

DISCRIMINATION BASED ON HIV/AIDS STATUS IN THE
WORKPLACE.

By

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ABSTRACT.

This mini-dissertation outlines the protection of rights of people living with HIV/AIDS in the workplace. It will highlight the fact that people living with HIV/AIDS can perform the work as long as they medically fit. It will show the need to promote anti discriminatory laws in the workplace. People think that HIV/AIDS can be transmitted through casual contact but that will be shown in the study that HIV/AIDS can not be transmitted by casual contact. The mini-dissertation also outlines the need to educate employees about their rights more particularly those living with HIV/AIDS in the workplace. Therefore policies such as affirmative action must be implemented to affirm several advantages to people living with HIV/AIDS. Equality is what people must enjoy in the country in terms of section 9 of the Constitution including people living with HIV/AIDS.

DECLARATION.

I declare that the mini-dissertation hereby submitted to the University of Limpopo, for the degree of Master of Laws in Labour Law has not previously been submitted by me for a degree at this or any other university and that it is my work in design and in execution, and that all materials contained herein has been duly acknowledged.

Rangoato S J (Mr)

Date

Dedication

I dedicate this piece of work to my uncle GM Rangwato, who made it a point that I go to school and all the sacrifices he made for me and my mother Makoma Evelyn Rangoato, my grandmother Mamoyahabo Rangwato and My late grandfather, may his soul rest in peace and the family at large, without you these was not going to be possible. My late twin sister Jessica Rangoato may your soul rest in peace. You will at all material times be remembered by myself and the family.

May the God of mount ZION bless you all and protect you.

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My special thanks are directed firstly to my supervisor Adv. Lufuno Tokyo Nevondwe without you I would be lost. You played a tremendous role in my career since 2006. It was your responsibility for this work in becoming a reality.

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It is not possible to thank all people who made this work to be what it is yet I thank you all even if your name does not appear.

MAY THE LORD OF ZION BLESS YOU ALL. KGOTSO E BE LE LENA KA MOKA
(PEACE BE WITH YOU ALL)

List of abbreviations.

AIDS	Acquired Immune Deficiency Syndrome
ANC	African National Congress
BCEA	Basic Conditions of Employment Act 75 of 1997
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
DOL	Department of Labour
EEA	Employment Equity Act 55 of 1998
HC	High Court
HIV	Human Immuno-deficiency Virus
HRO	Human Resource Officer
HRM	Human Resource Manager
ILO	International Labour Organisation
LC	Labour Court
NP	National Party
LRA	Labour Relations Act 66 of 1995
SAA	South African Airways
SCA	Supreme Court of Appeal
MEC	Member of Executive Council
MSA	Merchant Shipping Act
TU	Trade Unions
PLT	Practical Legal Training
LAC	Labour Appeal Court

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Labour Relations Act 66 Of 1995

Skills Development Act 1997

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

CHAPTER ONE: INTRODUCTION

1.1 Historical background to the study.

During apartheid, South African parliament represented only the white minority population while the majority black population were not represented and were governed by the executive¹. Apartheid was an official policy which was introduced and implemented immediately after the 1948 general elections which blacks did not participate. Government under the leadership of National Party with Dr D.F Malan as the President enforced apartheid where the rights of black people been the majority inhabitants of the land were limited and the minority rule by the white people was maintained².

Laws enacted during apartheid regime classified inhabitants into racial groups and residential areas were also segregated³. Discriminatory laws affected every aspect of social life whereby for an example laws prohibiting marriages between non white and whites were passed⁴. African people's movement within the country were limited by the pass laws⁵. This led to the protest against apartheid pass laws and sixty nine people were killed at the Sharpeville by police⁶. In April 1960, following the Sharpeville massacre and the ANC led Defiance campaign; both the ANC and PAC were banned in South Africa and were forced to operate underground⁷.

In response to the riot by the government police ANC takes up armed struggle, establishing *Umkhondo we sizwe* in 1961⁸. During 1963 at least ten ANC leaders were charged and their trial was called the Rivonia trial, Mandela, Sisulu, Govan Mbeki and five others were convicted and sentenced to life imprisonment.

¹Currie I and de Waal J, The Bill of Rights Handbook (2005) 3.

²Muller C.F and Phil D, Five Hundred Years A History of South Africa (1986) 466.

³Racial group refers to blacks, whites, coloureds, and Indians

⁴Prohibition of Mixed Marriages Act 55 of 1949

⁵Every African was supposed to carry an identity document wherever they go and that particular id was called a dompass.

⁶ On the 21 March 1960 and now it is a holiday referred to as Human 's Rights day in South Africa

⁷Muller C.F and Phil D, Five Hundred Years A History of South Africa, (1986) 467

⁸Umkhondo we sizwe literally means the spear of the nation.

On the 02nd of February 1990 the state president F.W de Klerk announces the unbanning of ANC and other anti-apartheid organisations and the release of Nelson Mandela and other political prisoners. Peace negotiations started immediately after the release of Nelson Mandela, where the ANC and National Party government represented by Mandela and de Klerk respectively signed the *Groote Schuur minute* in Cape Town to end the political violence.

After the 1994 first democratic election were held where blacks participated, the doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy⁹. Section 2 of the Constitution states that the constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled¹⁰. The principle of constitutional supremacy instructs all spheres of government to respect promote and uphold the core values of the Constitution¹¹. The courts did not have the power to declare any Act of parliament invalid but after the parliamentary sovereignty was replaced the courts had the power to declare the Act of parliament invalid¹². Previously the courts had power to declare invalid only the procedure followed when the Act was passed¹³. It means courts had limited authority and no person or institution could challenge the laws passed by parliament even if they are unfair with reference to the case of *Harris v The Minister of Interior*¹⁴. It is clear that the Constitution has brought a drastic change in that the principle of separation of powers was also introduced which

⁹Currie I and de Waal J, *The Bill of Rights Handbook* (2005) 2.

¹⁰The Constitution of the Republic of South Africa, 1996

¹¹Section 1 of the Constitution of the Republic of South Africa, 1996 provide the following values: Human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the constitution and the rule of law and universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness

¹²Section 172 of the constitution of the Republic of South Africa, 1996

¹³Dicey A.V, *An introduction to the study of law of the constitution* (1959), Page 13

¹⁴1952(2) SA 428 (A), parliamentary sovereignty.

includes among other the function of law making, executing the laws and enforcing the laws was kept in separate authorities¹⁵. In the case of *South African Association of Personal Injury Lawyers v Heath*¹⁶, the Constitutional court held that there can be no doubt that our Constitution provides for such separation of powers and that the law or conduct inconsistent with what the constitution requires in that regard are invalid¹⁷.

The Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary and all organ of state¹⁸. It means that labour laws in the country must also not violate any right enshrined in the Bill of Rights. It also applies to labour organisations and employers respectively¹⁹. Because South Africa is a member state of Independent Labour Organisation (ILO) therefore it must ensure that rights of employees are not violated but always must be protected and respected. People living with HIV/AIDS are also included when we talk about employees. If the law discriminate people living with HIV/AIDS it will be unlawful with reference to the case of *N v Minister of Defence*²⁰, in this matter the Namibian Labour court also stuck down the Namibian Defence force 's policy of excluding recruits solely on the basis of HIV infections. Clearly it is unfair discrimination.

Everyone is equal before the law and has the right to equal protection and benefit of the law²¹. People living with HIV/AIDS are also protected by the law and have the

¹⁵The parliament is law making body, the executive is the executing body and the courts enforce the laws.

¹⁶2001(1) SA 883(CC)

¹⁷Currie I and de Waal J, The Bill of Rights handbook (2005) 18.

¹⁸Section 8 of the Constitution of the Republic of South Africa, 1996.

¹⁹Section 8(2) of the Constitution of the Republic of South Africa, 1996.

²⁰(2000) 21 ILJ 999(LCN).

