred with by Pillay J, who fully agreed that tests of anonymous nature leaves no opportunity at all for discrimination and prejudice against employees on the part of the employer.¹⁵² The test should furthermore be so designed so that HIV positive or negative employees may not be identified in any way by anyone other than those conducting the HIV tests.¹⁵³ To assist this process it is advisable that the practitioner responsible for conducting such tests be a person independent from the organization. If the *I & J* judgment has not done so, it seems that the last judgment of *PFG Building* has settled the debate around the interpretation of the EEA's HIV testing provisions. What will now follow is an assessment of the legal requirements for HIV related dismissal within the workplace.



¹⁵¹ Ibid 169.

¹⁵² At 990 Para 55.

¹⁵³ At 990 Para 56.

Chapter Five

1. HIV/AIDS and Dismissal

The extent to which the LRA protects HIV positive employees against unfair dismissal with its automatically unfair dismissal provisions has already been briefly introduced in chapters one and three. Similarly, the extent to which international laws and South African legislation contribute towards such protection has also been the focus of previous chapters. This chapter will therefore examine the extent of such protection and ascertaining the conditions under which an employer may dismiss the HIV positive employee.

In doing so, I will examine automatically unfair dismissal claims resulting from discrimination against the HIV positive employee. I will further discuss “*inherent requirements of the job*” as a defence to such a claim. In addition, dismissal of HIV positive employees as a result of ill-health, disability and due to operational requirements will also be examined. Some of the questions which I will address under these kinds of dismissals include the following: When would dismissing the HIV positive employee due to ill-health be appropriate? Is HIV regarded as a disability? When is dismissing the HIV positive employee on operational requirements grounds - (with reference to objections on the part of fellow employees to have their HIV positive colleague around) appropriate. And finally, how does one determine what the real reason for dismissing the HIV positive employee is? In conclusion this chapter will address the appropriate dispute resolution procedures (in terms of the LRA and EEA) and give guidance on the prescribed remedies in instances of unfair dismissal of the HIV positive employee.

2. A Summary of the Code of Good Practice on Key Aspects of HIV/AIDS & Employment

Detailed discussion on the Code has already taken place in chapter three. Only principles relevant to the dismissal of HIV positive employees will therefore be touched on. The Code’s primary objective is that of creating a non-discriminatory work environment; dealing with HIV testing, confidentiality and disclosure; providing equitable employee

benefits; dealing with dismissals; and managing grievance procedures.¹⁵⁴ In terms of section 11 of the Code, no employee may be dismissed solely because of their HIV status. Furthermore section 11(2) obliged employers to follow the accepted guidelines as stipulated in schedule 8 the LRA, in instances where an employee is unable to perform his normal duties as a result of his HIV related ill-health.

Furthermore, section 11(3) promotes confidentiality during incapacity proceedings and suggests that employers should do everything possible to ensure that the employee's HIV status is kept confidential during and after this time. From this, flows the employee's right not to be tested for HIV or to disclose this information without the employer obtaining permission from the Labour Court. Generally, the Code does not place any other obligations on employers other than those prescribed by the LRA and the EEA.

3. Dismissing the HIV positive employee under the LRA

In terms of section 187(1)(f) of the LRA¹⁵⁵, an HIV positive employee may not be dismissed because of his/her HIV status. Section 188(1) furthermore, stipulates that a dismissal will be unfair if the employer fails to prove that the reason for the dismissal is related to the employee's conduct or capacity or based on the employer's operational requirements. Such a dismissal would also be regarded as unfair if not effected in accordance with a fair procedure. Clearly, the same principles promoted by the ILO in 1982 apply.¹⁵⁶ HIV dismissals under the conditions described above will now follow.

4. HIV Discrimination and the Automatically Unfair Dismissal [s187(1)(f)]

The term automatically unfair dismissal has its roots from international law such as ILO Convention 158 of 1982. In terms of Article 5 of the Convention, any dismissal resulting from or related to "an employee being a member of a union or participating in trade union activities with the employers consent during working hours, seeking to be an office

¹⁵⁴ Schedule 2(1) of the Code of Good Practice on Key Aspects Relating to HIV/AIDS and Employment.

¹⁵⁵ Labour Relations Act 66 of 1995.

bearer of a trade union, the filling of complaints against an employer for contravention of labour legislation, related to race, colour, sex, marital status, family responsibility, religion, political opinion, national extraction or social origin”, is regarded as an automatically unfair dismissal. So too, are dismissals related to the employee’s pregnancy. Furthermore, in terms of Article 5, dismissal based on age or absences while on military service are also proscribed, but subject to national laws and practice.¹⁵⁷

According to Grogan,¹⁵⁸ “there are two possible methods of dealing with such dismissals: firstly, to criminalise them; secondly, to ensure that employees dismissed for reasons considered unacceptable have recourse to a civil remedy that provides the employees with adequate redress, and deters the employer from repeating such dismissals.” Within South Africa, the drafters of labour legislation have opted for the second option to discourage not only victimisation, but also discrimination. It is also their intention to enforce the provisions of the LRA on employers.¹⁵⁹ The enforcement of such provisions can be found in section 187(1) of the LRA. In terms of section 187(1) a dismissal is automatically unfair if the employer (in dismissing an employee), acts contrary to section 5. It is also regarded as automatically unfair, if the reason for the dismissal is due to any of the listed grounds in section 187(1).

