



Lesotho's implementation of the ILO standards
on prevention of discrimination against
employees living with HIV/AIDS in the workplace:
Lessons from South Africa

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DEDICATION

This mini-dissertation is dedicated to my late father Ntate Lehloa Jacob Ts'olo. May your soul continue to rest in peace.

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I would like to extend my appreciation and thanks to:

God for giving me direction and confidence to finish this work.

My wife Mme Malehloka Ts'olo for the support she has shown to me throughout this journey, and my son who has been an inspiration to me to complete this work.

My mother, my sisters and their families for keeping me in their prayers, ke ea leboha Bataung.

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ABSTRACT

It is a set principle of international customary law that states are obliged to put in place laws and policies that are intended to prohibit all forms of unfair discrimination and those which promote equality to all its citizens. Both Lesotho and South Africa have acceded to several international instruments that are intended to prevent and prohibit unfair discrimination against people living with HIV/AIDS in the workplace.

The law prohibits all forms of discrimination against people living with HIV/AIDS based on their health status, as it violates their constitutionally enshrined rights such as the right to dignity and equality. In realisation of these rights, the law prohibits, amongst others, mandatory testing, mostly in situations where it is used as a condition for employment. The law also prohibits an employer from forcing workers to disclose their HIV/AIDS status and furthermore to subject employees to any form of dismissal that is based on their HIV/AIDS status.

The majority of people living with HIV/AIDS have been recognised to be those who are within the working age and this fact has been identified to have a direct impact on the workforce, hence the need to address all forms of unfair treatment which workers living with HIV/AIDS are subject to. It has also been recognised that failure to protect the rights of people living with HIV/AIDS in the workplace leads to stigmatisation and discrimination, which has shown to have a great impact on productivity. This fact has therefore necessitated the need to address the ramifications which came as a result of the stigma and unfair discrimination in the world of work.

Keywords: HIV/AIDS, employees, unfair discrimination, discrimination, dismissal, human dignity, inherent requirements of the job, pandemic, unfair practice, workplace, limitation of rights.

OPSOMMING

Dit is 'n vaste beginsel van internasionale gewoontereg dat state verplig is om wette en beleide in te stel wat bedoel is om alle vorme van onbillike diskriminasie te verbied en dié wat gelykheid aan al sy burgers bevorder. Beide Lesotho en Suid-Afrika het tot verskeie internasionale instrumente toegetree wat bedoel is om onbillike diskriminasie teen mense wat met MIV/VIGS in die werkplek leef, te voorkom en te verbied.

Die wet verbied alle vorme van diskriminasie teen mense wat met MIV/VIGS leef op grond van hul gesondheidstatus, aangesien dit hul grondwetlik verskanste regte soos die reg op waardigheid en gelykheid skend. In die verwesenliking van hierdie regte verbied die wet, onder andere, verpligte toetsing, meestal in situasies waar dit as 'n voorwaarde vir indiensneming gebruik word. Die wet verbied ook 'n werkgever om werkers te dwing om hul MIV/VIGS-status bekend te maak en verder om werknemers te onderwerp aan enige vorm van ontslag wat op hul MIV/VIGS-status gebaseer is.

Die meerderheid mense wat met MIV/VIGS leef, word erken as diegene wat binne die werkende ouderdom is en hierdie feit is geïdentifiseer om 'n direkte impak op die arbeidsmag te hê, vandaar die behoefte om alle vorme van onbillike behandeling aan te spreek waarmee werkers wat met MIV/VIGS saamleef, onderhewig is aan. Dit word ook erken dat versuim om die regte van mense wat met MIV/VIGS in die werkplek te beskerm, lei tot stigmatisering en diskriminasie, wat 'n groot impak op produktiwiteit het. Hierdie feit het dus die behoefte genoodsaak om die gevolge aan te spreek wat voortgespruit het uit die stigma en onbillike diskriminasie in die arbeidsmark.

Sleutelwoorde: MIV/VIGS, Werknemers, Onbillike diskriminasie, Diskriminasie, Ontslag, Menswaardigheid, Inherente vereistes van die werk, pandemie, Onbillike praktyk, Werksplek, Beperking van regte.

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LIST OF ABBREVIATIONS

EU	European Union (Abbreviation)
AIDS	Acquired Immune Deficiency Syndrome
AJM	American Journal of Medicine
AJHTL	African Journal of Hospitality Tourism and Leisure
AHRLJ	African Human Rights Law Journal
ARV	Antiretroviral
BCEA	Basic Conditions of Employment Act of 1997
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CEACR	Committee of Experts on the Application of Conventions and Recommendation
CILSA	Comparative and International Law of Southern Africa
EEA	Employment Equity Act of EEA of 1998
EEAA	Employment Equity Amendment Act 47 of 2013
HIV	Human Immunodeficiency Virus HIV
HSRC	Human Science Research Council
ICCPR	International Convention on Civil and Political Rights of 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILJ	Industrial Law Journals

ILO	International Labour Organisation
JAL	Journal of African Law
JSAL	Journal of South African Law
LAC	Appeal Court
LC	Labour Court
LDf	Lesotho Defence Force
LLJ	Lesotho Law Journal
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 12 of 2002
MHSA	Mine Health and Safety Act
NEHAWU	National Education, Health and Allied Workers Union
NUMSA	National Union of Metal workers of South Africa
OHSA	Occupational Health and Safety Act 85 of 1993
PELJ	Potchefstroom Electronic Law Journal
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 Of 2000
SAA	South African Airways
SADC	Southern African Development Community
SAJHRM	South African Journal of Human Resources Management
SALC	Southern African Litigation Centre
Sri Lank J Int'l L	Sri Lanka Journal of International Law

UDHR	Universal Declaration of Human Rights
UIA	Unemployment Insurance Act
UN	United Nations
WHA	World Health Assembly
WHO	World Health Organisation

Chapter 1

1 Introduction and Background

1.1 Introduction

Equality and non-discrimination are indispensable in labour law to ensure a fair workplace as well as equal rights and opportunities for all employees. According to statistics published by the foundation for AIDS research, it has been recorded that more than sixty million people have contracted Human Immunodeficiency Virus and Acquired Immune Deficiency Syndrome (HIV/AIDS) globally, which has resulted in the death of more than thirty million people.¹ The HIV/AIDS epidemic has had a significant impact on society and the workplace.

Consequently, several workplace issues have emerged as a result of the HIV/AIDS epidemic. These include significant absenteeism of employees, loss of production and the cost which employers incur to replace workers who have lost employment due to HIV/AIDS. This study demonstrates that protection of people living with HIV/AIDS in the workplace is a core human right and that failure to do so leads to stigmatisation and discrimination. The study further demonstrates that HIV/AIDS has a great impact on productivity in the workplace which leads to other factors that affect the economy. Therefore, this has been seen to be a great threat to the survival of businesses and the industries to effectively operate in the competitive global markets.²

The reality now is that people living with HIV/AIDS are not only discriminated against in society but also within the workplace.³ For purposes of this study, it was firstly important to determine the extent to which employers and co-workers should accommodate employees within the workplace who are living with HIV/AIDS. Secondly, the question of whether the current laws and policies afford sufficient

¹ Statistics: Worldwide the regional Picture available at: <http://www.amfar.org> (Accessed on 8 March 2022).

² ILO 2018 the impact of HIV and AIDS on the world of work: Global estimates 13.

³ Preamble of the HIV and AIDS Recommendation, 2010 (R200).

protection to people living with HIV/AIDS in the workplace and whether such laws and policies conform with international standards had to be asked. With these questions as background, this study conducted a comparative analysis on the Lesotho and South African HIV/AIDS legal framework within the workplace to ascertain whether they have sufficient resources to afford protection to people living with HIV/AIDS. Additionally, the study determined whether the standards adopted by both countries are in line with international standards. It also shows that South Africa has taken its international obligation very serious and, as a result, it has improved its legal and policy framework to be on par with international standards.

In an endeavour to address the impact of HIV/AIDS on employees in the workplace, the International Labour Organisation (ILO) has put in place binding standards for the elimination of discrimination, particularly based on HIV in the workplace. The preface of the ILO Code of Practice on HIV/AIDS and the World of Work clearly states that these instruments are a reaction to the evidence that employees who are diagnosed with HIV/AIDS often face discrimination and stigmatisation.⁴ Lesotho became a member of the ILO in 1966 soon after gaining independence from the British protectorate,⁵ while South Africa became a member in 1994 after it was isolated for 30 years from being a member of the ILO due to its apartheid policy, which allowed the white minority population to dominate politically, socially and economically.⁶

The ILO has set binding standards for the elimination of discrimination, particularly based on HIV/AIDS within the workplace. The standards against discrimination in the workplace are contained in the Convention on Discrimination in respect of Employment and Occupation⁷ while the ILO Code of Practice on HIV/AIDS in the World of Work (ILO Code of Practice) contains specific standards for the treatment of workers with HIV/AIDS. The Code of Practice should therefore be read in line

⁴ ILO Code of Practice on HIV/AIDS and the World of work 2001.

⁵ Maqutu and Sanders 1987 CILSA 378.

⁶ Christionson *et al*/Law @ work (2018) 23.

⁷ Convention on Discrimination in respect of Employment and Occupation (C 111).

with the mentioned convention to properly address the issues concerning discrimination and stigmatisation based on HIV/AIDS in the workplace.

Lesotho ratified the Convention on Discrimination in respect of Employment and Occupation in 1998⁸ and, as a result, it is obliged to adhere to its provisions. Apart from the general prohibition on discrimination based on HIV/AIDS, the ILO Code of Practice particularly states that HIV testing should not be required at the time of recruitment or as a condition of continued employment and an employee's HIV status must remain confidential.⁹ In 2010, the General Conference of the ILO noted that there was still a need to address the promotion and implementation of all other international instruments relevant to HIV/AIDS in the world of work.¹⁰

The HIV/AIDS Recommendation, 2010¹¹ was adopted to guide member states on the best practices and ways to address the gaps and limitations which were not covered by all the other instruments. The recommendation is also geared towards achieving social peace and equality in the workplace through the promotion of a decent working environment for employees where their freedom, equity, security and human dignity are respected.¹²

The most important, and the only piece of a legislative framework which contains provisions that afford protection to employees living with HIV/AIDS in Lesotho, is the Labour Code,¹³ but it has been seen to be lacking in many areas. However, Lesotho has not adopted measures that sufficiently implement the ILO Code. This is despite an informed observation that has been made over decades of experience, that the most effective ways to prevent transmission of HIV/AIDS and the impact

⁸ Convention on Discrimination in respect of Employment and Occupation (C 111).

⁹ Article 8.1 of ILO Code of Practice on HIV/AIDS in the World of Work 2010.

¹⁰ Clause 30 of the R 200 HIV/AIDS Recommendation, 2010 (No 200) states that "The working environment should be a safe and healthy, in order to prevent transmission of HIV in the workplace, taking into account the Occupational Safety and Health Convention, 1981, and Recommendation, 1981, the Promotional Framework for Occupational Safety and Health Convention, 2006, and Recommendation, 2006, and other relevant international instruments, such as joint International Labour Office and WHO guidance documents".

¹¹ HIV and AIDS Recommendation, 2010 (R200).

¹² Article 3(a) and preamble of the HIV and AIDS Recommendation, 2010 (R200).

¹³ Labour Code Order no 24 of 1992.

which it has, are through enactments of laws that are aimed at protecting human rights. There are clear gaps which are identified under chapter three of this study and an area of research interest as far as Lesotho is concerned with its legal framework specifically tailored to protect employees living with HIV/AIDS in the world of work against discriminatory acts and stigmatisation.

South Africa on the other hand has adopted legal and policy measures, which are directly aimed at accommodating and ensuring fair treatment of employees living with HIV/AIDS in all aspects of the workplace. Legislative measures which South Africa has taken include the enactment of the Labour Relations Act 66 of 1995¹⁴ which prohibits dismissals based on HIV/AIDS, the Employment Equity Act 55 of 1998,¹⁵ which promotes various aspects of equality and dignity and prohibiting discrimination based on HIV/AIDS in the workplace, the Occupational Health and Safety Act,¹⁶ the Basic Conditions of Employment Act¹⁷ and the Code of Practice on Key Aspects of HIV/AIDS and Employment.¹⁸

These laws are put in place to protect employees living with HIV/AIDS and are made in line with and to give effect to the provisions of South Africa's Constitution. These policies and laws are primarily aimed at achieving equality, the right to dignity and the promotion of fair treatment of all people. Both Lesotho and South Africa have attempted to develop their employment laws in line with their international obligations. Unlike Lesotho, South Africa has been able to adequately implement its employment laws to afford protection and accommodation to employees with HIV/AIDS in the workplace.