²¹Section 9 of the constitution of the Republic of South Africa,1996.

right to equal protection and benefit of the very same law²². People living with HIV/AIDS must be free from discrimination.

1.2 Problem statement.

Acquired Immunodeficiency Syndrome is caused by Human Immunodeficiency Virus which causes the body's immune system to become depleted²³. It means HIV attacks and slowly damages the body's immune system²⁴.

Discrimination based on Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome status in the workplace is a major problem faced in South Africa as well as in other countries in Africa such as Namibia, Swaziland and others. HIV/AIDS is the most dangerous disease and probably the most widely talked about disease, which affects various spheres of the society including the workplace.

The problem is that people living with HIV/AIDS are subjected to different kind of prejudice or stigmatization. People living with HIV/AIDS are faced with a range of unfair discrimination in the workplace but our focus is only limited to discrimination based on HIV/AIDS status. The question that one can ask himself or herself is can HIV/AIDS prevent or limit an employee from performing the duties required to do? If the answer is no, then how do people living with HIV/AIDS see that they are protected by the Constitution²⁵. Is the law protecting people living with HIV/AIDS? With reference to the case of *Hoffman v SAA*²⁶, in this case Mr Hoffman applied for a position with the South African Airways (SAA) as a cabin attendant. During the time he applied for the position, the SAA had a policy which says they must not employ

²²Section 9 of the constitution of the Republic of South Africa,1996.

²³HIV/AIDS and The Law a Resource Manual third edition (2003) 10.

²⁴Immune system is the defence against infections and diseases. The body no longer fights off infections and other diseases.

²⁵The Constitution of the Republic of South Africa,1996

²⁶ 2000(1) SA

people living with HIV/AIDS. Unfortunately Mr Hoffman tested positive when the employer conducted the pre-employment HIV/AIDS tests. Meaning he could not be employed because of his health status.

He was dismissed for being HIV positive and SAA argued that he could not be able to perform his duties properly as the flight crew had to be fit for world wide duties. They will be required to fly to yellow fever endemic countries and they must be vaccinated against yellow fever when they fly to those countries. Hoffman was discriminated against by SAA on the basis of his health status. The CC held that the SAA policy to exclude people living with HIV/AIDS unfair and unconstitutional.

Can HIV/AIDS be transmitted by a casual contact between employees at work? It is clear from the Constitution and EEA that discrimination based on health status and or any other arbitrary ground has no place in the workplace with reference to the case of *Whitehead v Woolworths*²⁷, in this case Ms Whitehead was appointed to the position which was created because of the proposed merger between one of the company's division and external company. Woolworths management decided that the incumbent had to remain in the post for at least a year. After she was offered the position, she disclosed she was pregnant. Woolworths withdrew the offer of permanent and offered her a fixed term contract that would terminate at the time of her confinement.

1.3 Literature review.

Basically a dismissal is easy to identify and it takes place when a contract of employment is terminated at the instance of the employer²⁸. Always when one talks about discrimination the concept of equality is not left out. Equality dictates that all

²⁷(1999)8 BLLR 862(LC)

²⁸Grogan J, Workplace law, (insert the year) 144.

people should be treated similarly. The formal idea of equality is that people who are similarly situated in relevant ways should be treated similarly²⁹.

Equality should at all times be promoted also in the workplace, according to Currie I and de Waal the third objective of the Act³⁰ say that chapter five of the Act sets out a list of positive duties placed on the state to develop substantive equality and address unfair discrimination. When we talk about equality, discrimination will also come to the picture. People living with HIV/AIDS are equal before the law and if the act or conduct of an employer does not violate an employee's constitutional rights therefore it will be a fair discrimination based on the fact. A law or conduct will violate section 9 of the Constitution if the discrimination does not have legitimate purpose and if there is no rational connection between the differentiations³¹.

Some authors are behind the thing that HIV/AIDS in the workplace should be included in section 9 of the Constitution as a disability³². According to American case in *Bragdon v Abbott*³³, the court decided that HIV/Aids is a protected disability and people living with HIV/AIDS have a right to anti –discrimination protection under the Americans with Disabilities Act 1990.

According to Grogan J, the most obvious overlap between termination based on discrimination and also based on poor work performance arising from disability³⁴. If the discrimination is based on disability or HIV/AIDS status the employer will have to satisfy the court that the discrimination is allowed by the law or is inherent job requirement and that it does not violate any right in the Bill of Rights.

²⁹Currie I and de Waal J, the Bill of Rights handbook (2005) 230.

³⁰Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

³¹Currie I and de Waal J, the Bill of Rights handbook (2005) 239.

³²Currie I and de Waal J , the Bill of rights handbook (2005) 240.

³³1998 United States Supreme Court.

³⁴Grogan J, Workplace law (2005) 149.

The legislature for the past years more particularly from 1994 up to this pointing time has created policies which are aimed at creating equitable employment environment. In other words one might say it is the balancing of grounds. With the main purpose of not discriminating against anyone directly or indirectly on one or more grounds listed in the Constitution³⁵. It is because of these developments in law that we have identified the aim of EEA as to eliminate discrimination in the workplace. In general employment equity measures aims to eliminate unfair discrimination in the workplace and affirms several advantages to previously disadvantaged groups including people living with disability and HIV/AIDS.

HIV/AIDS testing is prohibited in the workplace on employees or job applicant. In addition HIV/AIDS is allowed only if the LC had ordered it with reference to the case of *Joy Mining Machinery a division of Harnischfeger (SA) (Pty) Ltd v NUMSA & others*³⁶. It was also held that the employer need not apply to the LC to conduct HIV test if the employee had consented to the testing and it is voluntary.

According to John Grogan, victims of automatic unfair dismissal will invariably be reinstated, unless they prefer compensation, in which case they may receive compensation of twice the amount of dismissal that are simply procedurally or substantively unfair³⁷. Therefore employers can not terminate employment contract on the basis of employee's health status.

According to Modise Lavery and Mahomed Nadeem, South African law protects those with HIV positive people and people living with Aids in the workplace.

³⁵The Constitution of the Republic of South Africa, 1996

³⁶2002 23 ILJ 391 (LC).

³⁷Grogan J, op cit at page 18.

Employers are required to provide a supportive work environment where such employees are safeguarded against discrimination and can work for as long as they are medically fit to do so³⁸.

According to John Grogan, apart from their general constitutional right not to be discriminated against, employees are specifically protected against discrimination by section 187(1) f of LRA and section 6(1) of EEA³⁹.

1.4 Aims and objectives of the study

This study aims at analyzing the rights of employees more particularly those living with HIV/AIDS in the workplace. The study will also illustrate the need to eliminate unfair discrimination in the workplace permanently. It will also make some recommendations which must be considered for the development of workplace HIV/AIDS policy and programmes.

It is hoped that the study will contribute to a better understanding of the need to encourage employers and trade unions on how they should both respond to HIV/AIDS discrimination in the workplace. It will benefit law students for a better understanding on HIV/AIDS discrimination and disability issues. They will be equipped with a powerful tool for them to give a relevant advice to clients during pro bono services at PLT.

It is believed that the research will also benefit the communities especially where there are people living with HIV/AIDS, employees, employers and trade unions to

³⁸Sowetan 08 February 2011, Lavery Modise and Nadeem Mohamed.

³⁹Act 66 of 1995 and Act 55 of 1998 respectively.

have a clear understanding and knowledge of the law in order for them to deal with discrimination in the workplace. It will also contribute in making employees living with HIV/AIDS on how they can exercise their rights. This study will also benefit law students who want to pursue a career in the field of labour law and the Constitution. It is my opinion that the study will be helpful to the Human Resource Managers and Human Resources Officers for them to consider the labour law and the Constitution when they want to employ an employee.

This study will highlight on the employer's legal duty to promote anti-discriminatory laws in the workplace. It also supports the elimination of unfair discrimination in the workplace to ensure that South Africa is a democratic state. I believe that in a democratic state everyone is equal before the law⁴⁰. It must be borne in mind that South African democracy was founded on values mentioned in section 1 of the Constitution⁴¹.