Just what does the term automatically unfair dismissal mean within the context of South African Labour Law? In terms of English Jurisprudence the term is intended to indicate that any dismissal listed under section 187(1), is deemed to be an automatically unfair dismissal. It therefore means that an employer will have no recourse to any explanation or justification for such a dismissal even if s/he has followed a fair procedure prior to dismissing the employee.¹⁶⁰ In other words, all that is required is for the courts to determine whether in fact dismissal based on one of the listed grounds of section 187(1)

¹⁵⁶ Article 4 of the ILO Convention 158 of 1982, which stated that an employee could not be dismissed unless such dismissal was related to the capacity or conduct of the employee or based on the operational requirements of the employers business.

¹⁵⁷ John Grogan, ‘Dismissal, Discrimination & Unfair Labour Practice’ (2005) 1st Edition JUTA at 182.

¹⁵⁸ Ibid 182.

¹⁵⁹ Ibid 182.

¹⁶⁰ Ibid 183.

had taken place. It will therefore be a factual enquiry into determining the true reason for the dismissal.¹⁶¹

In the South African context, dismissal of an HIV positive employee would therefore, fall within the ambit of the unfair dismissal provisions of section 187(1)(f) of the LRA. In terms of section 187(1)(f), “a dismissal is automatically unfair ...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...”

The provision in the Act, should also be read in line with section 6 of EEA's which affords employees the same protection against dismissal relating to unfair discrimination linked to any one of the above mentioned arbitrary or listed grounds.¹⁶² “The listed grounds are sometimes referred to as the ‘specified grounds’. The wording of the subsection makes it clear that the list is not closed, and that the courts have recognised claims based on what have been termed ‘analogous grounds’, for example, HIV status or citizenship.”¹⁶³ Therefore, any discrimination related to the ‘listed’ or ‘analogous’ grounds are afforded the protection of section 187 (1)(f) and places a duty on the employer to explain the reasons for such discrimination. The employer is therefore faced with the responsibility of explaining to the courts why their actions should not be regarded as an automatically unfair dismissal.¹⁶⁴

The employer does however have recourse to escaping this legislative provision. In terms of section 187(2), an employer is entitled to dismiss an employee if such dismissal is based on an inherent requirement of the job. All that is required in this instance is for the employer to establish the extent that some inherent requirement is attached to the

¹⁶¹ Ibid 183.

¹⁶² Andre Van Niekerk, ‘Unfair Dismissal’ (2004) 2nd Edition Siber Ink at 35.

¹⁶³ Ibid 35.

¹⁶⁴ *ibid.*

employee successfully performing the required obligation of the job.¹⁶⁵ What will now follow is some discussion on the concept as a defence against the automatically unfair dismissal claim.

4.1 Inherent Requirement of the Job

Despite subsection 187(1)(f), “ a dismissal may be fair if the reason for the dismissal is based on an inherent requirement of the job.” An employer thus has recourse to subsection 187(2)(a) as justification for discrimination against an employee on any of the listed grounds. What this section basically means is that any discrimination, regarded as unfair in terms of section 187(1)(f), immediately becomes fair if one can show that it was the inherent requirement of the job and not the discrimination in itself, that forced the employer to arrive at the decision not to appoint or to dismiss an employee.

According to Basson,¹⁶⁶ “section 187(2)(a) is an escape clause and qualifies automatically unfair dismissals where the dismissals constitutes unfair discrimination.” In other words, the Act permits discrimination under one of the listed grounds, which affords the employer the right to dismiss. An important point that should be highlighted however is that the term as a defence mechanism only applies to section 187(1)(f). Thus employers are not able to use it as a justification to discriminate on the bases of section 187(1)(a)-(e) & (g).¹⁶⁷

But just what does the term ‘inherent requirement of the job’ mean? According to Grogan,¹⁶⁸ “the law offers no clear guidance on the meaning of the phrase ‘inherent requirements of the particular job’. ‘Inherent requirements’ clearly depends on the nature of the job. A requirement is inherent to a particular job, it seems, if the work cannot be performed because the employee cannot satisfy the requirements. Since the phrase occurs in a provision justifying dismissal, it follows that the requirement must relate to the employee’s ability to perform the work. And since section 187(2)(a) is an exception to

¹⁶⁵ Andre Van Niekerk, ‘Unfair Dismissal’ (2004) 2nd Edition Siber Ink at 35.

¹⁶⁶ Basson et al, ‘Essential Labour Law-Volume 1 : Individual Labour Law’(2002) 3rd Edition LLP at 165

¹⁶⁷ Ibid 165.