It is crucial to protect HIV/AIDS workers because the stigma and discrimination manifest itself through different forms and settings within society and the workplace. These factors can be attributed to a number of social, economic, institutional and other factors. The court in the case of *Hoffmann v South African*

¹⁴ Labour Relations Act NO 66 of 1995.

¹⁵ Employment Equity Act 55 of 1998.

¹⁶ Occupational health and safety Act NO 85 of 1993.

¹⁷ Basis Conditions of Employment Act NO 77 of 1998.

¹⁸ Code of Practice on Key Aspects of HIV/AIDS and Employment 2000.

*Airways*¹⁹ identified these factors to include lack or inadequate understanding of HIV/AIDS, misconceptions of the way HIV is transmitted and the fact that AIDS is incurable.²⁰ Lesotho and South Africa also fall amongst other African countries which have been affected by HIV/AIDS.²¹

Studies have revealed that, out of ten people who are HIV positive, nine are within a productive working age group of 15 - 49 years.²² Due to the high prevalence of HIV/AIDS amongst people of the working age, there has been a loss of experience in the labour force, which translates into declining productivity, which in turn leads to reduced profits on the part of employers and reduced earnings on the part of the affected workers. As a result, many people living with HIV/AIDS have been left without jobs, as employers are reluctant to employ them. Furthermore, those in employment are subjected to different treatments which ultimately infringe upon their human rights, including the right not to be unfairly discriminated against.

In a report that was published by the UNAIDS in 2019, it was reflected that they had recorded high numbers of positive individuals between 2005 and 2011, which resulted in significant death rates.²³ The report also showed that there had been a substantial decrease of about 50% in the death rate post-2011 due to the introduction and proper access of antiretroviral treatments (ARV).²⁴

1.2 Problem Statement

Employees living with HIV/AIDS are subjected to unfair discrimination in the communities that they live in as well as in the workplace. They are often denied

¹⁹ *Hoffmann v South African Airways 2000 (1) SA 1(CC).*

²⁰ *Hoffmann v South African Airways 2000(1) SA 1 (CC) para 35.*

²¹ Zungu-Dirwayi "An audit of HIV/AIDS policies in Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe" Human Sciences Research Council 2004 21.

²² Zungu-Dirwayi "An audit of HIV/AIDS policies in Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe" Human Sciences Research Council 2004 1.

²³ <https://aids2020.unaids.org/report/>. (Accessed 7 March 2022).

²⁴ <https://aids2020.unaids.org/report/>. (Accessed 7 March 2022).

benefits which are generally enjoyed by all other employees such as promotions and training despite the qualifications they may possess.²⁵

Amongst other things, people with HIV/AIDS are continuously stigmatised and subjected to many forms of discrimination, which may include mandatory testing at the time of recruitment or as a condition of continued employment, different treatment by health insurance schemes and mandatory disclosure of HIV/AIDS status as well as breach of confidentiality and name reporting.²⁶ It should therefore be demonstrated that, while there are general laws against discrimination, Lesotho has failed to put in place HIV/AIDS specific laws that prohibit employees from being subjected to these forms of discriminatory acts.²⁷ South Africa on the other hand, has put in place the EEA which is primarily aimed at achieving equality in the workplace.²⁸ The EEA promotes, amongst other things, fair treatment of employees and elimination of all forms of discriminatory acts in the workplace.²⁹ Due to fear of being discriminated against, most employees are more likely not to live freely, or to accept their status.³⁰ Therefore, this study critically analysed the laws and policies of Lesotho and South Africa and determined the extent to which they respond to the protection of the rights of people living with HIV/AIDS in the workplace. This critical analysis was done against the backdrop of their international obligations and to determine whether there are lessons that Lesotho can draw from South Africa to

²⁵ Farahani et al "Effects of AIDS-related disability on workforce participation and earned income in Botswana" 2013 15. See also Elliot R "Protection against Discrimination based on HIV/AIDS status in Canada" 2004 ILJ 49.

²⁶ ILO 2018 "The impact of HIV and AIDS on the world of work: Global estimates" 24. See also Chinwe R "Social Consequences of HIV/AIDS: Stigma and Discrimination in the workplace in Nigeria" paper presented at the XXV international population Conference in Tours, France 18 – 23 2005 21.

²⁷ This fact was also stated by the Human Rights Committee Report of the ICCPR in 2020. They stated that "There are currently no specific legislation that focuses on discrimination in the country.<http://docstore.ohchr.org/SelfServices/FilesHandler.ashx?enc=6QkG1d%2FPPRiCAqhKb7yhshIm43xrngtfZ4DjpX%2F0kGLCKq5obVIrgCMsXxGn8YTXtlwM%2FnIviXesVITD0wHsiPpi8ofPcjC5dx%2BWjZBOFX3INGL2Mlr1Q9IJQDxNFSrc>. (Accessed 16 June 2021).

²⁸ Preamble of the Employment Equity Act.

²⁹ S 5 of the Employment Equity Act.

³⁰ Chinwe R "Social Consequences of HIV/AIDS: Stigma and Discrimination in the workplace in Nigeria" paper presented at the XXV international population Conference in Tours, France 18 – 23 2005 21".

promulgate relevant legislation for the effective elimination of all forms of discrimination in the workplace.

The most important question which this study sought to answer was whether the current laws and policies in Lesotho afford adequate protection to people living with HIV/AIDS in the workplace and whether such laws and policies conform with international standards. The study also inquired if such provisions conform with ILO standards to afford employees living with HIV/AIDS protection against discrimination and occupational exposure. A view that is upheld is that as much as some provisions offer protection in the Labour Code,³¹ they can still be improved if best practices in other jurisdictions are taken into consideration.

1.3 Research Methodology

The study was based on a review and critical analysis of relevant literature consisting of textbooks, law journals, legislation, case law, international instruments and internet sources. This form of methodology aimed to compare the Lesotho legal framework to that of South Africa in line with international standards as members of the ILO. This was done to advocate for best practices that Lesotho employers may put in place to protect and accommodate people living with HIV/AIDS in the workplace under the Labour laws of Lesotho.

1.4 Aims and objectives of the study

The overall aim of this study was to investigate Lesotho's implementation of the ILO standards on the prevention of discrimination against employees living with HIV/AIDS. The specific objectives were therefore, first, to analyse ILO standards on protection of persons living with HIV/AIDS from discrimination in the workplace. Secondly to critically review Lesotho's laws and policies and determine the extent to which they protect the rights of people living with HIV/AIDS in the workplace. Thirdly to critically analyse South Africa's laws and policies on people living with HIV

³¹ Labour Code Order no 24 of 1992.

in the workplace and the progress which it has taken to incorporate ILO standards to improve the protection of people living with HIV in its national laws.

Fourthly this study was aimed at identifying areas where Lesotho can draw lessons from South Africa's experience on the approach it has taken to implement international standards in its national laws. Lastly, this study will propose interventions and reforms where the need may arise.

1.5 Chapter breakdown

This study is divided into five chapters. Chapter 1 is the introduction, providing a brief background of the study, the context as well as the problem statement. Chapter 2 provides an international overview of the protection of people living with HIV/AIDS in the workplace against discrimination and relevant instruments provided by the UN and the ILO. Chapter 3 focuses on Lesotho's legal framework for implementing UN and ILO instruments which are aimed at affording protection to employees living with HIV/AIDS against discrimination in the workplace. This chapter also demonstrates that there are employees who are still discriminated against based on their HIV/AIDS status in Lesotho. Chapter 4 provides South Africa's position in the implementation of the ILO instruments in affording protection to employees living with HIV/AIDS in the workplace. The chapter also looks into what South Africa has done to address issues that relate to HIV testing, stigma and discrimination at work which will be used as guidance and lessons to Lesotho on the progress that South Africa has made. Chapter 5 concludes the study, highlighting the findings and recommendations that Lesotho should adopt from South Africa.

Chapter 2

2 International standards on protection of persons living with HIV/AIDS in the workplace

2.1 Introduction

This chapter considers the international position on the protection of employees with HIV/AIDS in the workplace against discrimination and stigmatisation and also the extent to which their human rights are protected. With different international standards come various duties and obligations on state parties in affording protection to people living with HIV/AIDS. Therefore, it becomes apparent to highlight the status and roles of such standards and how they can properly be applied at the national level.

International law specifies the principles that need to be upheld, and implemented at the national level, to protect individuals' human rights. This study focussed largely on the United Nations and ILO treaties and their provisions which are relevant to people living with HIV/AIDS in the workplace. This chapter, therefore, provides a critical analysis of the legal framework that governs HIV/AIDS at the international level.

Article 1(1) of the United Nations (UN) Charter³² clearly states that the main objective of the organisation is the promotion of peace and security and it also highlights the importance of the protection of human rights.³³ Through its founding Charter, the UN has realised the need to afford protection to human rights without any distinction.³⁴ The UN has been proactive in developing international human

³² The United Nations Charter 1945.

³³ Article 1(1) of the UN Charter provides that "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace".

³⁴ Article 1(23) of the UN Charter.

rights instruments³⁵ which are central in promoting equality amongst all forms of people.

The International Labour Organisation (ILO)³⁶ is the UN specialised agency that seeks the promotion of social justice and internationally recognised human and labour rights.³⁷ Therefore, ILO has also developed standards that are aimed at giving effect to the universal human rights standards which have been set by UN treaties in the workplace. Since both Lesotho and South Africa are signatories and members of these international bodies, it, therefore, follows that they should comply with certain international standards which are enshrined in international instruments.

Ebere *et al* state that, in terms of international law, state parties to international instruments are required to incorporate the principles and standards set out in those instruments into their national laws.³⁸ Standards set at the UN are contained in treaties – which are binding to states that have ratified them – as well as in resolutions and declarations.³⁹ Although the last-mentioned instruments are not binding, they still guide the implementation and interpretation of binding national instruments.⁴⁰ The ILO is the UN's specialised agency that seeks the promotion of

³⁵ These instruments include amongst others, "The Universal Declaration of Human Rights, United Nations Commission on Human Rights, International Covenant on Civil and Political Rights, International Covenant on Economic, Social, and Cultural Rights", which have all been ratified by both Lesotho and South Africa.

³⁶ Valticas International Labour law 27. The International Labour Organisation (ILO) was established through the Treaty of Peace of Versailles which was signed on 28 June 1919 by signatories to the Peace Treaty of Versailles.

³⁷ Van Niekerk et al Law@work 20.

³⁸ Ebere Constitutional Law and Practice in the International Labour Organisation 152.

³⁹ Resolutions and declarations are binding under international law, but are regarded as international norms. In terms of s 231(2) of the Constitution of South Africa "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of provinces, unless it is an agreement referred to in subsection (3)." The constitution of the Kingdom of Lesotho does not however have such a provision.

⁴⁰ UNHCHR international law (2000). <http://www2.ohchr.org/english/law/>. "Resolutions are non-binding under international law; they are however reflective of the acceptance of an international norm. in a number of cases they request that governments comply with their obligation".(Accessed 20 February 2022).

social justice and internationally recognised human and labour rights.⁴¹ As a result, the ILO draws its standards from the general standards set at the UN level and makes them applicable in the world of work. One of the core functions and aims of the ILO itself is to afford protection to all employees against maltreatment and discrimination in the workplace, especially vulnerable groups such as people living with HIV/AIDS.⁴²

This chapter is structured into four sections. The first section here provides an introduction and illustrates the relationship between the UN, the ILO and both Lesotho and South Africa; the second section discusses the UN standards on the rights of people living with HIV/AIDS both in and outside the workplace; the third section focusses on standards set out in ILO instruments which are aimed at accommodating and protecting employees with HIV/AIDS at the workplace, after which a conclusion on the international position regarding employees with HIV/AIDS is reached in the fourth section.

By using the information provided in this chapter, the subsequent chapters evaluate whether Lesotho complies with its international obligations and whether there are any lessons which Lesotho may learn from South Africa if it is found that the Lesotho position is lacking.

2.2 UN standards on the protection of people living with HIV/AIDS

The UN was founded and established in 1945, following the Second World War under the UN Charter.⁴³ The UN Charter sets out the rights and obligations of member states and also establishes the UN's organs and procedures. The preamble of the UN Charter clearly states that the main objectives of the organisation are the

⁴¹ <http://www.ilo.org/public/english/about/index.htm> (Accessed 20 February 2022).

⁴² The ILO has developed amongst others, the ILO Code which was published with the aim of providing guidance to employers, workers, and workers organisations, as well as policy makers on how to formulate and to implement policies in the workplace that are intended to prevent all kinds of discriminations against people living with HIV/AIDS.