It is very much clear that EEA⁴² is the first piece of legislation which directly instructing employers not to discriminate against employees on the basis of their HIV/AIDS status in the workplace. Employers are also bound by the Constitution and subject to its provisions in the Bill of Rights⁴³. I am very much concerned with the propensity of employers and employees who are not infected by HIV/AIDS particularly when they discriminate people living with HIV/AIDS or who are suspected of been infected by this pandemic disease.

⁴⁰Section 9 of the Constitution of the Republic of South Africa,1996.

⁴¹Section 1 of the Constitution of the Republic of South Africa,1996 states that Republic of South Africa is one, sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of ns equality and the advancement of human rights and freedoms. (b) Non-racialism and sexism. (c) Supremacy of the constitution and rule of law. (d) Universal adult suffrage, a national common voters roll, regular elections and multi-party system of democratic government, to ensure accountability, responsiveness and openness.

⁴²Act 55 of 1998

⁴³Bill of Rights is in chapter 2 of the Constitution of the Republic of South Africa,1996

It is believed that many employers in South Africa do not have HIV/AIDS policies and programmes in place to educate employees to deal with other employees living with HIV/AIDS in the workplace. For this reason I saw it necessary to do a study based on issues affecting people living with HIV/AIDS or those suspected of been infected by the disease in the workplace. It is a fact that employees living with HIV/AIDS are in most cases discriminated on the basis of their status. With reference to the case of *Allpass v Mooikloof Estate (Pty) Ltd t/a Mooikloof Equestrian Centre*⁴⁴, in this case the applicant was employed by the respondent on a temporary basis and he was asked during interview about his health status which he did not disclose. He was hired and the following day in the papers given to him by the employer he disclosed that he was suffering from inter alia asthma and HIV/AIDS. He was dismissed. The employer justified the dismissal on the fact of dishonesty. The court found that the dismissal was unfair and ordered compensation for 12 months because he was a temporary employee.

The research will also show that there is a need for new workplace laws which compel employers to reasonably accommodate people living with HIV/AIDS and to assist them to continue working. It will be illustrated in the study the need to integrate the rights of people living with HIV/AIDS in the workplace. It is common knowledge especially in this world we are living that HIV/AIDS is the most dangerous disease in the world and the victims of the disease are in most cases vulnerable.

1.6. Research methodology

Basically, the research methodology to be adopted in this study is qualitative. Consequently, a combination of legal comparative and legal historic methods, based

⁴⁴ 2011(2) SA 638(LC)

on jurisprudential analysis, is used. Legal comparative method will be applied to find solutions, especially in the interpretation of access to health care services.

Concepts will be analyzed, arguments based on discourse analysis, will be developed. A literature and case law survey of the constitutional prescriptions and interpretation of statute will be made.

This study is library based and reliance is made of library materials like textbooks, reports, legislations, regulations, case laws, articles, news papers and papers presented in conferences.

1.7. Scope and limitation of the study

The study consists of five chapters which are interrelated. Chapter one is the introductory chapter which lays down the foundation for other chapters. Chapter two focuses on equality in the workplace particularly for people living with HIV/AIDS. Chapter three deals with discrimination of people living with HIV/AIDS in the South African workplace. Chapter four focuses on unfair labour practices and the Constitution. The last chapter being chapter five comprise of the conclusions and the recommendations that are construed from the whole study

CHAPTER TWO: EQUALITY TO PEOPLE LIVING WITH HIV/AIDS IN THE WORKPLACE

2.1. Introduction.

South Africa is one sovereign, democratic state founded on the following values: human dignity, the achievement of equality and advancement of human rights and freedoms⁴⁵. Everyone is protected by the Constitution more particularly the Bill of Rights in chapter two of the Constitution⁴⁶. The Constitution is the Supreme law of the land, law or conduct inconsistent with it must be declared invalid and the obligation imposed by it must be fulfilled⁴⁷. The Bill of Rights is the foundation of democracy in South Africa and it has guaranteed all people in the Republic the protection and must also be respected by the parliament, different spheres of government, the courts and private organizations and including individuals.

The term equality is viewed as a simple ideal on the one hand and on other it is not, because it is a difficult and deeply a controversial social ideal⁴⁸. Everyone has a constitutional right to be treated equally. Equality in the workplace means to be treated in the same manner that is to treat employees who are employed by the same employer in the same workforce similar. Equality should be practice and be seen been done in the workplace. One might ask himself or herself, whether an employee in the managerial position be treated like any other employee who is not in the managerial position? If the answer to the question referred above is no, it take us to a discrimination context. Inequality will always be present in the society. The follow up question will be, is that particular discrimination fair or unfair? All the

⁴⁵ Section 1 of the Constitution of the Republic of South Africa, 1996

⁴⁶ The Constitution of the Republic of South Africa, 1996

⁴⁷ Section 2 of the Constitution of the Republic of South Africa, 1996

⁴⁸ Currie I and de Waal J, *op cit* at page 234.

fairness and unfair discrimination will be discussed later and how it affects the workplace. *Section 9* of the Constitution⁴⁹ guarantees equality to all people in the country irrespective of their HIV/AIDS status. People living with HIV/AIDS are equal to everyone in the country.

Equality is a pervasive value under the Constitution. It has been described as a core value underpinning post-apartheid South Africa⁵⁰.

2.2. Understanding employment law

Employment law or what is commonly known as labour law has two categories. It is further understood as legal rules which govern the relationship between employee and employer and also employers together with trade unions⁵¹. The first category is individual labour law which focuses on employee and employer relationship, it relates to employee as individual⁵². The second category is collective labour law which regulates the relationship between employer, employer's organization, trade unions and trade federations⁵³.

For an employment relationship to exist, firstly there must be employment contract between employer and an employee. And this kind of relationship after the conclusion of a contract of employment will be employer and employee relationship. For these relationship to be created the parties must enter into an employment contract. It is the one referred as individual labour law because it only concern employee individually and the employer. Under the South African law illegal contract

⁴⁹ The Constitution of the Republic of South Africa, 1996

⁵⁰ Ngwena C, Equality and Disability in the workplace: South African Approach. Seminar presentation in the school of law University of Leeds, England, 29th November 2004.

⁵¹ Basson A C, Christianson M A,, Garsbers C, le Roux A Ak, Mischke C and Strydom EML, Essential Labour law(2002),

⁵² Bassonet, ibid at 206

⁵³ Basson et, ibid at 420

are not enforceable and are not protected by the law. An agreement must comply with the requirement of a valid contract. It includes employment environment. Employment agreement must be a legal agreement which create employment relationship and also be recognized as an employment contract under South African law.

Now that we have seen how employment relationship is created. Another important thing is to know the parties to employment contract, which are the employee and the employer. Only employees are protected by the LRA⁵⁴. We can not talk about unfair labour practices if there is no employment relationship between the parties. LRA does not apply to members of South African Defence Force⁵⁵, Intelligence Agency and South African Secret Services and also unpaid volunteers working for an organization serving a charitable purpose and a person employed on vessels at sea, MSA applies⁵⁶.

2.3. Equality in the workplace.

The right to equality is extensively accommodated in the provisions of the Bill of Rights, in *section 9* of the Constitution⁵⁷ which stipulates that '*everyone is equal before the law and has the right to equal protection and benefit of the law*'. It simply means that all people have the right to equality and not to be unfairly discriminated. The right is also extended to people living with HIV/Aids. It also protects people living with HIV/Aids in the society and or in the workplace. The law does not permit

⁵⁴Act 66 of 1995.

⁵⁵ The members of the South African Defence Force are not allowed to strike and to participate in any other activity which will prevent them from executing their daily duties with reference to the case of *SANDF Union v Minister of Defence & Another 1999(6)BCLR 615 (CC)*.