¹⁶⁸ John Grogan, ‘Dismissal, Discrimination and Unfair Labour Practice’ (2005) 1st Edition JUTA at 208.

section 187(1)(f), it follows also that the disqualification must arise because the employee possesses some attribute linked or akin to the prohibited grounds”

The first published case in which the ‘inherent requirement’ defence has been considered by the South African courts was, *Whitehead v Woolworths (Pty) Ltd*,¹⁶⁹ where ‘inherent requirement’ was defined as an ‘indispensable’ attribute which must relate in an inescapable way to the performing of the job. This simply means that where an employee is unable to perform a specific job as specified by the job requirements, the dismissal of such an employee would be fair. Thus a male for example, cannot claim discrimination if he was not accepted for employment at a female only massage parlour, as it is an inherent requirement that the person employed should be a female. Similarly, where an employer can prove that the job applicant or employee applying for a promotion does not meet the inherent requirements of the job, the non acceptance of such a candidate would be regarded as justifiable and fair and would also pass the court’s scrutiny when assessing a claim of unfair discrimination by an employee.¹⁷⁰ The Labour Appeal Court however held that inherent requirement conditions still has to conform to the EEA and that commercial rationale cannot be used as a justification for discrimination.¹⁷¹ A recent Labour Court decision of *Wallace v Du Toit*,¹⁷² however leaves room for the view that, the court will take a stricter approach to a case of automatically unfair dismissal in terms of section 187(1) of the LRA, than that of discrimination claim lodged by a job applicant. This, it is believed, will be heavier than the *Whitehead v Woolworth’s*¹⁷³ approach which was considered under provisions in terms of the LRA dealing with applicants discriminated against and not that of an not the case of an existing employee.

Furthermore, in *Hofmann v SAA* the meaning of this concept was further explored especially in the context of HIV. Here, the court rejected SAA’s argument that it was within the interest of the business that it ensured the Health and Safety of its passengers.

¹⁶⁹ (1999) 8 BLLR 862 (LAC).

¹⁷⁰ Du Toit et al, ‘Labour Relations Law-A Comprehensive Guide’ (2003) 4th Edition BUTTERWORTHS 571.

¹⁷¹ Ibid 571.

¹⁷² (2006) 8 BLLR 757 (LC).

¹⁷³ *Supra*.

Such explanation came from the idea that Hoffmann was a risk to passengers.¹⁷⁴ This view was expressed by SAA with the following words:

“The need to promote the health and safety of passengers and crew is important. So is the fact if SAA is not perceived to promoting the health and safety of its passengers and crew this may undermine the public perception of it. Yet the devastating effects of HIV and the widespread lack of knowledge about it have produced a deep anxiety and considerable hysteria. Fear and ignorance can never justify the denial to all people who are HIV positive of the fundamental right to be judged on their merits”¹⁷⁵

In a more recent case of *IMATU & Another v City of Cape Town*,¹⁷⁶ the Labour Court was faced with the question of whether the employer was justified in imposing a blanket ban on the employment of diabetics in the position of firefighter. This question arose from the employer’s refusal to appoint an employee into the position of firefighter due to him being an insulin-dependent diabetic. The employer based its refusal on the basis of the “inherent requirement of the job” provision of the LRA.

After consideration of the medical and other applicable supportive evidence the court concluded that the employer had not proved that a blanket ban on the employment of diabetics in the position of firefighter was justifiable.¹⁷⁷ It also held that although the employer’s had an obligation of providing a guarantee to public safety, such obligation could never override the employee’s constitutional right to non-discrimination.¹⁷⁸ The court therefore concluded that “unfair discrimination on the basis of an illness needs to be justified on an individual basis and a blanket ban¹⁷⁹ on the appointment of persons suffering from a certain illness will not be established on the basis of the inherent requirement of the job.”¹⁸⁰

¹⁷⁴ Ibid 209.

¹⁷⁵ *ibid.*

¹⁷⁶ (2005) 11 BLLR 1084 (LC).

¹⁷⁷ Adriaan van der Walt & Glynis van der Walt, ‘The defence of inherent requirements of the job: a blanket ban for medical reasons not justified.’ (2005) 26 *Obiter* 447 at 448.

¹⁷⁸ *IMATU & Another v City of Cape Town* (2005) 11 BLLR 1084 (LC). At 26 Para 98

¹⁷⁹ At 28 Para 110.

¹⁸⁰ *Ibid* 453.

It therefore seems that the ‘inherent requirements of the job’ as a defence would not easily act as a justification for the employer’s discrimination of the HIV positive employee. To this extent, the automatically unfair dismissal provisions in the LRA, currently seems sufficient in protecting the HIV positive employee against unfair dismissal.

5. HIV and Incapacity Dismissals

In terms of section 188 of the LRA, the dismissal of an HIV positive employee will be regarded as unfair unless the employer can prove that the reason for the dismissal is due to a fair reason related to the employee’s ill-health or incapacity and that the employer has followed a substantive and procedurally fair procedure prior to dismissing the employee. Such a dismissal will therefore be justified under those circumstances.

Although protection against dismissing an HIV positive employee is provided by section 187(1)(f), it is not expected from employers to accommodate or have in their employ employees who are unable to perform their job responsibilities. This is especially so, if such non-performance impact on the financial wellbeing of the company. The employer may therefore dismiss an employee who is no longer able to perform his or her job responsibility and has full-blown AIDS. The Act therefore provides that such a dismissal would be fair provided a fair procedure is followed.