⁴³ <https://www.un.org/en/about-us/history-of-the-un>. (Accessed 20 February 2022).

promotion of peace and security and it also highlights the importance of the protection of human rights.⁴⁴ The recognition and protection of human rights and fundamental freedoms such as the right to equality, human dignity, privacy and integrity are further reinforced in several subsequent articles of the Charter.⁴⁵

For UN instruments to be fully effective, they should first be signed and ratified by a country and then domesticated into the laws of that particular country.⁴⁶ By doing so, the human rights standards that the UN seeks to promote can be universally maintained. In terms of the *Vienna Convention on the Law of Treaties* 1969, "ratification" has been defined as "an act whereby a state establishes on the international plane its consent to be bound by an international treaty".⁴⁷

International laws may either be non-self-executing or self-executing. Self-execution law means that the instruments can be directly enforced by national courts without domestication, while a non-self-executing law can only be used by the courts for interpretive guidance and they only have a persuasive value.⁴⁸ Recommendations, declarations, charters and guidelines are non-binding to member states and they do not need any form of ratification to come into effect. These instruments solely serve a guiding role to member states on how to put in place policies, legislation and/or practice at national level.⁴⁹ Lesotho is a dualist state; treaties form a separate legal system from national law and they cannot be applied directly into the national legal system. For international standards to be

⁴⁴ "...whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people, whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law"

⁴⁵ For example, see A 1, 13(1), 55, 52(2), 68, 76(c) of the UN Charter.

⁴⁶ Vazques four doctrines of self-executing treaties 695.

⁴⁷ A 2(b) of Vienna Convention on the Law of Treaties. See also *Government of Zimbabwe V Fick* 2013 (5) SA 325 (CC) para 34.

⁴⁸ Vazques four doctrines of self-executing treaties 695.

⁴⁹ Tully Business & Economics 93.

applicable and accessible in Lesotho, they should first be ratified and domesticated.⁵⁰

Thus, it is only after the provisions of the treaty have been enacted into national laws, that they can officially be regarded as law and binding in Lesotho. On the other hand, South Africa adopts a hybrid monist approach in that, although it requires treaties to be domesticated,⁵¹ it also recognises that treaties can be enforced without having been domesticated into national laws.⁵²

In terms of the Constitution of South Africa, international instruments which are administrative, technical and executive are automatically applicable and enforceable without being embodied into the municipal law and going through the national assembly and the council of provinces.⁵³ On the other hand, all other international agreements should first be domesticated for them to have effect and force of law.

Amongst 193 members of the UN, 185 thereof are also members of the ILO, with both Lesotho and South Africa included.⁵⁴ Importantly, Lesotho (and South Africa for that matter) is a signatory to many international human rights instruments adopted by the UN; thus, it has a positive obligation to abide by the provisions of any instruments emanating from the UN.⁵⁵ However, as noted above, the Lesotho Government does not consider the country bound by the instruments unless such an instrument has been ratified and adopted in its national laws.⁵⁶

⁵⁰ Pholo Lesotho Justice Sector and the Rule of law 24. Judge Semapo Peete during an address at Mofokeng Lecture memorial in Maseru 2009 stated that "treaties do not have the same status as laws enacted by the Lesotho Parliament. Ratified treaties have to be transformed into domestic laws first".

⁵¹ The Supreme Court in the case of South Africa in *Pan American World Airways Incorporated v SA Fire and Accident Insurance Company Ltd*, Chief Justice Steyn made the following remarks:... "in this country the conclusion of a treaty, convention or agreement by the South African government with any other government is an executive and not a legislative act, as a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law, except by legislation process".

⁵² Sloss *Treaty Enforcement in domestic courts, a comparative analysis* 7.

⁵³ S 231(3) of the Constitution of South Africa.

⁵⁴ <http://www.ijrcentre.org/universal...bodies.../international-labour-organisation>. (Accessed 24 February 2022).

⁵⁵ Even the non-binding documents may impose obligations as they are part of customary international law.

⁵⁶ Pholo Lesotho Justice Sector and the Rule of law 24.

In this chapter, the mentioned instruments under discussion below – which are in the form of treaties, declarations and resolutions – are divided into two categories: the first category being those which contain general human rights standards but have overarching relevance for the protection of people living with HIV in and outside the workplace and the second being those which deal specifically with HIV/AIDS in the workplace. It is significant at this point to indicate that maltreatment of people living with HIV/AIDS in the workplace undoubtedly infringes on a variety of human rights such as the right to equality, human dignity, privacy and integrity. The general human rights instruments will thus be similarly applicable in the venture to promote fair treatment of employees with HIV/AIDS, albeit less focussed on HIV/AIDS per se.

It therefore means that the general human rights standards applicable to people living with HIV/AIDS can be derived from legally binding standards which are set out in treaties, statutes, protocols and conventions which are binding to state parties following ratification and domestication processes or after they have acceded to them.⁵⁷ Non-binding instruments in the form of recommendations, declarations, charters and guidelines are also discussed in this chapter as they often provide a moral force on how states should conduct themselves in affording protection to the rights of citizens and as they are also used by the courts for interpretative purposes.⁵⁸

The relevant international human rights instruments aimed at the protection of people living with HIV/AIDS are discussed to establish the specific HIV/AIDS-related obligations placed on member states of the UN.

⁵⁷ Signature, ratification and accession can be defined as follows: "Signature of a treaty is an act by which a State provides a preliminary endorsement of the instrument. Signing does not create a binding legal obligation but does demonstrate the State's intent to examine the treaty domestically and to consider ratifying it. While signing does not commit a State to ratification, it does oblige the State to refrain from act that would defeat or undermine the treaty's objective and purpose. Ratification is an act by which a State first signs it and then fulfils its own national legislative requirement. Accession is an act by which a State signifies its agreement to be legally bound by the terms of a particular treaty. It has the same legal effect as ratification but is not preceded by an act of signature."

⁵⁸ UNHCHR international law (2000). <http://www2.ohchr.org/english/law>. (Accessed 24 February 2022).

2.3 UN treaties of general application

2.3.1 Universal Declaration of Human Rights

The Universal Declaration of Human Rights (UDHR)⁵⁹ was adopted in 1948 as a legally non-binding document. It is often used as "an authoritative listing of human rights and basic components of international customary law, binding all s, not only members of the United Nations".⁶⁰ The UDHR has firmly been identified as having achieved the status of customary international law⁶¹ and has also been identified as one of the sources of international law.⁶² This is also owed to the fact that the UDHR, unlike other international instruments, does not necessitate signing or ratification for a state to be bound by it.

The declaration recognises the universality of human rights which are inherent in every individual human being, as reflected in article 1. Article 1 of the declaration states that all human beings are free and should be afforded the same rights and dignity and that the spirit of brotherhood should reign amongst them.⁶³ The declaration affords protection to the human rights of all people without distinction. All people are worthy of concern and entitled to equal respect and dignity. Therefore, people who, for instance, contracted HIV/AIDS are entitled to all inalienable rights, freedoms and opportunities on equal footing with others.

Furthermore, the UDHR protects all human beings from any acts of discrimination which are based, amongst others, on race, religion, social origin, property, birth or

⁵⁹ Universal Declaration of Human Rights, adopted 10 December 1948.

⁶⁰ Buegenthal Shelton Steward International Human Rights in nutshell 42.

⁶¹ *United States of America v Iran 1980 ICJ reports* 1 in which the ICJ invoked the United Declaration and referred to the principles contained therein as fundamental principles legally binding on Iran with regard to deprivation of liberty and the imposition of physical constraints and conditions of hardship.

⁶² Article 38 of the Statute of the International Court of Justice (ICJ) lists custom as one of the sources of international law. Also see United Nations, Statute of the international Court of Justice 1946.

⁶³ Article 1 of the Universal Declaration of Human Rights: all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

other status and protects them against "any discrimination, which may impair equal protection of the law."⁶⁴ Although not expressly identified, the prohibition of discrimination based on HIV/AIDS should be understood as part of the article, as the list of grounds is not meant to be a *numerus clausus*; HIV/AIDS can be read into the phrase "or other status".

Additionally, in the context of employment, the Declaration provides that everyone has the right to work and the right to just and favourable conditions of employment⁶⁵ as well as the right to a standard of living adequate for health and wellbeing.⁶⁶ By using the word "everyone", these provisions are similarly wide enough to fully cater for all employees or applicants, regardless of personal characteristics or health status.

It consequently follows that the obligation which a state has towards the protection of human rights within its borders can be extended to cover matters relevant to HIV/AIDS status, despite the general application of the UDHR. As a result, employees suffering from HIV/AIDS can also claim the protection of their human rights in terms of this instrument and should not see their right to equality, dignity, favourable working conditions and equal opportunities infringed because of the said status.

2.3.2 International Covenant on Economic, Social and Cultural Rights

The International Covenant on Economic, Social and Cultural Rights (ICESCR)⁶⁷ came into force in 1976 and was ratified by Lesotho in 1992,⁶⁸ while South Africa only signed it in 1994.⁶⁹ The Constitution of Lesotho does not however guarantee economic, social and cultural rights as fundamental human rights, but only recognises them as principles of state policy that are subject to the availability of

⁶⁴ Article 2 and 7 of the Universal Declaration of Human Rights.

⁶⁵ Article 23(1) of the Universal Declaration of Human Rights.

⁶⁶ Article 23(3) of the Universal Declaration of Human Rights.

⁶⁷ UN International Convention on Economic, Social and Cultural Rights 1976.

⁶⁸ <http://www.claiminghumanrights.org/Lesotho.html>. (Accessed 14 February 2022).

⁶⁹ <http://www.claiminghumanrights.org/southafrica.html>. (Accessed 14 February 2022).

resources.⁷⁰ On the other hand, South Africa, despite not having ratified the ICESCR, guarantees economic, social and cultural rights and these rights are justified.⁷¹

The ICESCR was adopted after the Second World War in an attempt to promote social progress and also to afford all people protection of their human rights and employing the international machinery to that end.⁷² Similar to the UDHR, the ICESCR does not have provisions that directly afford protection to people living with HIV/AIDS but generally provides for rights that are often regarded as second-generation rights.⁷³ However, provisions of the ICESCR guides states parties on the implementation of economic, social and cultural rights for all people without distinction, therefore including those living with HIV/AIDS.

The rights contained in the ICESCR include the right to the enjoyment of the highest attainable standard of physical and mental health,⁷⁴ the equal right of men and women to the enjoyment of all economic, social and cultural rights⁷⁵ and the right to freedom from discrimination.⁷⁶

In terms of article 2(2) of the Covenant, states are mandated to guarantee that people can exercise the rights enunciated in the Covenant without any discrimination which may be based on their race, colour, sex, language, religion, birth or another status.⁷⁷ The UN Commission on Human Rights, at its 51st meeting

⁷⁰ S 25 of the Constitution Lesotho states that "The principles contained in this Chapter shall form part of the public policy of Lesotho. These principles shall not be enforceable by any court but, subject to the limits of the economic capacity and development of Lesotho, shall guide the authorities and agencies of Lesotho, and other public authorities, in the performance of their function with a view to achieving progressively, by legislation or otherwise, the full realization of these principles."

⁷¹ *Government of South Africa and others v Grootboom and others (CCT11/00) [2000] ZACC 19; 2011 SA 46.*

⁷² Liebenberg 2002 South Africa's evolving jurisprudence on socio-economic rights: an effective tool in challenging poverty 180.

⁷³ These rights are the right to equality, human dignity, privacy and integrity etc.

⁷⁴ Article 12 of the ICESCR.

⁷⁵ Article 3 of the ICESCR.

⁷⁶ Article 2(2) of the ICESCR.

⁷⁷ Article 2(2) of the ICESCR states that "The State parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as race, color, sex, language, religion, polecat or other opinion, national or social origin, property, birth or other status."

in 1995,⁷⁸ held that the term "or another status" in international human rights instruments should be interpreted to include health status which is also understood to include HIV/AIDS. Furthermore, article 12(1) of the Covenant also provides that state parties recognise that all people have a right to be afforded the highest attainable standard of both physical and mental health and as a result, state parties are mandated to take appropriate steps to achieve the full realisation of that right.⁷⁹

The ICESCR is a vital document in the protection of economic, social and cultural rights of all people, including those who are living with HIV/AIDS. Similar to the UDHR, the overarching nature of this instrument allows for a wide application in all spheres of life and a variety of contexts. Thus, an employee suffering from HIV/AIDS will be able to invoke the general rights enshrined in the ICESCR when such have been infringed due to their status.