⁵⁶ Act 57 of 1951

⁵⁷Section 9 of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law. Equality includes the full and equal enjoyment of all right and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons or categories of persons, disadvantaged by unfair discrimination may be taken.

discrimination on the basis of any ground listed in the Constitution⁵⁸. When I look on the concept of equality, it is found that it is not an easy concept to understand without understanding what the Constitution⁵⁹ achieved in our country. The departure of any Constitutional analysis is at all material time the Constitution itself. We must know and precisely understand what rights the Constitutional provision confers on people and the boundaries of protection by the right. *Section 9* of the Constitution⁶⁰ can give rise to different claims under different Acts as it was witnessed in *George and Others v Minister of Environmental Affairs and Tourism*⁶¹.

Equality is not only a fundamental right found in the Bill of Rights but also seen as a core value of our Constitution⁶², the CC stated that there can be no doubt that the guarantee of equality lies at the heart of the Constitution. It permeates and defines the very ethos upon which Constitution is premised⁶³.

Discrimination on any of the listed grounds is accordingly presumed to amount to unfair discrimination and therefore is prohibited. Even if HIV/AIDS is not listed in the Constitution but the fact remains it is unfair discrimination and therefore is prohibited. More details on discrimination will follow in the next chapter. Equality in the workplace is very important in the sense that all employees will enjoy the benefit and protection of the law.

⁵⁸ Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic, any law or conduct inconsistent with it must be declared invalid and the obligation imposed by it must be fulfilled and observed.

⁵⁹ Constitution of the Republic of South Africa, 1996, the 1993 Constitution referred to as the interim Constitution also played a vital role in protecting

⁶⁰ Section 9 of the Constitution.

⁶¹ 2005 (6) SA 297 (Equality Court), Erasmus J pointed out that same set of facts invariably give rise to a claim under both the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 and the Constitution and any other legislation.

⁶² *Fraser v Children 's Court Pretoria North* 1997(2) SA 261 (CC)

⁶³ Currie I and de Waal J, *op cit* at page 5.

In *Harksen v Lane NO*⁶⁴, the CC stated that the right to equality is violated when someone is treated differently in a manner which is unfair discrimination. Whether it is in employment or not, people must be equally treated. Employees must not discriminate against employees living with HIV due to their health status. The right to dignity of human being must at all times be respected⁶⁵. Human dignity is a central value of the objective, normative value system⁶⁶. Equality goes with other rights in the Bill of Rights that is to say they are interrelated. People in employment force or environment whether living with HIV or not, the Constitution requires that they be treated with human dignity.

In *Hoffman v SAA*⁶⁷, in these case what happened is that Mr Hoffman applied for a position in the SAA as a cabin attendant. He went through four stage selection processes being pre-screening interview, psychometric test, a formal interview and final screening process involving role play. Out of sixteen people, he was a suitable candidate. At that time he applied for the position, the employer (SAA) had a policy that says they must not employ HIV people. Mr Hoffman was subjected to pre employment HIV testing. It transpired that the applicant (Mr Hoffman) was HIV positive. He was dismissed for being HIV positive and the employer argued that Mr Hoffman could not be able to perform his duties properly because he was HIV positive. SAA denied the charge and justified the practice on safety, medical and operational requirement. The flight crew had to be fit for world wide duty. In the course of their duties they will be required to fly to yellow fever endemic countries. To fly to these countries they must be vaccinated against yellow fever in accordance with guidelines issued by National Department of Health. People living with HIV or

⁶⁴ 1998(1)SA 300(CC)

⁶⁵ Section 10 of the Constitution of the Republic of South Africa, 1996

⁶⁶ Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

⁶⁷ 2001(1)SA1(CC)

who is HIV positive may react negatively to this vaccine and may therefore not take it. If they do take it, however they run a risk not only of contracting yellow fever but also of transmitting it to others. The court found that the employer had violated the applicant's Constitutional right to equality and the right to human dignity. It was further decided that the discrimination was unfair and ordered the employer to compensate the applicant.

Hoffman's case is one of the landmark cases that highlighted the independence of courts⁶⁸. The court also found that there was no well founded medical support for the employer's policy that all persons who are HIV positive are unable to be vaccinated for yellow fever. It was held that exclusion of HIV positive individual from employment solely on the basis of HIV positivity can not be justified. Section 8 of the Constitution provides that the Bill of Rights applies to all laws and binds the legislature, the executive, the judiciary and all organ of state. So SAA is controlled by Transnet which is an organ of state in terms of Section 239 of the Constitution⁶⁹.

In *Allpass v Mooikloof Estate (Pty) Ltd t/a Mooikloof Equestrian Centre (LC)*⁷⁰, this is a recently decided case in which it was held that the employer had violated the employee's right to equality in that he was discriminated against on the basis of his HIV status. The employee was dismissed immediately after the employer became aware of the HIV status of the employee. It showed us how people living with HIV in the workplace are subjected to vast vulnerability of discrimination. That is one of the reasons why people living with HIV do not want to come forward and disclose their health status. This case really reveal the most difficult situation people living with HIV

⁶⁸ Section 165(2) of the Constitution of the Republic of South Africa, 1996 provides that the Courts are independent and subject to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice

⁶⁹ The Constitution of the Republic of South Africa, 1996

⁷⁰ 2011(2)SA 638(LC)

meet in their daily life more particularly if their status is known to the employer or other co employees.

2.4. Affirmative action.

Affirmative action is a measure designed to promote employment equity that is fair in favour of designated groups⁷¹.

It is very much frustrating to note that the law is highly against discrimination but on the other hand very interesting that the law allow discrimination which can be justified. This means that there are some forms of discrimination which are unfair on the one hand and on the other hand some forms of discrimination are fair. *Section 6(1)* of EEA⁷², the Act provides that no person may unfairly discriminate against any employee in employment policy or practice on the basis of an employee's HIV status. While at the same time *section 6(2)* of EEA provides for affirmative action measures that are in line with the purpose of the Act and that will not be unfair. In *Dudley v City of Cape Town and Another*⁷³, in this case Ms Dudley a coloured woman applied for a position of Director in the City Health. But a white male was appointed meaning her application was unsuccessful. She contended that this constituted unfair discrimination and challenged it in the Labour Court. The LC dismissed her claim because the City raised some exceptions to her claim.

She went on appeal and the Labour Appeal Court considered the extent to which a person from a designated group might demand preferential treatment by virtue of affirmative action as provided by the EEA⁷⁴. The LAC dismissed her claim by *inter alia*, that when it comes to the obligation to prepare an employment equity plan and

⁷¹ Designated groups are blacks, women and disabled persons

⁷² Act 55 of 1998

⁷³ (2008) 12 BLLR 1155 (LAC)

⁷⁴ Act 55 of 1998

implementation thereof the EEA prescribes a process of monitoring and enforcement through the DOL by means of a written undertaking. An individual is accordingly not allowed to approach the Labour Court on the basis that the employer has failed to implement affirmative action measures prior this monitoring and enforcement process has been exhausted.

Affirmative action must not be unlawful, with reference to the case of *Gordon v Department of Health, Kwa-Zulu Natal*⁷⁵, in this case Gordon applied for a position of Deputy Director Administration at Grey Hospital in Pietermaritzburg together with one Mr Mkhongwa. After the interviews, the selection panel decided that Gordon was already administering three hospitals and that in its own shows strong leadership, planning and control competencies.

But the recommendations of the panel were not accepted by the Provincial Public Services Commission and directed that Mkhongwa be appointed. In the circumstances the SCA held that the Labour Court was incorrect to conclude that it was not a prerequisite for the Department to have a plan or programme first before appointing Mkhongwa and held that Gordon's non appointment amounted to unfair discrimination on the basis of race. It appeared that the employer did not apply affirmative action measures properly because Mr Gordon's rights were violated and that is the reason why the SCA ruled against the decision of the labour Court.