The Code of Good Practice on Dismissal (schedule 8 subsection 10 and 11), also gives guidelines in this regard. Although principally supporting a process of procedural and substantive fairness, the Code states that the employer is not forced to accommodate an employee who is absent for an unreasonably long time. What is meant by ‘unreasonably long time’ is not very clear. It is however submitted that this question will depend on the circumstances of each case. In making an assessment, factors such as the importance of the employees’ job, the ease at which replacement could be found; the company’s financial ability to pay for such a replacement, the employee’s length of service, the employee’s speed of recovery and the impact of this absence on other employees should be considered (Item 10(1) of the Code.

In general terms, the HIV positive employee's incapacity usually results in regular or excessive absenteeism. Other effects that his/her HIV status has on his/her capacity include depression, loss of memory and confusion.¹⁸¹ The employee's incapacity must however be treated no differently to, other cases of incapacity due to ill-health. This simply means that his or her dismissal must be preceded by a process whereby the employer attempts to accommodate the employee's illness. The extent of such accommodation will be more thoroughly examined in the paragraph below. I will now shed more light on dismissal of the employee on the basis of ill-health and disability. I will then examine dismissal based on operational requirements with reference to recent case law on the matter.

5. (a) Dismissal due to Ill-Health

Prior to dismissing an employee for incapacity an employer is required to consider a range of alternatives in the course of following a fair procedure. That protection is afforded to the HIV positive employee.

(i) Is there a case of incapacity?

Where an employer is confronted with an employee's incapacity or illness impacting on the business, s/he firstly needs to establish whether the conduct of the employee is in fact related to incapacity. According to Grogan,¹⁸² "the employer is required to determine the nature and severity of the employee's incapacity and the employee's prognosis. Management's duty to properly acquaint itself with the employee's medical condition is partly substantive and partly procedural. Whatever the cause of the incapacity, the onus rests on the employer to prove that the employee is in fact incapacitated." This is what was illustrated in the *Hoffmann* case where SAA refused to appoint Mr. *Hoffmann* as a cabin attendant because of his HIV status. The court however regarded his dismissal as unfair and held that a mere assumption on incapacity linked to an employee's HIV status will not be sufficient in proving a case of incapacity¹⁸³ The court was however of the

¹⁸¹ Matthew Grossett, 'Discipline and Dismissal-A Practical Guide for Managers' (1999) 2nd Edition Thompson Publishing at 134

¹⁸² John Grogan, 'Dismissal, Discrimination & Unfair Labour Practice' (2005) 1st Edition JUTA at 354.

¹⁸³ Ibid 354.

opinion that such an approach would possibly have been accepted if *Hoffmann* was employed in such a post and illness had reached the stage of the disease which precluded him from having yellow fever injections and performing his job properly¹⁸⁴. This should provide comfort to the employer as it indicates that current legislation does not in any manner provide more protection to the HIV positive employee than an employee suffering from other forms of chronic illnesses.¹⁸⁵

Our courts are however also of the view that, an employer has a responsibility in conducting a proper evaluation on the nature of the employee's illness or injury. Such evaluation should furthermore attempt the severity and nature of the employee's incapacity and prognosis. This was highlighted in the case of *Spoornet v TWU obo Du Plessis*,¹⁸⁶ where an apprentice was dismissed after he was diagnosed with epilepsy. The dismissal was however regarded as unfair as the employer failed to consult the employee and attempt to establish the extent of his illness.¹⁸⁷

(ii) How serious must the illness be before dismissal?

We know that the section 188 and schedule 8 (11) of the LRA provides sufficient protection to the employee and clearly guides us in terms of incapacity dismissal requirements. A question that arise however is, how serious must an employees' illness or injury prior to the employer dismissing the HIV positive employee?¹⁸⁸ According to Grogan¹⁸⁹, "the code draws a distinction between temporary absences due to illness or injury and those that endure for a time that is unreasonably long in the circumstances. Generally, dismissal is not justified in the case of an illness or injury that results relatively brief absence, except if the absence occurs frequently. Many companies have absence policies that provide for dismissal for repeated brief absence, even if they are

¹⁸⁴ Ibid 355.

¹⁸⁵ Ibid.

¹⁸⁶ (1998) 7 BALR 973 (IMSSA).

¹⁸⁷ *ibid.*

¹⁸⁸ Ibid 356.

¹⁸⁹ Ibid 356.

occasioned by different illnesses and injuries. However, in such cases employees must still be counseled and consulted.”

(iii) Just what does finding alternatives and reasonable accommodation mean?

Just what does considering alternatives prior to dismissing the HIV employee means? This is understood to mean that the employer must adapt the work setting or find some alternative responsibility, which the employee is able to carry out successfully. Only after alternatives have been considered and fair procedures have been followed may an employer dismiss the employee due to incapacity (section 188 of the LRA).

What is regarded as reasonable accommodation by our courts?, The term reasonable accommodation does not in any way take away the employees responsibility to conform to the inherent requirements of the job. This basically means that although the term reasonable accommodation is meant to accept a reasonable amount of incapacity on the part of the employee and to accommodate the employee in this regard, it is still requires a degree of ability in the area of competence and efficiency.¹⁹⁰

It can therefore be seen that as much as provision is made in the Act, for accommodating employees due to incapacity and disability, no strict guideline or rule exist for determining how one determines the degree of reasonable accommodation required from the employer. The employer will therefore to the disadvantage of the incapacitated or disabled employee be able to make a final decision in this regard.