2.3.3 The International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights (ICCPR)⁸⁰ first came into force in 1976 and was ratified by both Lesotho and South Africa in 1992 and 1998 respectively.⁸¹ The ICCPR, like the ICESCR, does not contain specific provisions regarding HIV/AIDS, but it is nevertheless applicable in a similar fashion. In general, the Covenant provides for traditional rights and freedoms, which include, amongst others, the right to life,⁸² the protection of human dignity,⁸³ protection from inhuman or degrading treatment,⁸⁴ the right to privacy and also protection from discrimination which is based on the ground of race, colour, sex, language, or other status, to all persons."⁸⁵

⁷⁸ 51st meeting of the UN Commission on Human Rights held on March 1995.

⁷⁹ Article 12(1)(2) of the ICESCR provides that (1) "The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. (2) the steps to be taken by the State parties to the present Covenant to achieve the full realization of this right shall include those necessary".

⁸⁰ UN the international Covenant on Civil and Political Rights 1969.

⁸¹ <http://indicators.ohchr.org/> (Accessed 16 February 2022).

⁸² Article 6 of the ICCPR.

⁸³ Article 10 of the ICCPR.

⁸⁴ Article 7 of the ICCPR.

⁸⁵ Article 26 of the ICCPR.

Article 17 of the ICCPR further affords protection to everyone from arbitrary or unlawful interference with their privacy, family, or home.⁸⁶ In terms of this article, it is clear that no person's privacy may be invaded either through arbitrary or unlawful interference, anywhere they are, either in their family or home or even in the workplace. That being said, it goes without saying that this article can be read to also offer protection to employees who are living with HIV/AIDS from arbitrary or unlawful interference with their privacy in the world of work at all times.

It follows therefore that employees should not be subjected to arbitrary testing and they should not be unjustifiably required to disclose their status. If they do disclose their HIV/AIDS status, then such information should be treated as confidential. Thus, it can be reasonably held that employees should not be required to disclose their status, except if it would be against public policy and occupational health and safety regulations due to the nature of the job to NOT disclose.⁸⁷

In as much as the instruments discussed above do not specifically refer to HIV/AIDS directly, their application is wide enough to allow for sufferers of HIV/AIDS to claim their rights which may be infringed due to their illness.

2.4 UN instruments that are specific to HIV/AIDS.

This part of the paper focuses on the strides which both the UN and the World Health Organisation as a division of the UN have made over the years to adopt non-binding instruments specifically tailored for people living with HIV/AIDS.

The United Nations Commission on Human Rights (UNCHR), in its meeting held on 21 April 2005, adopted the Human Rights Resolution 2005/84 which was aimed at addressing the need to afford protection to human rights in the context of

⁸⁶ Article 17 of the ICCPR provides that "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation".

⁸⁷ *Hoffmann v South African Airways*, the Constitutional Court of South Africa held that it was wrong for South African airways to have used Hoffmann's HIV-Positive results as a condition for refusal to employ him.

HIV/AIDS.⁸⁸ This resolution expressly states in its preamble that the rights of people living with HIV/AIDS should be protected at all times. One can assume that the UNCHR recognises the vulnerability of these people and takes cognisance of their exposure to discriminatory and other unfair practices.

In addition, this resolution pays special attention to the rights of people living with HIV/AIDS in the world of work. It provides that states are urged to put in place national laws, policies, practices as well as workplace policies that adhere to the respect of human rights, more specifically the right to equality, human dignity, privacy and integrity. These policies further provide for policies on protection against unfair discrimination, equal opportunity to access the labour market, prohibition on medical testing and others.⁸⁹ In a similar vein, the Resolution provides that states should ensure that there are effective programmes aimed at preventing and treating HIV/AIDS, which also prohibits HIV-related discrimination and stigmatisation.

When dealing specifically with discrimination against people infected with both HIV/AIDS, the *World Health Assembly (WHA)*⁹⁰ adopted a resolution on 13 May 1988. Like all other UN resolutions, the *World Health Assembly Resolution* is equally important to Lesotho, South Africa and all UN member states as it serves as a guiding tool in the implementation of their national laws and policies on how they should protect people living with HIV/AIDS against all forms of discrimination.⁹¹ This Resolution further introduces the initiatives which should be taken to ensure that all people, including workers, living with HIV/AIDS have their rights and dignity

⁸⁸ OHCHR Human Rights Resolution 2005/84; The protection of Human Rights in the Context of HIV/AIDS.

⁸⁹ 5th paragraph of the Human Rights Resolution 2005/84 provides that "...urges States to ensure that their laws, policies and practices, including workplace policies and practices, respect human rights, in the context of HIV/AIDS and promote effective programmes for the prevention and treatment of HIV/AIDS and the prohibition of HIV-related discrimination, including through voluntary testing and counselling, education, media and awareness-raising campaigns, improved and equitable access to high-quality good and health care, particularly to safe and effective mediation, assistance to educate people infected with and affected by HIV/AIDS about their rights and to assist them in realizing their rights".

⁹⁰ The World Health Assembly is the supreme law-making body of the World Health Organisation (WHO).

⁹¹ Clause 3(2) of the Forty-first World Health Assembly, Geneva 2-13 May 1988: resolution and decisions.

protected.⁹² It is therefore the indubitable goal of the Resolution to promote freedom from all unfair discrimination and stigmatisation when dealing with the provision of services, employment and travel.⁹³

Clause 1(3) of the Resolution continues to provide that states should put in place policies that will ensure the protection of the confidentiality of HIV testing and also to avail counselling services to those who have been found to have been infected with HIV/AIDS. This Resolution is similar to other general UN instruments on equality, non-discrimination, the right to privacy and protection of dignity.

In June 2001, the UN Assembly adopted the National Assembly Declaration of Commitment on HIV/AIDS.⁹⁴ This declaration is not specifically aimed at protecting the rights of people living with HIV/AIDS in the workplace, but it still refers to the need for the protection of people with HIV/AIDS in the world of work.

Of specific relevance to the protection of people living with HIV/AIDS are the provisions that state that the response to HIV/AIDS in the world of work should be strengthened by seeing to it that prevention and care programmes are established and implemented in the workplace.⁹⁵ These prevention and care programmes are supposed to be established in all sectors of the economy, including private, public and informal work.

The Declaration further provides that state parties should develop both national legal and policy frameworks which are aimed at protecting the rights and dignity of people living with HIV/AIDS in the workplace.⁹⁶ It suffices therefore to hold that both Lesotho and South Africa, by having acceded to international human rights treaties, do have an international obligation to protect all people living with

⁹² <http://apps.who.int/iris/handle/10665/164520>. (Accessed 16 January 2022).

⁹³ Clause 1(2) of the Forty-first World Health Assembly, Geneva 2-13 May 1988: resolution and decisions.

⁹⁴ The UN National Assembly Declaration Commitment on HIV/AIDS (2001) <http://www.un.org/ga/aids/coverage/FinalDeclartionHIVAIDS.html>. (Accessed 6 March 2022).

⁹⁵ See para 49 of the UN National Assembly Declaration of Commitment on HIV/AIDS (2001).

⁹⁶ Article 69 of the Declaration of Commitment on HIV/AIDS.

HIV/AIDS against any acts which may ultimately infringe on their human rights, in line with set international standards.

2.5 ILO standards on the protection of people living with HIV/AIDS

2.5.1 Origins of the ILO

The ILO is the United Nations (UN) specialised agency, an Inter-Governmental institution consisting of member states who are signatories to the ILO Constitution. It is aimed at seeking the promotion of social justice and internationally recognised human and labour rights.

The ILO was established in 1919 after the First World War under the Treaty of Versailles.⁹⁷ What mainly necessitated the creation of the ILO was the rapid growth of industrialisation after the First World War which led to the exploitation of workers and ended up subjecting them to work under harsh and tedious working conditions.⁹⁸ For that fact, workers were subjected to, amongst others, irregular working hours, inhuman treatment, discriminatory acts and other acts which infringed on their human rights. The international intervention was necessary to afford them protection and to improve the workers' working conditions. Security, humanitarian, political and economic considerations form the core of the Constitution governing the ILO.⁹⁹

The main objective of the ILO is to promote opportunities for both men and women to achieve social justice, obtain decent working conditions and protect their human rights in the workplace.¹⁰⁰ The ILO sets out its standards in the form of Conventions and Recommendations. The Declaration of Philadelphia was adopted in 1944 and has reaffirmed the position and mandate of the ILO Constitution by pointing out that all human beings have the inherent right to "pursue both their material well-

⁹⁷ Valticas International Labour Law 27.

⁹⁸ Alcock History on the International Labour Organisation 4.

⁹⁹ Alcock History on the International Labour Organisation 5.

¹⁰⁰ Valticas International Labour Law 10.

being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity" irrespective of their race, creed or sex.¹⁰¹

Furthermore, the Declaration of Philadelphia has also played a major role in shaping the mandate of the ILO into four fundamental principles, which mainly focus on the protection of labour rights, protection of expression and freedom of association, eradication of poverty and social dialogue through a tripartism structure – business, labour and government representatives.¹⁰²To the present date, the International Labour Conference of the Organization ILO 189 conventions, 205 Recommendations and 6 Protocols have been adopted by the ILO.¹⁰³

Similar to other international law instruments, the ILO conventions and treaties are only binding to state parties that have ratified them. ILO recommendations on the other hand are not binding and only serve as guidelines to member states on how they should interpret and apply the conventions. These guidelines are also intended to afford guidance on the application of the conventions in either policies, legislation or practices of a member state and are also intended to set down minimum standards which are acceptable in the world of work.¹⁰⁴

It has caught the attention of the ILO that a huge pool of people living with or affected by HIV/AIDS are those who are still within the working age and this fact hinders them from making their full contribution to economic development.¹⁰⁵ The ILO has recognised HIV/AIDS as a global epidemic and that it has a direct impact on the labour force. This fact has resulted in the ILO putting forth the following measures that are intended to address the stigmatisation and discrimination of workers who are affected by HIV/AIDS in the workplace.¹⁰⁶

¹⁰¹ Valticas International Labour Law 29.

¹⁰² Sengenberger 2013 The International Labour Organisation 9.

¹⁰³ Sengenberger 2013 The International Labour Organisation 9

¹⁰⁴ Sengenberger 2013 The International Labour Organisation 11.

¹⁰⁵ ILO 2018 the impact of HIV and AIDS on the world of work: Global estimates 13.

¹⁰⁶ ILO 2018 the impact of HIV and AIDS on the world of work: Global estimates 2.

2.5.2 The ILO Code of Practice on HIV and the World of Work

The ILO Code of Practice on HIV and the World of Work (the ILO Code)¹⁰⁷ was issued in 2001. This document was established to prove the ILO's commitment to addressing HIV/AIDS in the world of work. Thereafter, other ILO instruments which are subsequently discussed could by way of argument be made applicable to people living with HIV/AIDS in the workplace and offer them additional protection.

The main objective of the Code is to assist and guide employers as well as employees and their representatives in the workplace on how to address the HIV/AIDS epidemic while also promoting decent work. The ILO Code protects those who are living with HIV/AIDS from compulsory invasive testing, to mandatory disclosure of their HIV status and to be unfairly dismissed solely based on their HIV status.

The ILO Code also imposes a duty on employers to formulate guidelines on the ways of addressing the HIV/AIDS epidemic in the world of work, by promoting the idea of prevention, management and mitigation, care and support of the infected. Over and above, employees are further protected from real or perceived unfair discrimination which is based on their health status on issues that relate to their benefits.

The ILO Code is based on ten key principles,

The code will be instrumental in helping to prevent the spread of the epidemic, mitigate its impact on workers...It covers key principles, such as the recognition of HIV/AIDS as a workplace issue, non-discrimination in employment, gender equality, screening and confidentiality, social dialogue, prevention and care and support, as the basis for addressing the epidemic in the workplace.¹⁰⁸

This quotation sums up the ten key principles upon which the ILO Code is premised in protecting workers affected by HIV/AIDS. These principles are mainly intended

¹⁰⁷ ILO Code of Practice on HIV/AIDS and the World of work 2001.

¹⁰⁸ Preface of the ILO Code of Practice on HIV/AIDS and the world of work.

to curtail the spread of HIV and to afford protection to those who have already been infected, against discrimination and gender inequality and guarantee confidentiality as well as care and support in the workplace. The codes and recommendations are however not binding on member states, but they serve as guidelines to employers, employees and all relevant stakeholders on best practices.¹⁰⁹

Further to that, article 8 of the ILO Code of Practice on HIV/AIDS provides that HIV testing should not in all circumstances be carried out in the workplace unless specified in the Code. This provision is based on the fact that HIV testing should be voluntary and confidential and once workers are required to test in the workplace, that may lead to impeding their human rights such as the right to privacy and dignity. This may also lead to misuse of confidential information which may often be without the consent of workers. The ILO Code of Practice provides that HIV testing should not be required at the time of recruitment or as a condition of continued employment.¹¹⁰

In terms of article 8.4 of the ILO Code of Practice, workers may, at their initiative or through voluntary testing programmes, agree to be tested for HIV/AIDS. It is also further provided that this voluntary testing should be done by the community health services and not at the workplace. The testing should be performed by suitably qualified personnel who shall administer pre-and post-counselling for the employee to understand and appreciate the nature and purpose of the HIV tests. It should be gathered from the provisions of this Code that this instrument still stands to be an important tool in affording state parties as well as employers with guidance on how they should put in place laws and policies that protect and promote the human rights of people living with HIV/AIDS in the workplace. However, these provisions are applicable to everyone, and are not limited to people living with HIV/AIDS in the workplace.