What happens when two or more people from the same designated group compete with each other for a position or it might be promotion. In *IMATU v Greater Louis Trichardt Transitional Local Council*⁷⁶, the Council failed to apply for affirmative action correctly and the court said that service can not be delayed for the purpose of

⁷⁵ (2008) 11 BLLR 1023 (SCA)

⁷⁶ (2000)21 ILJ 1119(LC)

affirmative action and if no person from designated groups qualifies, others must be appointed for the purpose of service delivery. Now the question is can employee claim that an employer failed to apply affirmative action if he was not shortlisted for any of the posts. With reference to the case of *Harmse v City of Cape Town*⁷⁷.

When applying affirmative action in the workplace, employer must make sure that it (affirmative action) achieves equitable representation of designated groups. The next step will be to understand the term equitable representation before we proceed further. It simply refers to a fair balance of employees both in gender and racial groups. Giving people living with disability tools in the employer's workplace and assisting them to perform their work. By so doing the employer will be balancing the employment environment.

2.5. Employment equity plan

Employment Equity plan is that part of the law which assist in implementing a fair discrimination that is affirmative action in the workplace properly in as far as the employer is concerned. The employer must before applying affirmative action in its workforce, put in place Employment Equity plan to comply with the law. As explained that affirmative action is a fair discrimination and it must as well comply with the law.

If an employer apply affirmative action without employment equity plan such action will tantamount to unfair discrimination or a discrimination which the employer can not justify. The first step the employer must take when implementing affirmative action is to put employment equity plan in place. It must be prepared by the

⁷⁷(2003) 6 BLLR 557 (LC). Sections 15 indicate the role for affirmative action that goes beyond the passivity of its status as a defence. The Act obliges an employer to take measures to eliminate unfair discrimination in the workplace.

employer intending to apply the said affirmative action in accordance with Section 20 of EEA⁷⁸.

The employment equity plan must also on the other hand show how it will achieve reasonable progress on employment equity of the concerned employer's workplace. There is an obligation on employers to prepare an employment equity plan and implement affirmative action measures as prescribed by the EEA. It goes further to say where an employer fails to comply with a compliance order, the Director – General of the DOL may institute proceedings in the Labour Court to compel the employer to comply with the order.

2.6. Disability in the workplace

Disability is also mentioned in section 9 of the Constitution as one of the grounds which one must not be discriminated against. Disability is considered as a long term or recurring having a physical or mental impairment which substantially limit the person abilities⁷⁹. It is known that HIV is a serious public health problem and it affects all corners of life. But even if it is a dangerous disease it is not a disability in most instances. In *Hoffman v SAA*⁸⁰, it was held that the employer had violated Mr Hoffman's rights and it also held that HIV can not prevent him from performing his duties. People living with disability have the right not to be discriminated against in any manner by the employer or other employees. Even if disability limit the person's abilities to do certain things but that does not mean employers should discriminate them on the basis of their disability or their HIV status. People with disability can still

⁷⁸ Employment Equity Act 55 of 1998

⁷⁹ Definition of disability according to the Act, 66 of 1995

⁸⁰ Above

perform their work if the employer has reasonably accommodated them in the workplace. With reference to the case of *Whitehead v Woolworths*⁸¹.

Employees living with disability face a range of discrimination in the workplace. In *Mashava v Cuzen & Woods Attorneys*⁸², Ms Mashava was employed by a firm of attorneys and she was employed on probation with a view to entering articles of clerkship with the employer (Cuzen & Woods Attorneys). When she informed the employer that she was pregnant, she was dismissed. After her dismissal she claimed unfair dismissal on the basis of her pregnancy and the employer denied that pregnancy was the reason for dismissal. It was held that the employer acted unfairly and she was awarded compensation in the circumstances.

⁸¹ See chapter 3 below for more details of these case.

⁸² (2000) 21 ILJ 402 (LC)

CHAPTER THREE: DISCRIMINATION BASED ON HIV/AIDS IN THE SOUTH AFRICAN WORKPLACE.

3.1. Introduction

Generally speaking, South African workplace is still faced with various challenges like shortage of skilled employees, low wages and discrimination and a lot of unrest or strikes. The focus in this chapter will be on discrimination in the workplace more particular on HIV status. Discrimination is not defined in the Constitution or the EEA, but it is understood as classification or differentiation⁸³. Treating people or employees at the same or similar level in employment environment differently by including others on the one hand excluding some on the other hand is a clear discrimination in the workplace. The subsequent step will be to determine whether the discrimination is fair or unfair.

Section 9 of the Constitution prohibits unfair discrimination on one or more grounds⁸⁴. Even though the alleged discrimination is based on a ground which is not listed but it is seen as arbitrary the court will protect the right and grant a fair order. But the section 6(1) of EEA prohibits unfair discrimination based on HIV status in the workplace⁸⁵. The type and forms of discrimination and how it harms the workplace will be outlined in details below in the chapter.

⁸³Basson A C, Christianson M A,, Garsbers C, le Roux A A k, Mischke C and Strydom EML - Essential Labour law(2002) ,203

⁸⁴Constitution of the Republic of South Africa, 1996. Section 9(3) provides the grounds which are considered to be unfair including race, gender, sex, pregnancy, marital status, ethnic or social origin, age, disability, religion, belief, birth, colour and sexual orientation.

⁸⁵ Act 55 of 1998

3.2. Types of discrimination

There are two types of discrimination, which is fair discrimination and unfair discrimination. Both fair and unfair discrimination can take two forms being direct discrimination or indirect discrimination. Not all discrimination are unfair or prohibited by the law. It will be shown below.

3.2.1. Fair discrimination

A fair discrimination is simply understood as a differentiation which can be justified under normal circumstances and also allowed by the law. The discrimination must not violate an employee's constitutional rights or any other right in terms of Common law or and other laws.

It is clear that the law does not prohibit classification or discrimination under any normal circumstance but proceed to prohibit only unfair discrimination. For any discrimination to an employee, there must be sufficient reasons to justify the discrimination. A fair discrimination is allowed by law and will not harm an employee in any way or infringe the employee's constitutional rights such as the right to dignity⁸⁶. The right to dignity is protected by the Constitution and need not be violated under any circumstance with reference to the case of *National Coalition for Gay and Lesbian Equality v Minister of Justice*⁸⁷.

Affirmative action is a fair discrimination designed to empower previously disadvantaged groups in our society and workplace⁸⁸. Another fair discrimination is called fair compulsory discrimination by law. It arises where the law does not allow

⁸⁶ Section 10 of the Constitution of the Republic of South Africa, 1996

⁸⁷ 1999(1) SA 6 (CC), it was held that the Common law criminalisation of sodomy was a violation of the right to dignity.

⁸⁸ Above in chapter 1.

employers to employ persons under the age of 15. Really it is straight forward and need not be interpreted in a wrong way to make it unfair to children. Employees are protected against unfair discrimination in the workplace even if discrimination is allowed by the law. Bear in mind that only discrimination which is justified and is consistent with the law should be applied. One can not justify unfair discrimination which is clear that it can not be justified by the law on the basis of affirmative action or any other fair discrimination which is allowed by the law or can be justified.

3.3. Justification of discrimination

According to the common law doctrine of *audi alteram partem* rule, the court or any person authorised to take a decision or Tribunal must afford all parties an opportunity to present their case before it can make a decision. The employer must also be afforded an opportunity to justify any of the alleged unfair discrimination in the workplace because not all discrimination is unfair. Bear in mind that the employer must not violate employee's right in any way under normal circumstances relying on unreasonable justification.

Employer must show that the discrimination is in line with the Constitution and does not infringe any of employee living with HIV/AIDS's right. The employee only alleges that there was a discrimination which took place in the workplace and the burden of prove shift to the employer to argue that the discrimination is consistent with the law and that such discrimination is also permitted by the law.

It must be clear to everyone that not all attribute or discrimination does qualify for protection by the Constitution, EEA and the LRA in the workplace. The Constitution does not prohibit discrimination but a discrimination which is unfair and which violate the rights of employees including those living with HIV/AIDS. To succeed in claiming

discrimination which is unfair, the applicant or an employee must show that the conduct complained of prejudice him or her as a class of vulnerable person e.g. people living with HIV/AIDS.