5.(b) HIV and Disability

Dismissing an HIV positive employee on grounds of disability would initially be regarded as an *automatically unfair dismissal* and be afforded the protection of section 187(1)(f). This would however differ once an employer is able to justify the dismissal of the employee due to ill-health. Such justification would primarily come from the defence

¹⁹⁰ Charles Ngwena, ‘Equality for People with Disabilities: The Limits of the Employment Equity Act of 1998’ (2001) People with disabilities and limits of EEA/Equality Conference at 7.

afforded by section 187(2)(a) of the LRA. All that would be required in such a case is the employer's compliance with procedural requirements prescribed by the Act.¹⁹¹

This is however more easily said than done. In the normal circumstances differentiating between dismissal on grounds of disability and due to ill-health is not at all difficult. There are however instances where this is not very clear. This difficulty is further worsened by the LRA's failure to define disability. The same could be said about the "EEA and the Code of Good Practice: Key Aspects of Disability in the Workplace of 1998, who gives nothing more than a general definition of disability (with no specific mention of HIV/AIDS status as a disability."¹⁹² Furthermore, the failure by both the EEA and the Code of Good Practice: Key Aspects of Disability to include HIV in its definition a disability, makes it difficult to decide on the appropriate dispute resolution procedures to follow. This is so, as a disability based dismissal would usually go directly to the Labour Court as an automatically unfair dismissal, whereas an incapacity dismissal would come before the Commission for Conciliation, Mediation and Arbitration. In addition to this, would be the different compensations that could be received.¹⁹³

What is however clearly articulated in the definitions of these legislative provisions are that "mental" or "physical" impairment only meets the disability definition requirements if such a disability is "*substantially limiting*" in the case of job applicants or current employees. What substantially limiting disability means is that the employee must still be able to effectively carry out the job responsibility. This therefore only makes provision for limited accommodation of an employee's disability. It further indicates that such disability would have to compete with the inherent requirements of the job, which already leaves the impression that a case of HIV is excluded from consideration. What this means is that thus far, HIV/AIDS has not met the requirements of disability provisions referred to in these legislation. Doing so would place a heavy burden on the employer to extend their accommodation of HIV positive employees much further than just complying with the LRA. It would also not be regarded as fair towards the employer.

¹⁹¹ Basson et al, 'Essential Labour Law-Volume 1: Individual Labour Law' (2002) 3rd Edition LLP at 168.

¹⁹² Ibid 318.

¹⁹³ Ibid 168.

Dismissal resulting from such a case is clearly as a result of the employee's incapacity to perform and not as a result of his/her HIV discrimination.¹⁹⁴

In conclusion then, Basson¹⁹⁵ is of the view that, "it would seem, however, that by equating HIV/AIDS with disability, there would be a big burden on employers to ensure that they do not dismiss prematurely and do not dismiss based on generalized assumptions about the abilities of HIV positive and AIDS infected employees to do their job."

6. HIV and Operational Requirement Dismissals

Would the employer be justified in dismissing the HIV positive employee as a result of co-employees' refusal to work with such an employee? Although the employer has a duty to provide a safe and accident free workplace environment for his employees, this alone is not a good enough reason for dismissing an HIV positive employee. This is especially so, considering the fact that HIV can only be spread in a limited way and may bear no direct health risk to fellow employees. May an employer then dismiss such an employee if there is a commercial rationale for doing so? May operational requirements be accepted as a justified reason for dismissing the employee?

The case of *Mazibuko and Others v Mooi River Textiles Ltd*,¹⁹⁶ is however an example of dismissals based on operational grounds, which was found to be unfair by the court. Here, the employer dismissed employees (belonging to the minority union), as a result of members of the majority union refusing to work with them. The court went on further by reiterating the importance of preserving employee's fundamental rights such as freedom of association and disassociation. The court said that although the dismissal could be justified on grounds of operational requirements, various factors had to be considered in justifying its fairness. This can however be done after considering alternatives and taking reasonable steps¹⁹⁷ prior to ultimately dismissing the HIV positive employee.¹⁹⁸

¹⁹⁴ Ibid 319.

¹⁹⁵ Ibid 320.

¹⁹⁶ (1989) 10 ILJ 721 (IC).

¹⁹⁷ Reasonable steps include training and educating employees about HIV and AIDS. The employer will also be expected to find alternative employment for the HIV positive employee and only once all

This is what was decided in the more recent case of *Lebowa Platinum Mines Ltd v Hill*,¹⁹⁹ where three of the principles endorsed by the Labour Court as important consideration prior to dismissing an HIV positive employee included;

- (1) That the demand had to have a good and sufficient foundation where it impinges upon fundamental rights of an employee special consideration should be given to the enquiry;
- (2) That the extent of injustice to the employee that would result from the dismissal must be considered; and
- (3) Finally any blameworthy conduct of the employee should be taken into account.²⁰⁰

The principles outlined in this case although not applied in the context of HIV/AIDS are equally applicable in such cases. It is therefore clear from past case law that our courts will not easily accept dismissal of HIV positive employees that resulted from irrational and unreasonable demands from fellow employees. Therefore any employee who refuses to work with an HIV positive colleague (after being given the reassurance and provided with the necessary health and safety measures against contracting HIV), will be subjected to disciplinary action. Such discipline may be justified especially after the employer has informed the employees and their refusal affects productivity which is unreasonable and scientifically unjustified.²⁰¹

However, instances may arise where those employees refusing to work with an HIV positive colleague form the majority in an establishment. Would such instances then justify the dismissal of the employee instead of dismissing the irrational co-employees? Could the employer not argue that the dismissal is justified on the basis of the company's

reasonable measures had been taken to no avail (if the employer is unable to discipline or dismiss all employees objecting to work with the HIV positive employee after extensive programmes of AIDS awareness as they constitute the majority of employees) is the employer justified in dismissing the AIDS sufferer due to commercial rational.