¹⁰⁹ Preface of the ILO Code of Practice on HIV/AIDS and the world of work.

¹¹⁰ Article 8.1 of the ILO Code of Practice on HIV/AIDS and the world of work.

2.5.3 The ILO HIV/AIDS Recommendation

The *HIV/AIDS Recommendation* (Recommendation 200)¹¹¹ was adopted by the General Conference of the International Labour Organisation at the 99 Session in 2010. The preamble of Recommendation 200 provides that this document is premised on the promotion and protection of the human rights of all workers in the workplace without any form of discrimination and/or stigmatisation based on HIV/AIDS.

In terms of Article 1 (e) of Recommendation 200, discrimination is defined as follows:

Discrimination means any distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, as referred to in the Discrimination (Employment and Occupation) Convention, 1958, and Recommendation, 1958

It is provided in both Recommendation 200 and Convention 111¹¹² that, for discrimination to be established, there should first be a differential treatment either being an exclusion or distinction made to an employee and such distinction or exclusion should be based on the listed grounds and lastly, that exclusion or treatment should have an effect of nullifying or creating inequality in opportunities or treatment in the workplace.

In terms of Recommendation 200,¹¹³ state parties are required to afford equal protection to all workers as provided for under Convention 158, including those with HIV/AIDS. Recommendation 200 further provides that every state should put in place measures that will protect HIV/AIDS infected employees not to be discriminated against on their real, or perceived status when recruited, in continuous employment or even when being terminated from employment.¹¹⁴

¹¹¹ HIV and AIDS Recommendation, 2010 (R200).

¹¹² C111. Discrimination (Employment and Occupation) Convention. 1958.

¹¹³ Article 9 - 14 of the HIV/AIDS Recommendation, 2010 (R200).

¹¹⁴ Article 10 of the HIV/AIDS Recommendation, 2010 (R200).

Recommendation 200 further states that, amongst other things, workers together with their families should be allowed to have access to treatment of HIV/AIDS¹¹⁵ and also that workers as well as job seekers who are HIV positive, should not be discriminated against. Recommendation 200 further deals with policies¹¹⁶ and makes it clear that member states should see to it that workers have full access to health care services which can be provided through many schemes.

2.5.4 Convention Concerning Discrimination in Respect of Employment and Occupation

The *Convention Concerning Discrimination in Respect of Employment and Occupation* (Convention 111)¹¹⁷ was adopted by the International Labour Conference on 25 June 1958 and came into operation on 15 June 1960. Both Lesotho and South Africa have ratified Convention 111 in 1998 and 1997 respectively.¹¹⁸ Convention 111 is regarded as the ILO's leading instrument relating to the elimination of all forms of discrimination against people in the world of work.

Article 1-(1)(a) of Convention 111 provides that discrimination in the world of work includes any distinction, exclusion or preference which is made to any person based on his/her religion, colour, sex, race and political opinion. This has also been confirmed by the Committee of Experts in its third report in 1996 on the Application of Conventions and Recommendations (CEACR).¹¹⁹ Article 2 of the Convention places a duty on ratifying states to have an obligation of taking appropriate measures to put in place national policies that have an effect on promoting equality of opportunities and treatment in the world of work, with the aim of illuminating discrimination.

¹¹⁵ Article 3(e) of the HIV/AIDS Recommendation, 2010 (R200).

¹¹⁶ Article 17 of the HIV/AIDS Recommendation, 2010 (R200).

¹¹⁷ Convention Concerning Discrimination in Respect of Employment and Occupation of Employment and Occupation 1958 (Convention 111).

¹¹⁸ https://www.ilo.org/dny/normlex/en/f?p=1000:11200:P11200_Country_ID:103188. (Accessed 8 February 2022).

¹¹⁹ ILO: CEACR Report III (Part 4B) 1996 para 23.

It goes therefore without saying and as indicated, that Convention 111 is specifically designed to afford protection to the rights of all workers against all forms of discrimination at work, notwithstanding the forms it takes or the grounds on which it is based. Even though Convention 111 is not designed specifically to address employees living with HIV/AIDS, it can be understood that it has been designed in a manner that shows that it does not exclude other categories of employees, but seeks to afford protection to everyone in the workplace.

2.5.5 ILO Convention on Termination of Employment

The *ILO Convention on Termination of Employment (Convention 158)*¹²⁰ was adopted in 1982 and specifically deals with issues that relate to termination of employment in the workplace. Lesotho ratified Convention 158 on 14 June 2001,¹²¹ while South Africa has not ratified it. In terms of article 4 of the Convention, an employee shall not be terminated from work unless the employer has substantive reasons for terminating¹²² and has followed fair procedures provided in terms of article 7. This procedure which has been stated in article 7 of the Convention also relates to cases where employees may be terminated based on incapacity, which may be caused by any kind of illness.

Articles 4 and 7 of Convention 158 provide that an employee who is living with HIV/AIDS, may not be arbitrarily dismissed from work based on their health status and that there should be valid reasons with fair procedures being followed before termination of employment. Article 6 of the Convention on the other hand provides that temporary absence from work based on illness shall not constitute a valid reason for termination of employment. This provides that employees living with HIV/AIDS are not to be dismissed from their employment based on temporary absence from work during the times of their sickness. Lastly, article 5 of the

¹²⁰ ILO Convention 158 Termination of Employment Convention 1982.

¹²¹ www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103188 (Accessed 8 February 2022).

¹²² Article 4 of Convention 158 provides that "The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirement of the undertaking, establishment or service".

Convention regards any dismissal which is made on any of the grounds which are discriminatory to be an automatically unfair dismissal.

2.5.6 Occupational Safety and Health Convention,¹²³ Convention on the Promotional Framework for Occupational Safety¹²⁴ and Health and Promotional Framework for Occupational Safety and Health Recommendation.

Both the *Occupational Safety and Health Convention* (Convention 155) and the *Convention on the Promotional Framework for Occupational Safety* (Convention 187)¹²⁵ of the ILO are conventions that were adopted to try to prevent accidents and injuries to health which may occur or may be linked with the workplace.¹²⁶ Lesotho and South Africa have ratified Convention 155 on 1 November 2001 and 18 February 2003 respectively.¹²⁷

In terms of these two conventions, it suffices that member states are required to put in place adequate national frameworks and policies which are aimed at creating a healthy and safe working environment as far as practically possible. This can be understood to also mean that working environments should be healthy and safe for purposes of preventing transmission of HIV/AIDS in the workplace. Recommendation 197 further provides guidance in terms of how state parties are supposed to implement their national laws and policies in providing a coherent and systematic treatment of occupational safety and health in the workplace.¹²⁸

2.5.7 ILO Code of Protection of Workers' Personal Data

The ILO Code of Protection of worker's data¹²⁹ is a voluntary and non-binding document that is aimed at providing guidance to employers and employees on

¹²³ ILO Convention No 155 on Occupational Safety and Health Convention 1981 (C155).

¹²⁴ ILO Convention No 187 on the promotional framework for occupational safety and health (C187).

¹²⁵ ILO Recommendation No 19 20067 on the promotional framework for occupational safety and health (R197).

¹²⁶ Article 4(2) of ILO Convention 155.

¹²⁷ www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103188

¹²⁸ Preamble of ILO Recommendation No 197. (Accessed 8 February 2022).

¹²⁹ ILO Code of Protection of Workers Personal Data.

legislation, regulations, workplace policies and practical measures expected in the workplace. It is submitted that no one is allowed to collect personal data of an employee without their consent, as that is tantamount to invasion of their privacy and not in compliance with national legislation, confidentiality of client's confidential information.¹³⁰

2.6 Conclusion

In this chapter, specific international human rights standards against unfair discrimination on people living with HIV/AIDS in the workplace were discussed. As clearly demonstrated, international law plays a very pivotal role in affording protection to people living with HIV/AIDS both in the workplace and out of the working environment. The UN and the ILO have stressed the importance of enacting national laws which are intended to eliminate discrimination around HIV/AIDS. Most of these instruments, if not all, underline the importance of equality and protection of dignity, irrespective of HIV/AIDS status. Various provisions of international instruments referred to in this chapter also make a glaring emphasis on the right to privacy of people living with HIV/AIDS. They also oblige employers to keep the health status of individual employees confidential at all times.

The standards which have been set by the UN through conventions and recommendations have also been adopted by the ILO. The ILO conventions also oblige states to incorporate their provisions into their national laws. Apart from the obligations and commitments which have been cast upon state parties through ratified instruments, governments are still expected to refer to other non-binding instruments¹³¹ as a point of reference and guidance on how they can shape their national laws. These non-binding instruments can also be used by the courts of law when interpreting cases that deal with HIV/AIDS in the workplace.

In as much as the codes, recommendations and declarations are not binding, they serve as an important tool to guide member states to put in place national legislation

¹³⁰ Clause 5 of the ILO Code of Practice on the Protection of workers Personal Data 1996.

¹³¹ These instruments may either be Conventions Which States have not ratified, or other non-binding instruments such as recommendation, resolution etc.

that protects HIV positive employees against discrimination. All these international instruments come together to affirm, promote and ensure that HIV/AIDS employees are treated with dignity, that they receive equal treatment as other employees and that they should not be discriminated against based on real or perceived HIV/AIDS status.

It, therefore, becomes apparent to highlight that, in order to eliminate discrimination against people living with HIV/AIDS at work, national legal frameworks need to be aligned with international standards. The following chapters analyse the roles which both Lesotho and South Africa have taken to abide by international standards to improve their national laws to afford protection of employees living with HIV/AIDS in the workplace.

Chapter 3

3 Lesotho's legislative framework on HIV/AIDS in the workplace

3.1 Introduction

The previous chapter discussed relevant binding and non-binding international standards on the protection of people living with HIV/AIDS against unfair discrimination and it also showed how they are applied and interpreted in the law and in general. The theme of this study is that protection of employees living with HIV/AIDS in the workplace cannot be achieved by mere ratification of international instruments, but that there should be effective domestication and implementation of those instruments into national laws. As a result, this chapter analyses the strides which Lesotho has taken to improve its legal framework for the protection of employees living with HIV/AIDS in the workplace against unfair discrimination.

It was observed in the previous chapter, that HIV/AIDS is regarded as a global epidemic and that has created a need for international agencies to intervene by creating standards to address issues related to HIV/AIDS. Various UN and ILO treaties have emphasised the need and importance to enact legislation and regulations at the national level, that are intended to address issues of workplace discrimination amongst employees living with HIV/AIDS.

Lesotho has ratified various international human rights treaties with the objective of affording protection to people living with HIV/AIDS.¹³² In this chapter, the researcher, therefore, aims to investigate the extent to which Lesotho conforms to its international obligation to implement laws and policies that address the protection of workers living with HIV/AIDS in the workplace. This chapter mainly

¹³² These include amongst others, "The ILO Code of Practice on HIV and the World of Work, World Health Assembly Resolution, National Assembly Declaration of Commitment on HIV/AIDS, The ILO HIV and AIDS Recommendation, Convention Concerning Discrimination in Respect of Employment and Occupation, ILO Convention on Termination of Employment, Occupational Safety and Health Convention, Convention on the Promotional Framework for Occupational Safety and Health and Promotional Framework for Occupational Safety and Health Recommendation, ILO Code of Protection of Workers Personal Data".

focuses on evaluating the national strides Lesotho has taken to put in place legal and policy frameworks that address the elimination of discriminatory policies, practices within the workplace, in comparison with its international obligations and standards set by the ILO.

The chapter is divided into three sections. The first section gives an overview of the prevalence of HIV/AIDS in Lesotho and provides the laws and policies that Lesotho has put in place to protect people living with HIV/AIDS against discrimination and the extent to which their human rights are protected. Secondly, this chapter provides a critical discussion of the laws that Lesotho has put in place to afford employees living with HIV/AIDS protection against discrimination in the workplace. Lastly, the chapter evaluates the extent to which Lesotho has been able to execute its international mandate and obligation on protecting employees with HIV/AIDS in the workplace against discrimination and the extent to which their human rights are protected.