3.4. Unfair discrimination

The law in general prohibit unfair discrimination. In most instances it is a discrimination based on the grounds listed in both section 9 of the Constitution and section 6 of EEA respectively⁸⁹. There are grounds which are not listed in section 9 of the Constitution but the Courts have held that the discrimination based on HIV positive status even if it is not listed to be unfair discrimination, with reference to the case of *Allpass v Mooikloof Estate (Pty) Ltd t/a Mooikloof Equestrain Centre*⁹⁰, in these case the applicant was employed by the respondent Mooikloof Estate as a stable yard manager and horse riding instructor on a temporary basis. And for a period of three months after which the post was to be inter alia reviewed. During health, was in same sex civil union and that he was homosexual. Two weeks or so after commencing his daily duties, he was requested to complete personal particulars form, in which he indicated that he had three illness amongst other asthma, deep vein thrombosis and HIV positive. After the employer became aware that the applicant was HIV positive a high ranking official of the respondent one Malan held a five minutes meeting with the applicant, where he was informed that his employment with the respondent was terminated with immediate effect. When an employee or job applicant claims discrimination on non listed ground for instance qualification, she or he must show the court that the discrimination or differentiation

⁸⁹The Constitution of the Republic of South Africa, 1996 and Act 55 of 1998

⁹⁰ 2011(2)SA 638(LC)

impairs or contain a potential impairment on the employee or job applicant's fundamental dignity as a human being⁹¹.

3.5. Inherent job requirement

Inherent job requirement covers the following, an essential characteristic, quality or capacity that is required in order to perform the duties of a job. When dealing with alleged discrimination an employer could argue that the discrimination is consistent with the law and thus justified by the inherent job requirement with reference to the case of *Whitehead v Woolworths*⁹², the employer justified the discrimination on the basis of inherent job requirement but the court took a decision that the discrimination can not be justified under the law. An employer in a reasonable person's position would foresee that the inherent job requirement will infringe an employee living with HIV/AIDS's rights. In *Hoffman v SAA*⁹³, it was not proven that HIV will prevent Mr Hoffman from performing his duties and therefore the employer's argument that it is an inherent job requirement for cabin attendant not to have HIV was held to be unfair.

3.6. Prohibition of unfair discrimination

Firstly discrimination which is unfair is prohibited by *section 9* of the Constitution. It must always be borne in mind that one can claim protection in terms of the said section even in employment law. It does not prevent employees from claiming protection under the provisions in the Bill of Rights and also under the LRA, EEA and

⁹¹Stojce v University of Kwa Zulu Natal and another (2007) 3 BLLR 246 (LC), the applicant unsuccessfully applied for a position as a lecturer in the engineering faculty of the first respondent. He then brought a claim in terms of the EEA and alleged that the respondent unfairly discriminated against him on the basis of race, language and his qualification and research experience. The applicant's claim was dismissed with cost because he failed to prove that the alleged discrimination.

⁹² (1999) 8 BLLR 862(LC)

⁹³ Above

BCEA⁹⁴. Secondly it is wrong to discriminate directly or indirectly against anyone living with HIV/AIDS.

Not only South African law prohibit unfair discrimination but other countries do as well prohibit unfair discrimination in the workplace. In Namibia, the Namibian Defence Force had a policy which excludes recruits solely on the basis of HIV status. The policy unequivocally discriminated against recruits on the basis of their HIV/AIDS status and it violated human rights. The Namibian labour court in *N v Minister of defence*⁹⁵ held that the policy is not in line with the law and therefore was struck down.

In *Whitehead v Woolworths (PTY)Ltd*⁹⁶, in this case the applicant claimed compensation on the grounds that she was dismissed and that such conduct by the employer constituted an automatic unfair dismissal in terms of the Act, or alternatively on the ground of an unfair labour practice. They alleged that she was offered a permanent position as Human Resource Generalists by the respondent which offer she accepted and subsequent to the conclusion of the agreement, she was dismissed after the respondent repudiated the employment contract. The applicant also alleges that she was unfairly discriminated against on the basis of her pregnancy and as such she was a victim of unfair labour practise.

The reason for withdrawing the offer as communicated to her by inskip was because of her pregnancy. The applicant's claim of automatic dismissal failed because she did not qualify to be an employee in terms of the definition according to the Act⁹⁷. It

⁹⁴ Constitution of the Republic of South Africa, 1996, Act 66 of 1995, Act 55 of 1998 and Act 75 of 1997 respectively

⁹⁵ (2000) 21 ILJ 999(LCN)

⁹⁶ (1999) 8 BLLR 862(LC) at 869 B - D

⁹⁷ Section 213 of LRA provides that: Employee is any person excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive any remuneration and any other

was not disputed that the applicant was an applicant for employment and thus employee for the purpose of item 2(1) a, the item provide that for discrimination to constitute an unfair Labour practised it must be unfair and based on an arbitrary ground. The court found that the Respondent have acted unfairly and had committed unfair labour practice. Therefore ordered the respondent to pay a compensation of R200 000 to the applicant.

Under normal circumstances, employers would argue that the discrimination is fair but facts will show that the discrimination was unfair and therefore prohibited by the law. It is now obligatory for employers not to discriminate employees on the basis of HIV/AIDS status. The law prohibits discrimination on any arbitrary grounds. Section 54(1) (a) of EEA protects people living with HIV/AIDS in the workplace, with reference to the case of *Hoffman v SAA*⁹⁸. The court had in most instances held that the employer had discriminated an employee and prohibits such conduct with reference to the case of *Baxter v National commissioner Correctional Services and another*⁹⁹, the court held that the applicant was unfairly discriminated against. The courts enforce the law and must at all material times uphold the Constitution. The reason why separation of powers is important in the country is to avoid abuse of powers.

Employers must impose serious sanctions to employees who discriminate other employees on the basis of their health status or HIV/AIDS status. Because employers must promote non discriminatory working environment at all times.

person who in any manner assist in carrying on or conducting the business of an employer and employed and employment have meanings corresponding to that of employee.

⁹⁸ above

⁹⁹(2006) 9 BLLR 844.

3.7. Reasonable accommodation

There is no a statutory definition of a reasonable accommodation but it is understood as measure which must be adopted in the employment in order to assist employees living with HIV/Aids to continue working. The understanding is that not only employees living with HIV/Aids are the only ones to be reasonably accommodation to fit the workplace but employees who are physically challenged or living with disability.

Reasonable accommodation will encourage employees living with HIV to disclose their HIV status. To enable the employer to create an employment environment which accommodate such employees. The purpose of a reasonable accommodation is to assist employees living with HIV/AIDS or those with disability to continue working and also to eliminate unfair discrimination on the basis of arbitrary grounds. In *Mashavu v Cuzen& Woods Attorneys*¹⁰⁰, the employer failed to reasonably accommodate an employee who was pregnant, the court find that the employer unfairly discriminated against her on the basis of her pregnancy.

3.8. Safe working conditions

In terms of section 8 imposes a duty on every employer to provide and maintain a working environment that is safe and without risk to the health of employee. Employers must ensure that employees are at all material time protected against anything at the workplace to their health. That is why the employer must provide employees with working uniform and tools to carry out the work. If the employer fails to provide safe working condition, those may have serious consequences. The

¹⁰⁰ Above

employer may be vicariously held liable for that as in *Ntsabo v Real security CC*¹⁰¹, in this in case the employer was held vicariously liable for sexual harassment perpetrated by a supervisor. The employer had failed to the tall any measures to address the on-going sexual harassment. The employer must at all times protect employees at work by creating a safe working condition.