¹⁹⁸ Matthew Grossett, 'Discipline and Dismissal- A Practical Guide for Managers' (1999) 2nd Edition Thompson Publishers 121 at 134.

¹⁹⁹ (1998) 7 BLLR 666 (LAC) 671-673.

²⁰⁰ Nicola Smit, 'Some observations regarding the occurrence and management of HIV/AIDS in South African workplaces' (2005) 2 TSAR 358 at 360-361.

²⁰¹ Ibid 361.

operational requirements if the employee's life is placed under threat by fellow employees? This was considered in the case of *East Rand Proprietary Mines Ltd v UPUSA*,²⁰² where Zulu speakers were placed under threat by Khoza speaking colleagues and subsequently dismissed because of it. The Labour Court then held that “there can be no doubt that, for management itself to dismiss a worker merely because he is Zulu, or because she is Jewish or because he or she has HIV, would be reprehensible. The court continued that for management to dismiss not directly, for that reason, but because the rest of its work-force holds that reason, places management only at one removed from consideration.”²⁰³

Therefore, what was meant was that the court will only accept such a dismissal if it can be shown by the employer, that s/he had no alternative but to dismiss the employees after consideration of various options. According to Smit,²⁰⁴ “where a dismissal is actuated by operational reasons that arise from ethnic or racial hostility (or HIV prejudice if it is submitted), the court will countenance the dismissal only where it is satisfied that management not only acted reasonably, but that it had no alternative to the dismissal.”

The answers to these questions seem to be in the positive. As mentioned above, it is important to note that acceptance of such a dismissal by the courts will not be easy. An assessment of the fairness of such a dismissal will be evaluated against the principles outlined in the *Lebowa case* above.²⁰⁵

7. Determining the Real Reasons for Dismissal (HIV status or some other, acceptable reason)

Determining the true reason for an employee's dismissal is not always easy. This is especially so, if an employer initiated the dismissal for some other legally acceptable

²⁰² (1996) ILJ 1134 (LAC).

²⁰³ *ibid.*

²⁰⁴ Nicola Smit, ‘Some observations regarding the occurrence and management of HIV/AIDS in South African workplaces’ (2005) 2 TSAR 358 at 360-361.

reason such as ill-health or operational requirements. The question that then comes to mind is how does one bring before the court the actual reasons for the HIV positive employee's dismissal (his/her HIV status)? With the protection afforded to the employee by the LRA, it would not seem to be too difficult to present such evidence to the court. This is especially so, if done within the provisions of section 187(1)(f).

This is however not that easy as could be seen in the case of *A v X (Pty)*,²⁰⁶ wherein Mr. A claimed automatically unfair dismissal based on his HIV status after he was dismissed after wearing an HIV positive t-shirt in his workplace. Both Mr. A and his employer Mr. X presented their cases before the Labour Court. Landman J however held that the employee was unable to show on the balance of probabilities that he was dismissed by his employer due to his HIV status. He further held that the applicant's evidence was less reliant than that of his employer Mr. X, and that it was in no way proved that his dismissal or departure from the company was based on his HIV status.²⁰⁷

What will however happen if the employee (who is very well and able to perform his/her particular job and is no way incapacitated or disabled), is dismissed by the employer for reasons related to operational requirements. Can an employee then claim that the employer recently became aware of his/her HIV status which resulted in the employer dismissing him/her due to operational requirements? This, it seems would be very difficult to prove especially, if the employer can provide evidence to the effect that s/he has complied with all, the legislative requirement before dismissing the employee. Thus once the employer has gone through the process of training the unco-operative employees (who are refusing to work with employee), it would be within the employers right to dismiss the employee for operational requirements even if the actual reason is due to him/her becoming aware of the employees HIV status. This might be regarded as an acceptable reason by our courts.²⁰⁸

²⁰⁵ see also *Amaran Govender v Mondi Kraft* (1998) 12 BLLR 1279 (LC) in this regard.

²⁰⁶ (2004) (LC) Case JS 597/02,

²⁰⁷ At 7.

²⁰⁸ The employer will however be required to show to the Labour Court that all alternatives were considered prior to taking such a decision.

8. Dispute Resolution Procedures and remedies in cases of HIV related Dismissals

The resolution of unfair and automatically unfair dismissal disputes is commonly resolved through the LRA. Provision is also made in the EEA for the resolution of discriminatory disputes by job applicants and by PEPUDA for those (excluded from the protection of the EEA), to lodge discriminatory claims. Therefore the HIV positive employee, who has been unfairly dismissed due to his /her HIV status, has recourse to the Commission for Conciliation, Mediation and Arbitration and the Labour Court, in terms of the Act.