3.2 Background to HIV/AIDS in Lesotho

Lesotho's legal regime recognises the need to afford protection to all people against all forms of discrimination, especially the vulnerable group of people living with HIV/AIDS.¹³³ For everyone to appreciate the strides which Lesotho has taken to respond to the impact that HIV/AIDS has brought, it is important to understand the attitude that Lesotho has adopted since the discovery of HIV/AIDS in the 1980s.¹³⁴

The first case of HIV/AIDS in Lesotho was reported in 1986 and it has since spread across the country; highlands, lowlands, rural as well as urban areas.¹³⁵ Lesotho has a population of approximately 2,007,001, with 30.3 % of the population being adult working men and women.¹³⁶ In response to the growing numbers of individuals

¹³³ Kometsi L "The impact of HIV/AIDS pandemic and the labour laws of Lesotho" LLJ 2013 241.

¹³⁴ Drimie S "The impact of HIV/AIDS on Land 2003: Case studies from Kenya, Lesotho and South Africa" 8.

¹³⁵ Report on compiled by the HIV law commission on Assessment of the Legal Environment for HIV and AIDS in Lesotho 2016.

<https://hivlawcommission.org/wp-content/uploads/2017/06/report-on-lea-for-hiv-aids-lesotho.pdf>. (accessed on 5 March 2022).

¹³⁶ Lesotho Census Report, 2016. <http://www.bos.gov.ls/>. (accessed on 5 March 2022).

infected with HIV/AIDS, Lesotho enacted laws to address the epidemic and to protect those who contracted HIV/AIDS. Nonetheless, the number of cases is still increasing. In an attempt to improve the fight against HIV/AIDS, Lesotho put in place several strategies, which include the direct allocation of resources such as direct allocation of ARVs and medical experts in areas of concern.¹³⁷ Despite the initiatives which Lesotho has taken, there are still alarming rates of infections due to the continuous spreading of HIV/AIDS, which has been felt by all sectors of the population, as reflected later in this paper. It has however been shown that HIV-related stigma and discrimination are still felt by people living with HIV/AIDS in Lesotho and that most women, youth and other key populations vulnerable to HIV exposure still endure consistent violations of their human rights.¹³⁸

3.3 LESOTHO AND THE ILO

Lesotho became a member of the ILO in 1966 soon after gaining independence from the British protectorate.¹³⁹ Lesotho is a dualist state and as a result, for a treaty to apply to it, it should first be ratified and domesticated for it to be part of its domestic laws.¹⁴⁰ This, however, does not include customary international law.¹⁴¹

The ILO has been recognised as the leading authority to all international labour laws and standards with well-established tradition and jurisprudence.¹⁴² Lesotho has ratified 23 ILO Conventions and it has only denounced the Convention on Minimum

¹³⁷ "The government funds 70 per cent of the ARVs and allocates 2 per cent to the budgets of individual public ministries' HIV workplace programmes. Prevention-of-Mother-To-Child Transmission (PMTCT) and antiretroviral therapy (ART) have resulted in a reduction of new HIV infections in children 0-14 years, dropping from 6,100 to 3,700 between 2002 and 2012". Report on compiled by the HIV law commission on Assessment of the Legal Environment for HIV and AIDS in Lesotho 2016.

<https://hivlawcommission.org/wp-content/uploads/2017/06/report-on-lea-for-hiv-aids-lesotho.pdf>. (accessed on 5 March 2022).

¹³⁸ Revised Lesotho National HIV and AIDS Strategic Plan 2011/12–2015/16. UNAIDS, 'UNAIDS Terminology Guidelines,' 2011.

¹³⁹ Maqutu and Sanders 1987 CILSA 378.

¹⁴⁰ Pholo Lesotho Justice Sector and the Rule of law 24.

¹⁴¹ Shale "Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy part" 4.

¹⁴² Cohen, Matee "Public servants right to strike in Lesotho, Botswana and South Africa- a comparative study" 25. See also Okene "The right of workers to strike in Democratic society: the case of Nigeria" 2007 Sri Lanka J int'l 194.

(Age) Industry.¹⁴³ In terms of section 4(c) of the Labour Code,¹⁴⁴ Lesotho has committed that, in situations where the application and interpretation of the Labour Code and its subsidiary legislation provision are ambiguous, interpretation should be made in line with the consideration of the provisions of the conventions and recommendations adopted by the conference of the ILO.¹⁴⁵

This was the case in *Independent Democratic Union (IDUL) v Minister of Labour and Employment and others*,¹⁴⁶ where the applicant, IDUL, a trade union, was challenging the powers of the minister of labour and employment to publish the wage gazette, which changed the decision of her predecessor. It was stated that the fact that the previous minister had unilaterally modified or rejected the decision of social partners on the proposed percentages conflicted with international labour law parlance, as the decision to do so undermined the true spirit of tripartism and social dialogue and the new minister was correct to implement the percentage which both parties had agreed on. It was further held that, because the Labour Code was not clear on this issue, the principle of consultation and participation between social partners is one of the pillars of the ILO Minimum Wage-fixing Convention and Recommendations, which requires that all parties should be fully consulted as provided.

As shown above, it is demonstrated that international law plays an important role in shaping and giving effect to the laws in Lesotho and reinforcing Lesotho's international obligation as reflected in international instruments. It is apparent that, in cases where the Labour Code is not clear on how the law should be applied,

¹⁴³ www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200COUNTRYID:103188. Lesotho denounced the Minimum (Age) Industry Convention, 1919 (No. 5) on 14 June 2002

¹⁴⁴ Labour Code Order no 24 of 1992.

¹⁴⁵ S 4(c) of the Labour Code states that "In case of ambiguity, provisions of the Code and of any rules and regulations made thereunder shall be interpreted in such a way as more closely conforms with provisions of Conventions adopted by the Conference of the International Labour Organisation, and of Recommendations adopted by the Conference of the International Labour Organisation".

¹⁴⁶ *Independent Democratic Union v Minister of Labour and Employment and others* LAC/REV/06/17.

reliance and guidance are then applied to international standards to develop the national law.¹⁴⁷

3.4 Legislative provisions on people living with HIV/AIDS in Lesotho

As indicated above, Lesotho is a party to a number of international instruments that are intended to address issues of workplace discrimination amongst employees living with HIV/AIDS. Notwithstanding this, research has shown that this is not the reality for many of these workers, as there is a lack of HIV specific laws that deal with the rights of people living with HIV/AIDS or any other broad anti-discrimination legislation which is aimed at affording protection to those living with HIV/AIDS. Furthermore, there is lack of domestication and effective implementation of international instruments at national level and therefore, employees do not fully enjoy this protection.

Everyone is able to access and enforce laws against other individuals basing themselves on national laws, as opposed to relying on international instruments as sources of their rights at national courts and exhaustion of local remedies. This necessitates national legal and institutional frameworks to be aligned with such instruments.

3.4.1 Constitution of the Kingdom of Lesotho

Lesotho has as a sovereign State, it adopted its Constitution which came into effect in 1993.¹⁴⁸ Lesotho has incorporated in chapter two and chapter three of its Constitution, some of the civil, political, social and economic rights which are similar to those which are provided for in international instruments.¹⁴⁹ The supremacy of the Constitution of Lesotho is stipulated in section 2. It follows the similar wording

¹⁴⁷ Section 4(c) of the Labour Code Order 1992.

¹⁴⁸ Constitution of Lesotho 1993.

¹⁴⁹ Civil and political rights are provided for in Chapter II, while social, economic and cultural rights are set forth in Chapter III of the Constitution. Chapter II provides for justiciable rights, which are protectable within the judicial system, while the rights which are contained in Chapter III are only principles of state policy and not justiciable. Principles of State Policy place an obligation on the State, for it to only realise them on a progressive basis, which can either be in a form of policy frameworks and law reforms.

as that of South Africa; it provides that the Constitution of Lesotho is the supreme law of the land and that any law which is inconsistent with its provision shall be regarded as null and void, to the extent of its inconsistency. The Constitution does not directly protect the rights of people with HIV/AIDS, but in reading this, it can be deduced that protection and enjoyment of the rights afforded by the Constitution can be extended to those living with HIV/AIDS.

The Constitution of Lesotho, unlike the Constitution of South Africa, does not provide for labour practices and provisions that specifically govern the working environment in specific terms.¹⁵⁰ However, it has been argued by authors such as Mosito *et al* that important aspects such as discrimination and equality may equally be brought into perspective and be interpreted into the labour law sphere as provided in the Constitution.¹⁵¹

Chapter 2 of the Constitution affords protection of fundamental human rights and freedoms in Lesotho. Section 4 specifically provides that every person in Lesotho is entitled to fundamental human rights and freedoms, which include the right to life and to be afforded the respect of privacy, not to be humiliated as well as the right not to be discriminated against.¹⁵² The rights which are contained under Chapter 2 are to be enjoyed by everyone who lives in Lesotho, including those living with HIV/AIDS. This, therefore, shows that Lesotho has made strides to fulfil its international obligation of committing that it shall put laws into place that protect all people in Lesotho of their fundamental human rights. Section 4(o) of the Constitution provides for the right to equality before the law and the right to equal

¹⁵⁰ S 23 of the Constitution of the Republic of South Africa, 1996 has devoted considerable attention to labour relations.

¹⁵¹ Mosito "The Constitutionalism of Labour law in Lesotho" 2014 LLJ 39.

¹⁵² "Fundamental human rights and freedoms (1) Whereas every person in Lesotho is entitled, whatever his race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status to fundamental human rights and freedoms, that is to say, to each and all of the following - (a) the right to life; (b) the right to personal liberty; (c) freedom of movement and residence; (d) freedom from inhuman treatment; (e) freedom from slavery and forced labour; (f) freedom from arbitrary search or entry; (g) the right to respect for private and family life; (h) the right to a fair trial of criminal charges against him and to a fair determination of his civil rights and obligations; (i) freedom of conscience; freedom of expression; (k) freedom of peaceful assembly; (l) freedom of association; (n) freedom from discrimination; (o) the right to equality before the law and the equal protection of the law; and (p) the right to participate in government".

protection for everyone who lives in Lesotho. Therefore, it becomes clear that, in terms of this section, every person in Lesotho, especially vulnerable workers, are entitled to fundamental human rights and freedoms, which includes the right to equal protection of the law and not to be humiliated and discriminated against because of their status.

The Constitution furthermore makes provision and guarantees the right to privacy to everyone.¹⁵³ As a result, it can be understood that no-one's personal or sensitive information should be disclosed without their prior consent. This includes their HIV/AIDS status. The Constitution provides for equality for 'everyone' in Lesotho; that is a right to equal treatment and thus a right not to be discriminated against. For these reasons, a person should not be forced to disclose any personal information pertaining to their HIV status if they do not wish to do so.

The Constitution further provides for the right to respect private and family life for everyone, which can simply be understood to mean the right to privacy and confidentiality.¹⁵⁴ Therefore, it is clear that each and every worker's right to privacy and confidentiality should at all times be protected. Section 8 of the Constitution¹⁵⁵ further provides that no one shall be subjected to inhuman, degrading punishment or any other maltreatment. Thus, no one can be forced to be tested for HIV without their consent or be obliged to disclose any information relating to their health status, or any status of any of their family members, or even to be treated in any manner which may make them feel degraded or humiliated.

Section 18 of the Constitution of Lesotho provides that, subject to the provisions of subsections (4) and (5), no law should discriminate or have a discriminatory effect either of itself or in its effect. In terms of section 18(3), discrimination is defined as follows:

Discrimination means affording different treatment to different persons attributable wholly or mainly to their respective descriptions

¹⁵³ S 4(g) of Constitution.

¹⁵⁴ S 11 of the Constitution of Lesotho.

¹⁵⁵ S 8(1) of the Constitution of Lesotho provides that "No person shall be subjected to torture or to inhuman or degrading punishment or other treatment."

by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

This, therefore, means that, in terms of the Constitution of Lesotho, no person may be afforded different treatment from others based on his or her race, colour, sex, birth or "other status". As a result, it can be reasonably argued that the list is not closed and that, in the absence of any provisions to the contrary, it should be understood that HIV/AIDS can be classified under the "other status" section. The UN Commission on Human Rights meeting has held that the term "other status" should be interpreted to include HIV/AIDS health status; thus, it can safely be interpreted that the Constitution of Lesotho includes HIV/AIDS as one of the grounds upon which any person may not be discriminated against.¹⁵⁶

The Constitutional Court in the case of *Thabo Fuma v The Commander LDF and Others*,¹⁵⁷ held that HIV status falls under "other status" which is recognised as one of the grounds which are prohibited that a person may be discriminated against within the purview of section 18(3) which contemplates "other status" as another ground, other than those specified therein.¹⁵⁸

In reality, workers face constant discrimination; they are being denied employment and dismissed for having HIV/AIDS. Authors such as Bose and Bhard *et al*, looking at the employment of HIV persons, indicated that "people living with HIV today face segregation in schools, hospitals under cruel and degrading conditions, denial or loss of employment, arbitrary testing, violence, and even murder."¹⁵⁹ This is very much evident in labour industries where people living with HIV/AIDS are discriminated against, denied employment and even dismissed. Lesotho on the

¹⁵⁶ 51st meeting of the UN Commission on Human Rights held on March 3, 1995. Available at <https://digitallibrary.un.org/record/227618?ln=en> (Accessed on 29th March 2022).