Employers must not provide only uniform or tools to enable employees to perform their duties but however provide safe working conditions for all employees irrespective of health status. The Code of good practise on HIV in the workplace encourage employers to create a supportive environment for employees living with HIV/AIDS so that they continue working under favourable conditions or normal conditions for as long as they are medically fit. In other instances employers fail to support employees living with HIV and in such a case people living with HIV face lots of prejudice. A good example is the case of *Hoffman v SAA*, where Mr Hoffman was discriminated against on the basis of his health status and he was not appointed as a cabin attendant. The employer had argued that he was not fit for the job on the one hand while on the other hand failed to prove that HIV will prevent him from performing his duties.

Safe working conditions must be encouraged in all spheres of employment so that employees living with HIV feel free at work and to help them take part in all employment programmes. Not only employers must create safe working conditions but also employees have a duty to create a safe working environment to accommodate fellow employees who are living with HIV/AIDS. If an employee refuses to work with an employee known or suspected of living with HIV/AIDS, the

¹⁰¹(2004) 1 BLLR 58(LC).

employer should take disciplinary actions against that particular employee. No employee is legally authorised to discriminate against another employee.

3.9. Compensation after unfair discrimination

Where there is a right, there is a corresponding duty to respect that particular right. Where there is a violation of rights there are remedies available. In terms of Section 194 of LRA compensation must be awarded to an employee who was dismissed unfairly but may not be more than the equivalent of 12 months remuneration calculated at the employee's rate of remuneration on the date of dismissal¹⁰². With reference to the case of *Mutale v Lorcom Twenty Two CC*¹⁰³, in this case the applicant Ms Mutale alleged that the respondent unfairly discriminated against her on the basis of race in that the respondent paid her a lesser remuneration than her white colleagues and that she was subjected to an automatically unfair dismissal when she complained about these discrepancies.

She was employed as a bookkeeper, she also possesses a degree and she earned R4000 per month. Ms Schuurman who had not attained matriculation or any other degree was the respondent sales manager. She earned about R 10 000 per month and she was also given a company car. At some point she was required to conduct interviews for the respondent where she was told by the manager to give black candidates between R1000 and R2000 but to accept anything a white candidate ask for. This left Mutale deeply hurt and request for a meeting to enquire whether Ms Schuurman was earning more than she is earning. It was found that the respondent discriminated against the applicant. In the circumstances the court ordered the respondent to pay Mutale an amount equal to 12 months remuneration in terms of

¹⁰² Labour Relations Act 66 of 1995

¹⁰³ (2009)3 BLLR 217(LC)

Section 194 of LRA as well as an additional amount of R 24 000 in terms of Section 195 of LRA¹⁰⁴.

In *Janse Van Rensburg v Super Group Trading (Pty) Ltd*¹⁰⁵, in this case the respondent was faced with difficult financial and business circumstances, which included a significant fall in revenue and increased competition. The respondent accordingly conducted a review of its operations and embarked on retrenchment. The retrenchment was held to be unfair by the court because the decision to retrench the applicant was made even before consultation process had started. In the circumstances the court held that the applicant's retrenchment was substantively and procedurally unfair and the respondent was ordered to pay compensation equal to 12 months remuneration.

Like in other cases where a relief is sought, I have read many cases of unfair discrimination where the employer has been ordered to compensate the employee as it was done in *Hoffman v SAA*, the employer to compensate the applicant. In *Whitehead v Woolworths*, the court also ordered that the employer compensate the employee in the amount of R200 000 and to pay the costs of the application. In *NM and others v Smith and others*¹⁰⁶, the third defendant was ordered to pay damages in the amount of R15 000 for both three plaintiffs.

¹⁰⁴ Act 66 of 1995

¹⁰⁵ (2009)3 BLLR 201 (LC)

¹⁰⁶ (2005) 3 ALL SA 457(W)

CHAPTER FOUR: UNFAIR LABOUR PRACTICES

4.1. Introduction

Section 23 of the Constitution provides that everyone has the right to a fair labour practice¹⁰⁷. In other words, unfair labour practises are prohibited by the law. What can be referred to as unfair labour practise? Unfair labour practise is defined in section 186(2) of the LRA¹⁰⁸. In this chapter we will look at what constitute unfair labour practice, HIV testing in the workplace, right to privacy and the right to dignity of people living with HIV/AIDS in the workplace. Not all labour matters are unfair.

4.2. Unfair labour practices

There are certain conducts of employers which appear as fair conduct on the one hand while on the other hand can be considered as unfair labour practice. Section 23 of the Constitution provides that everyone has the right to a fair labour practice¹⁰⁹. It means unfair labour practices are firstly prohibited by the Constitution before we can take into account other or relevant laws pertaining to employment or workplace. Because the departure of every constitutional analysis is the constitution itself.

Unfair labour practices are regulated by the LRA under section 186(2) which provides that any unfair act or omission that arises between an employer and employee involving unfair conduct by the employer relating to promotion, demotion, probation or training of the employee or relating to the provision of benefits to an

¹⁰⁷ The Constitution of the Republic of South Africa, 1996

¹⁰⁸ Act 66 of 1995

¹⁰⁹ Constitution of the Republic of South Africa,1996

employee¹¹⁰. It was held that the list of unfair labour practices as contained in section 186(2) of LRA is exhaustive but after a careful interpretation, it was found that the list of unfair labour practices is limited to accommodate only those listed.

In *SANDU v Minister of Defence & others, Minister of Defence & others v SANDU & others*¹¹¹, the SCA observed that the matter is not as simple as one would thought it is¹¹². In order to allege successfully that the employer's conduct constitute an unfair labour practice for the purpose of section 23 of the Constitution. The applicant concerned must prove that the relevant authorities or statutory provisions such as section 186(2) of LRA is unconstitutional in that they fail adequately to give effect to the constitutional right to a fair labour practices.

Unfair conduct on the part of the employer in relation to promotion constitutes unfair labour practice. It has been said above that unfair labour practices can be committed by the employer. With reference to the case of *Department of Justice v CCMA and others*¹¹³, in this case the Chief State law Adviser retired and the position was advertised. The third respondent one Bruwer then applied for the position. The selection committee interviewed four shortlisted candidates, inter alia Bruwer but the committee was not satisfied or comfortable in recommending any of them to the position. The matter was referred to the CCMA for adjudication and it was found that the Department has acted unfairly in not appointing because to Bruwer was going to be a promotion. Not only failure to promote an employee will constitute unfair labour practice according to the section 186(2) of LRA. The transfer or appointment of employees can also constitute unfair labour practice. More particularly where the

¹¹⁰ Act 66 of 1995

¹¹¹ 1999(4) SA469(CC), in this case the issue was whether soldiers enlisted in the Defence Force were workers for the purpose of section 23 of the Constitution and entitled to rights in the said section 23.

¹¹² Currie I and de Waal J, The Bill of Rights handbook(2005)

¹¹³ (2004) 4 BLLR 297 (LAC)

transfer is unlawful. With reference to the case of *Simelela & others v MEC for Education Province of Eastern Cape and another*¹¹⁴, the nine applicants were educators employed at Ebenezer Majombozi High school in the district of East London. On or about 28 January 2000 the educators were prevented from performing their duties and given instructions to report to the district office on the 31 January. Upon their arrival at the district office, they were supplied with a copy of report by the task team alleging inter alia, that teachers at EMHS absented themselves without reasons, pocketed school funds and many more. During month of February were given letters informing them that they had been seconded to another school. The court held that the purported transfer of the applicant from EMHS to various schools was unlawful.

Section 54(1) clearly protects people living with HIV against discrimination which is unfair in the workplace¹¹⁵.

4.3. HIV/AIDS testing in the workplace

The law in South Africa protects everyone including people living with HIV/AIDS and the Bill of Rights is the cornerstone of democracy¹¹⁶. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom¹¹⁷. People living with HIV/AIDS are also included, they must at all time enjoy the protection and benefit of the law.