8.(a) The appropriate remedies (s193)

If a dismissal is found to be unfair, prescribed remedies are afforded to the employee. Previously, the discretion was left to the Arbitrator or the Labour Court to decide on the appropriate compensation to afford the unfairly dismissed employee. The LRA has now put in place the specific remedies. In terms of section 193, three possible remedies are prescribed. These could include an order that the employer reinstated the employee from any date no earlier than the date of the dismissal (section 193 (1)(a), an order that the employer re-employed the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of the dismissal (section 193 (1)(b), or order the employer to pay compensation to the employee (section 193 (1)(c)). Furthermore, the first two remedies (reinstatement and re-employment) are prescribed and compensation will be the remedy in cases of where the employee does not wish to be reinstated or re-employed; the circumstance surrounding the dismissal are such that a continued employment relationship would be intolerable; it is not reasonably practical for the employer to reinstate the employee and the dismissal is unfair only because the employer did not follow a fair procedure.²⁰⁹

²⁰⁹ Andre Van Niekerk, 'Unfair Dismissal' (2004) 2nd Edition Siber Ink at 111.

With regard to unfair dismissal of an HIV positive employee, re-instatement would be the appropriate remedy as it would place the employee in the same position s/he was in prior to the dismissal. In the Constitutional Court judgment of *Hoffmann v South African Airways (SAA)*,²¹⁰ the court made an order of reinstatement²¹¹ as *Hoffmann* was not within the employ of SAA and therefore reinstatement could not be ordered. Furthermore, considering the fact that the dismissal of the HIV positive employee could be regarded as an automatically unfair dismissal, the Act also suggests that an interdict can be given to such an employer which prohibits such practice.

8.(c) The appropriate compensation (s194)

The appropriate compensation to be awarded to the unfairly dismissed employees is expressed in Section 194 (1) and (3) of the LRA. In terms of the section 194(1) of the Act, an employee whose dismissal is found to be unfair either because the employer did not prove that the reason for the dismissal was a fair reason relating to the employee's conduct or capacity or the employer's operational requirements or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal. Section 193(3) of the Act furthermore stipulates that, the compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstance, but not more than the equivalent of 24 month's remuneration calculated at the employee's rate of remuneration on the date of dismissal.

9. Conclusion

This chapter explained the options available to both employers (who want to dismiss their HIV positive employees) and employees (who want to pursue a case of unfair dismissal as a result of their HIV status). In doing so, I examined automatically unfair dismissals

²¹⁰ 2001 (1) SA 1 (CC).

resulting from HIV discrimination in the workplace. The employer's defence of inherent requirement of the job was also discussed. I also considered the conditions under which the HIV positive employee could be dismissed (as a result of incapacity resulting from his/her HIV status or for reasons based on operational requirements), and the recourse available to the employee who alleges that unfair discrimination or dismissal had taken place. In doing so, I considered the appropriate dispute procedures, remedies and amount of compensation applicable in cases of automatically unfair dismissals. By the use of case law, I examined the principles, which the Labour Court looks at when considering the fairness of a dismissal due to incapacity or for reasons based on the employer's operational requirements.

HIV as a disability was also explored. Although the decisions in these cases were not all taken in the context of HIV, it is argued that it equally applies to such instances. What also transpired from the discussion is that uncooperative and irrational behaviour on the part of co-employees towards the HIV positive employee will not be accepted. The courts therefore require from employers to counsel, educate, discipline and ultimately dismiss such employees. Dismissing these employees would however not be applicable in every instance. Sometimes, operational requirements will require that the HIV positive employee be dismissed after the employer considered alternatives short of dismissal.

Finally, our courts will not tolerate unfair dismissal due to an employee's HIV status. This will however be acceptable if the employer can show that the dismissal was justified in terms of incapacity due to ill-health and after a substantive and procedurally fair process had taken place. In conclusion then, I am of the opinion that the current legislative provisions on discrimination and dismissal sufficiently protect the HIV positive employee against unfair discrimination and ultimately unfair dismissal (as can be seen in the *Hoffmann* case).

²¹¹ "Where a person has been wrongfully denied employment, the fullest redress obtainable is reinstatement. Reinstatement serves an important constitutional objective. It redresses the wrong suffered, and thus eliminates the effect of the unfair discrimination" At 43 Para 52.

Concluding Remarks

“No policy or law can alone combat HIV/AIDS related discrimination. The fear and prejudice that lies at the core of the HIV/AIDS discrimination needs to be tackled at the community and national levels. A more enabling environment needs to be created to increase the visibility of people with HIV/AIDS as a ‘normal’ part of society. In the future, the task is to confront fear based messages and biased social attitudes, in order to reduce the discrimination and stigma of people who are living with HIV or AIDS”²¹²

This mini-thesis examined the extent to which our current legislation protects the HIV positive employee. In chapter two a brief medical background to HIV and AIDS is given, in order to introduce the reader to the medical condition called HIV/AIDS and to expose the extent of HIV/AIDS in South Africa. The extent to which HIV/AIDS related discrimination took place not only in the workplace but also throughout the community is also highlighted. In doing so, the extent of HIV related stigmatization is exposed.