¹⁵⁷ *Thabo Fuma v The Commander LDF and Others* CONST/08/2013.

¹⁵⁸ This case shall be further discussed later on.

¹⁵⁹ Suprabha Rao "Employment of HIV positive persons: a case in point" Chilli breeze India: http://www.chilebreeze.com/articles_various/Administrative-Tribunal.asp#a. (Accessed on the 10 January 2022).

other hand, has committed itself to put in place a clear legal system that adheres to the rule of law that respects and promotes the protection of human rights and that has an independent and impartial judiciary.¹⁶⁰ Despite this positive initiative by the Lesotho Government, there are still reported incidents of human rights violations including discrimination and stigmatisation of people living with HIV/AIDS.¹⁶¹ The National Strategic Development Plan reported Lesotho as one of the African countries with the highest societal abuse which includes discrimination, stigmatisation of people living with HIV/AIDS as well as child labour.¹⁶²

The rights provided for in the Lesotho's Constitution are not absolute and as such, they may be limited, provided that limitation is reasonable and justifiable.¹⁶³ In *Molefi Ts'epe v Independent Election Commission and others*,¹⁶⁴ the Constitutional Court dealt with the constitutionality of the amended section 26(1A)(a) and (b) of the Local Government Act. Mr Ts'epe challenged the amended provisions on the basis that they were discriminatory and unconstitutional in requiring one-third of the Council seats be reserved for females. In essence, the Council of Litjotjela fell amongst those constituencies identified as those to be reserved for females. It was Ts'epe's case that section 26(1A) (a) and (b) of the Local Government Act discriminated against him based on his sex. The respondents on the other hand conceded that their decision of excluding male candidates to take part in the selected constituencies constituted indirect discrimination based on sex. They went

¹⁶⁰ National Strategic Development Plan 2012/13 – 2016/17,

¹⁶¹ Article 5.6.2 of the National Strategic Development Plan 2012/13 – 2016/17.

¹⁶² National Strategic Development Plan 2018/19 – 2022/23, "Lesotho is ranked relatively high as compared to other African countries, in observing human rights. However, the Human Rights Report of 2019 still indicates that there were instances of... 'Societal' abuse, which include abuse of spouses and children; sexual abuse; restrictions on women's rights; discrimination against women; stigmatisation of persons with disabilities and HIV/AIDS and child labour. Human trafficking cases have also been recorded".

¹⁶³ The case of *Attorney General of Lesotho v Mopa* 2002 BCLR 645 (LAC) states the three essential requirements laid down as regards to the justification of the infringement of a constitutional right. The judgment further states that, "in as much as the constitution does not expressly provide for justification of Chapter II rights; unlike other constitutional instruments, it is clear from the scheme of the constitution that a limitation of a right is authorized where, in accordance with a broad test articulated by Dickson CJC in the Canadian Supreme Court in the well-known matter of *R V Oakes* (1986) 26 DLR (4th) 200 SCC at 226 7, the limitation of the rights is reasonable and demonstrably justified in a free and democratic society".

¹⁶⁴ *Molefi Ts'epe v Independent Election Commission and others* (2005) AHRLR 136.

further to justify their decision based on differentiation which was reasonable and justifiable. The Constitutional Court and the Court of Appeal upheld the respondent's argument and went further to point out that provisions of the Local Government Act were applied in a manner that showed that they were carefully designed to achieve the objective in question.¹⁶⁵ Lesotho can arguably be referred to as a dualist state, and treaties form a separate legal system from national law, and they cannot be applied directly into the national legal system. For international standards to be applicable and accessible in Lesotho, they should first be ratified and be domesticated.¹⁶⁶

As a dualist state, the treaties which it has ratified do not automatically bind it, but they serve as aids to interpretation.¹⁶⁷ Provisions of international instruments are directly applied by the courts where it is evident that there is ambiguity in the national legislation or where the application of domestic law does not extend the protection of citizens' rights. In the case of *Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea & Others*,¹⁶⁸ the court ruled that international instruments are not totally irrelevant in determining the dispute before it, but it mentioned that they are only of assistance as interpretative guides, where there is uncertainty in the interpretation of domestic law.¹⁶⁹ Further, in the case of *Makhasane v Commissioner of Police and others*,¹⁷⁰ the court relied on section 5 of the African Charter in determining the amount of compensation which was due, and ought to be awarded to Makhasane. The reason why the court relied on provisions

¹⁶⁵ *Molefi Ts'epe v Independent Election commission and others (2005) AHRLR 136 para 40.*

¹⁶⁶ Dugard *et al*/International law 42, "According to the dualist school of thought, international law, and municipal law differ radically in the matter of subjects of the law, sources and substance and a rule of internal law can never per se become of the law of the land. It must be made so by an authority of the state".

¹⁶⁷ Shale Historical perspective on the place of international human rights treaties in the legal system of Lesotho: Moving beyond the monist-dualist dichotomy. See also *Botswana Public Employees Union v The Minister of Labour and Home Affairs MAHLO-000674-11 (Unreported) para 205.*

¹⁶⁸ *Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea & Others C of A (CIV) 29/2013 [2014] LSCA*

¹⁶⁹ *Senate Gabasheane Masupha v Senior Resident Magistrate for the District of Berea & Others C of A (CIV) 29/2013 [2014] LSCA para 28.*

¹⁷⁰ *Makhasane v Commissioner of Police and others CIV/T/401/2006 [2011] LSHC 20.*

of an international instrument was due to the fact that the Constitution of Lesotho does not provide in clear terms for the right to dignity.

3.4.2 The National HIV/AIDS Policy

Apart from the Constitution, Lesotho has also enacted the national HIV/AIDS policy¹⁷¹ which lays down national responsibilities in response to addressing the rights of people living with HIV/AIDS. These responsibilities are extended to government ministries, the private sector, non-governmental and community-based organisations.¹⁷²

The national HIV/AIDS policy does not specifically deal with the rights of people living with HIV/AIDS in the workplace, but it provides a detailed outline of the initiatives and policies which employers should put in place to address HIV/AIDS prevention, care and support in the workplace. Chapter 7 of the National HIV/AIDS Policy specifically deals with how employers are expected to respond to HIV/AIDS in the workplace. The national policy on HIV/AIDS specifically makes mention of the fact that, to reduce and manage the impact of HIV/AIDS in the workplace, employers should implement HIV/AIDS policy and prevention, treatment, care and support programmes.¹⁷³

3.4.3 National Health Policy

The first National Health Policy¹⁷⁴ was established in Lesotho in 2011 which was revised and replaced by the current 2016 National Health Policy (NHP 2016). The current NHP was made with the Sustainable Development Goals (SDGs)¹⁷⁵ at the

¹⁷¹ National HIV and AIDS Policy, 2006.

¹⁷² Preamble of the National HIV and AIDS Policy, 2006.

¹⁷³ Para 7.1.3 of the National HIV and AIDS policy 2006.

¹⁷⁴ The National Health Policy 2016.

¹⁷⁵ The 17 Sustainable Development Goals (SDGs) of the 2030 Agenda for Sustainable Development.

helm of its agenda together with other international strategies, policies and frameworks being taken into consideration.

The National Health Policy is mainly aimed at attaining "national health coverage with a vision of a healthy population living a quality and productive life."¹⁷⁶ Thus, this policy is broadly based and is intended to address the issue of HIV/AIDS in all areas of concern in Lesotho, including the workplace.

3.5 Legislative provisions on employees living with HIV/AIDS

3.5.1 The Labour Code Order

Since its independence, Lesotho has adopted various labour legislation which includes the *Employment Act 1967, Regulation of Wages and Conditions of Employment Act 35 of 1969, Employment (Amendment) Act 14 of 1977 and the Employment Regulations of 1988*. It was in 1990 through the guidance of the ILO that all these laws were then consolidated to form the current piece of legislation called the Labour Code Order 24 of 1992.¹⁷⁷

Further to its commitment to afford protection and promotion of human rights to everyone, Lesotho has promulgated the Labour Code Order (*Labour Code*)¹⁷⁸ which is the principal law regulating to employment-related issues in the private sector.¹⁷⁹ The Labour Code applies to all employees, except those who have been categorically excluded from its application by statute.¹⁸⁰

The issue of discrimination in the workplace is addressed in section 5 of the Labour Code, giving effect to section 18 of the Constitution. Section 5(1) of the Labour Code prohibits discrimination on many grounds which include, amongst others, race,

¹⁷⁶ Para 7.1.5 of the National HIV and AIDS policy 2006.

¹⁷⁷ Lethobane "Tripartite conference on the Labour Code Order" ILO 2012 Lesotho baseline report: worker perspective from the factory and beyond 3.

¹⁷⁸ The Labour Code Order NO 24 of 1992.

¹⁷⁹ S 2(1) states that "The Code shall apply to any employment in the private sector and to any employment by or under the Government, or by or under any public authority, save as provided in subsection".

¹⁸⁰ S 5 of the Public Service Amendment Act No. 3 of 2007 provides that "The Labour Code Order 1992 shall not apply to public officers except in relation to appeals to the Labour Court in pursuance of section 20 of this Act."

sex, marital status or any ground which has an effect of impairing equality of opportunity or treatment in employment.¹⁸¹ Section 5(1) does not make mention of HIV/AIDS or does it make mention of "other status" as one of the grounds upon which a person may not be discriminated against.

This meant that HIV/AIDS did not fall amongst the grounds upon which an employee could not be discriminated against and this begged for the Labour Code to be amended. In 2006, the Labour Code was amended¹⁸² so that it can include HIV/AIDS as one of the grounds upon which an employee may not be discriminated against in the workplace.¹⁸³ After the 2006 amendment, it suffices to then conclude that the labour code provides HIV/AIDS as one of the grounds upon which an employee may not be excluded, treated with preference or distinction and be discriminated against.¹⁸⁴

In terms of the Labour Code Amendment Act, employees should be provided with HIV information and education,¹⁸⁵ so that they may have knowledge about HIV and for them to know how to treat other employees who are infected with it. Employers on the other hand are required to adopt policies that adhere to principles of confidentiality and non-disclosure of employees and that those policies should not have any discriminatory effect on employees who live with HIV/AIDS in the workplace.¹⁸⁶ In the case of *Baylor College of Medicine v Thabiso Ralenkoane & Another*,¹⁸⁷ the applicant Thabiso Ralenkoane was employed by Baylor College of Medicine of Lesotho, a well-known paediatric HIV/AIDS treatment centre in Lesotho. The applicant occupied a position of a social worker. On a certain day, the applicant

¹⁸¹ S 5(1) of the code states that "The application by any person of any distinction, exclusion or preference made on the basis of race, colour, sex, marital status, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation, is incompatible with the provisions of the Code".

¹⁸² Labour Code Amendment Act No. 5 of 2006.

¹⁸³ For example, Section 235 C. (1) provides that, "An employer shall not require a job applicant or an employee to undergo a direct or indirect HIV testing as a condition of employment, access to the employment, applications or training".

¹⁸⁴ S 235E (1) of the Labour Code (Amendment) Act 2006.

¹⁸⁵ S 235 B (1) of the Labour Code (Amendment) Act 2006.

¹⁸⁶ S 235 D of the Labour Code (Amendment) Act 2006.

¹⁸⁷ *Baylor College of Medicine v Thabiso Ralenkoane & Another LC/REV/100/10 – A.0243/10 (unreported)*.

instructed one of the field trackers to deliver a letter to the family of one of the parents of Baylor. It was mentioned that the letter was a standard letter that bore the letterhead and logo of Baylor and the envelope was not sealed. The field tracker then delivered the said letter to the neighbour's house and left. The child's parents then felt aggrieved by what the applicant and the field tracker did and they alleged that by this act, it was now known by the neighbours that their child was a patient of Baylor which was a specialised institution dealing with issues of HIV/AIDS. Baylor then called the applicant and he was charged with breach of oath of confidentiality which he had sworn to. He was subsequently dismissed.