Section 6 of EEA list HIV status as one of the grounds on which an employee may not be discriminated against directly or indirectly. No employer is allowed to discriminate an employee on the basis of HIV/AIDS status. The employer should

¹¹⁴ (2001) 22 ILJ 1688(LC)

¹¹⁵ Employment Equity Act 55 of 1998

¹¹⁶Section 8 of the Constitution of the Republic of South Africa,1996

¹¹⁷Section 8 of the Constitution of the Republic of South Africa,1996

know the employee's before we can talk about discrimination on the basis of such status. In a nutshell, the employer must first conduct HIV testing. Now is the question will be is the HIV testing allowed in the workplace. It doesn't matter whether it is done voluntarily or not.

Section 7(2) of EEA prohibits HIV testing on employees by their employers in the workplace or job applicant. It goes further to allow the HIV tests to be conducted only if it is justifiable and ordered by the Labour court¹¹⁸. With reference to the case of *Joy Mining Machinery A division of Harnischfeger (SA) (Pty) v NUMSA and others*¹¹⁹, in this case the employer approached the LC for an order allowing it to conduct voluntary HIV/AIDS tests on its employees. Such application was not opposed by the employees or Trade Union. The application was dismissed.

Unfair discrimination is prohibited by both the Constitution and Employment Equity Act in the South African workplace. No one must unfairly discriminate against the other¹²⁰. As I have already alluded above that the law does not prohibit discrimination but only prohibit unfair discrimination. Unfair discrimination has no place in the workplace and that is one of the reasons EEA¹²¹ was promulgated to give effect to the provision of the Constitution in section 23¹²².

The following amongst others will help the court to determine whether the testing of employees for their HIV/AIDS status by their employer is justifiable or not.

¹¹⁸ *Irvin & Johnson Ltd v Trawler & Line Fishing union & others*, in this case the employer approached the labour court for an order permitting it to conduct voluntary and anonymous HIV testing of its employees. The employer argued that voluntary and confidential testing did not fall within the scope of prohibition contained in section 7(2) of EEA.

¹¹⁹ (2002)4 BLLR 372(LC)

¹²⁰ Section 9 of the Constitution of the Republic,1996

¹²¹ Act 55 of 1998

¹²² The Constitution of the Republic of South Africa,1996

4.3.1. The need for HIV/AIDS testing

The employer must show to the court the reason why there is a need for the testing and how will it assist the employer if it is aware of employee's health status. To me it does not make sense to test employees HIV status by the employer. Because overall it would not heal HIV if the employee is infected.

4.3.2. The purpose of the test and medical facts

To prevent victimization against employees in the workplace, the employer must show a sound reason why the court must permit such test. The purpose must not be intended at employing people who are not affect by HIV because that in itself will amount to unfair discrimination on the basis of HIV status or health. In the case of Hoffman the court held that it was not medically proved that HIV can prevent an employee from performing his or her duties. The test will serve no purpose if people living with HIV will continue to face prejudice and stigma or victimization because of their HIV or health status. The test will be helpful only if the employer will not discriminate after knowing the health status.

4.3.3 A fair distribution of employee benefits.

Employees have the right to employment benefits and the employer must provide such. Employment benefits include leaves (sick leave, annual leave, maternity leave and paternity leave) in terms of section 20¹²³. With reference to the case of *Jardine v Tongaat-Hulett Sugar Ltd*¹²⁴. Section 20(4) of BCEA imposes a duty on the employer rather than imposing on employees to exercise their right of taking a leave within six months period.

¹²³ Basic Condition of Employment Act 75 of 1997

¹²⁴ (2003) 7 BLLR 717(LC), the Labour court held that the employee is entitled to be paid for all accumulated leave on termination of employment

One will ask when and where unfair labour practice can take place. Unfair labour practice can only be committed by the employer towards an employee. It must also be noted that it take place in the employment environment. For instance an HIV positive employee is not promoted due to his or her HIV status.

4.4. The right to privacy of employees living with HIV/AIDS.

The right to privacy is contained in Section 14 of the Constitution¹²⁵. Everyone has the right to privacy including people living with HIV/AIDS. Employers must at all times respect this right of privacy in the workplace. Employees living with HIV in the workplace have the right not to disclose their health status or HIV status. If an employer discloses HIV status of an employee without his or her consent, the employee may claim that the employer has violated his or her constitutional right of privacy. In *NM v Smith and others*¹²⁶, this case involved three plaintiffs who claimed damages in the amount of R200 000 each after their HIV status was disclosed and published, from the first defendant(a journalist) who wrote a biography, the second defendant (politician) who disclosed their names and HIV status and third defendant (publisher of biography). The claim was for an alleged breach of their constitutional right to privacy. The court awarded damages to the plaintiffs in the amount of R 15 000 each against the third defendant.

No person must infringe other person's right to privacy in the workplace. This right was also recognised under the Common law¹²⁷.

¹²⁵Constitution of the Republic of South Africa,1996

¹²⁶ (2005) 3 ALL SA 457(W)

¹²⁷ The common law recognises the right to privacy as an independent personality right. page 316 of The Bill of Rights Handbook by Iain Currie and Johan de Waal.

4.5. The right to dignity in the workplace and people living with HIV/AIDS.

Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. Employers must respect this right together with their organisations must respect it. Employment relationship between employees and their employer must not at any circumstances violate this right. It is upon the employer to ensure that employees do not violate each other's right during work hours.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS.

In conclusion, it was found that HIV/AIDS does not prevent an employee from performing his or her duties. It is also found that HIV/AIDS can not be transmitted through casual contact between employees. Employees living with HIV/AIDS can work with those not infected. It was not medically proved that a person living with HIV/AIDS can not perform his duties because of health status. In *Hoffman v SAA*¹²⁸ the CC held that the employer had discriminated Hoffman unfairly on the basis of his HIV/AIDS status. It must always be noted that HIV/ AIDS is a disease which can not prevent an employee from doing what is required of him/her.

Section 9 of the Constitution¹²⁹ prohibit unfair discrimination on any arbitrary grounds. It is true that the South African law protects people living with HIV/AIDS as it was seen in *Hoffman v SAA*, *NM v Smith* and a recently decided case of *Allpass v Mooikloof Estate (Pty) Ltd t/a Mooikloof Equestrian Centre*¹³⁰. Section 9 of the Constitution clearly states that everyone is equal before the law and has the right to equal protection and benefit of the law. So as people living with HIV and those with disability have the right to equal protection and benefit of the law.

The study also found that people living with HIV/AIDS have the right to dignity which must be respected at all material time, with reference to the case of *NM v Smith and others*¹³¹.

Employers are not allowed or are prohibited from unfairly discriminating against employees in the employment policy or practice because of their HIV status. The law also protect job applicants, that they must not be discriminated on any arbitrary

¹²⁸above

¹²⁹The Constitution of the Republic of South Africa, 1996

¹³⁰2011(2)SA 638(LC)

¹³¹(2005) 3 All SA 457 (W)

grounds. Discrimination must comply with the law in order to be fair one. It must not infringe the rights as contemplated in the Constitution Bill of Rights. Based on the above, it is recommended that the legislature draft a new legislation on affirmative action and also insert sanctions on employers who fail to accommodate employees living with HIV/AIDS or disability. The study also recommends that disability should go together with HIV/AIDS in the workplace. Employers must have programmes in place to educate employees about HIV/AIDS in the workplace.

The rights of employees must be protected and must also be exercised without disturbance. Employers, Trade Unions as well as the Government must put in place employees programmes on HIV/Aids. Employer must at all times promote equal opportunities in the workplace. Employers must also encourage employees to perform to their best abilities by giving best performers certificate and bonuses in the workplace. Employers, Trade Unions together with government must bring regulations on the issue of employees' assistances programmes. It also recommends participation in the employment policy by people living with HIV/AIDS and those living with Disability must be encouraged by the employer. They must not be excluded when addressing issues which will affect them in the employment policies. The legislature should enact a law which deals with testing, confidentiality and disclosure on HIV/AIDS in the workplace. There must be a law which compels employers and TU to assist and support those living with HIV/AIDS in the workplace and to remain productive for as long as possible.

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