Various Acts starting with international law and the supreme law of our land, the Constitution to the EEA are assessed in Chapter three. From this assessment I gather that these legislative provisions sufficiently protect the HIV positive employee against unfair discrimination and dismissal. The controversial HIV testing provisions of the EEA are critically examined in Chapter Four by sketching developments in HIV testing and how it progressed from an allowed and non-regulated discrimination practice ten years ago to regulated discrimination in the form of the EEA’s testing provisions. In doing so, the interpretive confusions with regard to the Act’s testing provisions in order to establish its true meaning are discussed.

It is argued similarly to the Aids Law Project (ALP) that the court should when interpreting section 7(2) of the EEA, “[a]dopt an interpretation that takes as its starting point the true purpose of the subsection, which is to prohibit employer’ initiated tests that are intended to discriminate”.²¹³ It was never the intention of the EEA to totally prohibit the practice of HIV testing. As HIV testing could be required for many other reasons other than to discriminate it would be unacceptable to place a general prohibition it.

²¹² Jenni Fredriksson & Annabel Kanabus, ‘HIV and AIDS Stigma and Discrimination: Attitudes towards HIV and AIDS’.17th June 2000 at 4.

²¹³ Mark Heywood & Jennifer Joni, ‘Judgment on section 7(2) of the EEA Creates uncertainty regarding HIV testing in the workplace.’ (2002) 23 ILJ 670 at 774.

Hence, the prohibition on testing that results in discrimination. Evidently then, what this section means is that only employer initiated HIV testing or testing that would result in discrimination should be subjected to the Labour Court for approval. The recent *Irvin & Johnson* judgment has given substance to this interpretation and where *Irvin & Johnson* have not totally done so, it is hoped that the last *PFG Building* case has finally closed the debate regarding the interpretation of section 7(2). It is furthermore, argued that this interpretation should be read in line with the overall objectives of the EEA, which is to remove the inequalities and discrimination entrenched by the apartheid system and promote a workplace free from discrimination.

In Chapter five, the conditions under which an HIV positive employee may be dismissed are assessed. Among the areas covered HIV discrimination regarded as an automatically unfair dismissal and the defence of inherent requirement of the job, commonly raised by the employer. HIV dismissals due to incapacity and disability are also examined. Finally then, dismissing an HIV positive employee due to operational requirements is also explored. Here, it's maintained that although courts will not sanction substantively and procedurally unfair dismissals, it would at times regard dismissals based on the employer's commercial rationale as fair. This will however only be accepted once an extensive evaluation is made on the reasoning behind such dismissal and whether all alternatives short of dismissal was considered. Consideration will also be given to whether the decision was taken in all fairness (whether linked to the employer's genuine operation requirements)

In conclusion then, it is mentioned that although the current legislation sufficiently protects the HIV positive employee, there is an urgent need to develop policies similar to that of the Anglo Alpha AIDS policy, which promotes non-discrimination against HIV positive employees in the workplace.²¹⁴ An AIDS policy is important for four reasons:

²¹⁴ Edwin Cameron, 'AIDS, Some Problems in Employment Law' (1991) 12 ILJ 193 at 203.

- ❑ It shows that the company has taken a firm stance with regard to AIDS and, in doing so, it has therefore been able to give attention to the problem before an HIV/AIDS crisis is reached;
- ❑ It generates a consistent approach with regard to the handling of HIV/AIDS infected employees, and thus protects the company from external criticism in not approaching each situation equitably;
- ❑ It allows the company to assess the vulnerability of its own specific finance and human resources to HIV/AIDS and, by doing so, it is able to assess any potential impact on labour relations;
- ❑ It allows the company to address the various issues surrounding discrimination and stigmatization of HIV/AIDS sufferers in the workplace.²¹⁵

Furthermore, such policies should promote the general anti-discrimination principles towards HIV positive employees as promoted by our Constitution and other principle legislation such as the EEA and Codes on HIV/AIDS. Such policies will however not be effective if not supported by the whole workforce. Thus a joint forum should be established in all workplaces that include all stakeholders from both management and labour when initiating such policies in the workplace. Notably, the employment of HIV/AIDS managers in numerous South African companies shows that there is a keen interest on the part of many employers to tackle the HIV/AIDS problem in the workplace. Others companies have however refused to address HIV in their workplaces or continue to discriminate against HIV positive employees by dismissing them. This is most evident among domestic workers who are being dismissed because of their HIV status.

Finally then, it is argued that the EEA, PEPUDA and broader constitutional objectives of prohibiting discrimination against the HIV positive employee will not be achieved by merely implementing the HIV/AIDS policies. What is required are policies that focus upon changing the attitudes of both employers and employees and the broader South African community towards people living with HIV/AIDS. Such policies must promote a

²¹⁵ Matthew Grossett, 'Discipline and Dismissal-A Practical Guide for Managers' (1999) 2nd Edition Thompson Publishers 136.

culture of acceptance of the HIV positive employee's condition by all individuals. This acceptance of the HIV positive employee's condition will lead to HIV positive employees being more comfortable about declaring their HIV status as their fear of discrimination and stigmatization will be eliminated. Thus, one may have to look beyond legislation to offer people with HIV/AIDS a work environment in which they do not feel stigmatized. Effective HIV/AIDS legislation and workplace policies are a step in this direction.



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