The applicant then challenged the fairness of his dismissal and the court that the reason for termination was not fair. This decision was made on the basis that a letter could not be said to be in breach of confidentiality, even if it expressly disclosed the patient's HIV status. It can be observed that there are no strict laws that are meant to protect the confidentiality of a patient's HIV status at work.

The Labour Code amendment further provides that employees shall not be discriminated against based on their HIV/AIDS status in issues that relate to promotion, transfer, training or other employee development programmes, job status or other terms of reference of employment.¹⁸⁸

In terms of the Labour Code Amendment Act, employers are compelled to establish and put into practice workplace policies on HIV/AIDS which are aimed at addressing several factors relating to HIV/AIDS, such as provision of care and support to affected employees, and management of the impact of HIV/AIDS in the workplace.¹⁸⁹ These policies should be primarily aimed at addressing the issue of prevention of new HIV infections and protecting infected employees from discrimination and stigma, among other things.¹⁹⁰

¹⁸⁸ S 235 (E) (1) of the Labour Code (Amendment) Act 2006.

¹⁸⁹ Ts'eole N P "Workplace HIV and AIDS management: the case of Thetsane industrial area in Maseru, Lesotho" 2011.

¹⁹⁰ S 235 (K) (1) of the Labour Code (Amendment) Act 2006. See also Ts'eole "Workplace HIV and AIDS management: the case of Thetsane industrial area in Maseru, Lesotho" 2011.

3.5.2 Guidelines for Implementation of the Labour Code Amendment Act.

The Guidelines for Implementation of the Labour Code Amendment Act (the guidelines)¹⁹¹ were developed to achieve only two primary objectives. The first objective of the guidelines is to enhance the implementation of Labour Code (Amendment) provisions about HIV/AIDS at work. Secondly, the guidelines are intended to guide employers and employees in the private sector on how to develop HIV/AIDS policies and programmes, which will address prevention, treatment, care and support and impact mitigation of the HIV/AIDS epidemic.¹⁹²

These guidelines are premised on the principles of non-discrimination, gender equality, confidentiality, prevention, care and support and protection against victimisation, amongst others.¹⁹³ In terms of these guidelines, employers are expected to put in place non-discriminatory policies, which apply equally to all people while also protecting people living with HIV/AIDS against victimisation and disrespect of their privacy. Thus, the guidelines have also gone a step further to provide for equitable access, without discrimination, to employees living with HIV/AIDS in the workplace.

3.5.3 Public Service HIV/AIDS Workplace Policy.

In an attempt to address the issue of HIV/AIDS in the workplace and to give effect to the rights which are enshrined in the Constitution of Lesotho, there have been several legislative initiatives that have been put into operation. As a result thereof, Lesotho adopted the Public Service HIV/AIDS Workplace Policy (*public service HIV/AIDS policy*)¹⁹⁴ in 2007, which was mainly aimed at addressing prevention, treatment, care and support to people living with HIV/AIDS at work and in the public

¹⁹¹ Guidelines for Implementation of Labour Code Amendment Act No. 5 of 2006.

¹⁹² Section 3.1 (i)-(ii) of the Guidelines for Implementation of Labour Code Amendment Act No. 5 of 2006.

¹⁹³ Section 4.1.1 (i)-(xii) of the Guidelines for Implementation of Labour Code Amendment Act No. 5 of 2006.

¹⁹⁴ Public Service HIV and AIDS Workplace Policy, 2007.

sector.¹⁹⁵ The policy also works as a guiding tool for public service management and the employees on how to address this epidemic.

It is worth mentioning that the terms of operation of the public service HIV/AIDS policy are made in conjunction with the legal framework of the Public Service Act of 2005, the Public Service Regulations of 2008, the National AIDS Policy of 2006 and the Gender Policy of 2003.¹⁹⁶ As a result, the public service HIV/AIDS policy thus serves as a guiding tool in the development of HIV/AIDS programmes in terms of the aforementioned laws.¹⁹⁷ The public service HIV/AIDS policy is further intended to sync with the national HIV/AIDS Policy, where the Government has committed to the protection and promotion of its employees' good health and wellbeing.

In terms of the public service HIV/AIDS policy, gender, stigma and discrimination are recognised as major fundamentals upon which an inclusive and complete workplace policy should be premised on.¹⁹⁸ The policy eliminates stigma and discrimination based on actual or alleged HIV/AIDS status.¹⁹⁹ Thus, this policy still recognises that employees living with HIV/AIDS should not be subjected to any acts which discriminate against them based on their health status and that the Government should put in place laws that equally apply to all employees in the public sector, with specific protection of and respect for their privacy and dignity.²⁰⁰

3.6 Discriminatory acts Based On HIV/AIDS in the Workplace: Lesotho

In as much as there are some strides which Lesotho seems to have taken to improve its national legislation and policies to afford protection to the rights of people living with HIV/AIDS in the workplace, there is still a lacuna in effective implementation of national legislation putting in mind its international obligations. This is based on the fact that there are still employees, both in the public and private sector, who

¹⁹⁵ Preamble Public Service HIV and AIDS Workplace Policy, 2007.

¹⁹⁶ Section 5 of the Public Service HIV and AIDS Workplace Policy, 2007.

¹⁹⁷ Section 7.9 of the Public Service HIV and AIDS Workplace Policy, 2007.

¹⁹⁸ 1.1 purpose Public Service HIV and AIDS Workplace Policy, 2007.

¹⁹⁹ 6.1.3 (d) of the Public Service HIV and AIDS Workplace Policy, 2007.

²⁰⁰ Kometsi L "The impact of HIV/AIDS pandemic and the labour laws of Lesotho" LLJ 2013 244.

face many challenges which relate to stigmatisation, inequality, unfair dismissal and discrimination based on their HIV/AIDS status.

3.6.1 *Unfair discrimination*

Lesotho's labour law is aimed at preventing discrimination; however, that is a far cry from what is happening on ground level. It has been observed that, on several occasions, discrimination has been used as a yardstick to determine if a person is employable, or worthy to climb the corporate ladder.²⁰¹

In the case of *Thabo Fuma v The Commander LDF and Others*,²⁰² Mr Thabo Fuma was employed by the Lesotho Defence Force (LDF) at a rank of a Private and in 2006, he tested positive for HIV. It was around this time that he started to lose his sight which had been deteriorating rapidly. In 2007 Dr Muller, an ophthalmic surgeon, declared him legally blind and as a result his case was referred to the medical board. The board issued a report that Mr Fuma was now legally blind.²⁰³ His issue was then referred before the medical board which then later issued a report that Mr Fuma was blind due to the "HIV *sequelae* with cytomegalic virus invasion of the retina and complicated cataracts."²⁰⁴ The medical board concluded that his health condition had been exacerbated by HIV and made recommendations that he be allowed to retire as he was permanently unfit to continue with his military duties.

Mr Fuma was not happy with the medical board's decision and recommendation. He argued that there were other employees within the National Defence National Defence Force who had similar health conditions and who were not forced to retire as Mr Fuma was being obliged to. Mr Fuma mentioned that they had not been diagnosed with HIV. He argued that these employees, with similar medical conditions were rather redeployed in other sections such as store departments

²⁰¹ Kometsi L "The impact of HIV/AIDS pandemic and the labour laws of Lesotho" LLJ 2013 241.

²⁰² *Thabo Fuma v The Commander LDF and Others* CONST/08/2013.

²⁰³ This is different to a clinical /medical blindness in which case one is totally blind. A legally blind person see at 20 feet (6.09m) what a person with typical vision sees at 200 feet. (60.9m) (American Foundation for blindness @ WWW.afb.org 20 feet – 200 feet.

²⁰⁴ *Thabo Fuma v The Commander LDF and Others* CONST/08/2013 para 12.

within the military. They were given other lighter duties to perform and reintegrated back into the system by being offered training in vocational occupations like sewing. It was based on those reasons that he challenged the board's decision to force him to retire on medical grounds, as being discriminatory and in violation of Fuma's right to equality before the law as provided under Section 18 and 19 of the Constitution of Lesotho in that it subjected him to unfair discriminatory treatment against other similar cases.

In response, the respondents attempted to justify their decision, by stating that Mr Fuma had not been discriminated against as his case was considered on its peculiar merits and that he was not in a similar situation as the other employees he had referred to. They pointed out that the other employees' blindness was not HIV related and that this was the reason why the medical board had not recommended that they should retire from the army.

In determining this case, the Constitutional Court made a finding that the applicant's claim was not based on the grounds listed in section 19(3) of the Constitution, but that it was based on a ground which was simply contemplated therein as *the other status* which might have constituted the basis for discrimination. This was motivated by the fact that the impression created by the list in section 19(3) was not exhaustive.²⁰⁵ The court held that the applicant was able, on a balance of probabilities, to prove that he was unconstitutionally discriminated against based on his *other status*, in comparison to the others in the same situation. Mr Fuma was able to convince the court that he had been discriminated against based on his 'other status' that was his visual disability caused by his HIV status.

It was further held that:

The Court has appreciated the logic and the persuasiveness of his lamentation before it. It has ultimately transpired to the Court that the Commander and the Minister's identified violations of the *constitutional equality of treatment* and to his *protection against unconstitutional discrimination* have adversely transcended into his

²⁰⁵ It was made against the background made in *Harsken v Lane 1997 (11) BCLR 1489 (CC) para 53* where It was directed that a complainant who relies upon an unspecified ground would have to establish the unfairness in the discriminative treatment.

constitutional right to *human dignity*. It is against the backdrop of the HIV status which the applicant has established as the basis of his unequal and discriminatory treatment by the 1st and the 2nd respondent respectively that the Court holds that this health condition should be recognized as one of the prohibited grounds for discrimination within the purview of Section 18(3) which contemplates *other grounds* other than those specified therein.

3.6.2 Compulsory HIV testing

Even though it can still be argued that there are laws in Lesotho that prohibit discrimination and deny a person an opportunity to be employed based on his/her HIV status, there are still several institutions that make HIV testing a compulsory prerequisite for employment.²⁰⁶

In the case of *Rametse Mphanya v Metropolitan Lesotho Ltd*, Mr Rametse was employed by Metropolitan Lesotho as an agent consultant on an indefinite and pensionable contract and amongst other tasks, his job was to recruit clients for Metropolitan Lesotho. All employees who worked at Metropolitan Lesotho, needed to join its medical aid scheme. Amongst the terms and conditions of joining the medical aid scheme, employees had to undergo both HIV/AIDS and diabetes testing and they had to declare the results to their employer for them to be allocated to an appropriate plan or scheme. In as much as the case of *Rametse Mphanya v Metropolitan Lesotho Ltd and another*,²⁰⁷ did not directly deal with discrimination and stigmatisation based on HIV/AIDS, it goes to demonstrate the practices which employers still put in place in the workplace, to subject employees to mandatory testing and mandatory disclosure of their HIV/AIDS status.

Those who are subjected to HIV testing in the workplace are being subjected to conducts that infringe on their right to privacy, which in turn manifests into stigmatisation and discrimination. In the case of *Mapitso Lekomola v Century*

²⁰⁶ This has been seen to be taking place in the garments sector, where there seems to be a great number of employees living with HIV/AIDS. See Lesotho Ministry of Health Global AIDS response progress report:2015 follow up to the 2011 political declaration on HIV/AIDS: intensifying effort to the elimination HIV/AIDS. (Accessed on the 3rd August 2022).

²⁰⁷ *Rametse Mphanya v Metropolitan Lesotho Ltd and another CIV/APN/320/2010*.

Clothing Manufactures,²⁰⁸ the applicant was offered employment in the logistics department on a one month probationary contract. It was set as a prerequisite that, during their probationary period, employees should avail their medical examination results to the employer and those reports should indicate that they were in good health to work. The workers were also required, during medical examination, to undergo an HIV testing. All employees complied with the set requirements and produced their medical examination results and the applicant produced her HIV positive results. At the end of the probation period, the applicant received a letter indicating that her probation was unsuccessful and she was not confirmed as an employee. The letter which terminated her probationary period stated that she did not perform well during the four months that she had been on probation. She then approached the Labour Court stating that the reason she was not appointed after the probationary period was not based on either her performance or her conduct at work, but that it was related to her HIV status which was revealed during the medical examination. It was her case that, during all the appraisals that were conducted, she always scored above average and better than some of the employees who were confirmed. During the proceedings, the employer made several concessions which were to the effect that her health status was amongst the factors that were ultimately considered. Before judgment could be delivered, both parties settled the matter and the applicant was allocated a position.

3.7 Conclusion

Although not conclusive, it was demonstrated and argued in this chapter that Lesotho has attempted to fulfil its international obligation of implementing laws and policies which conform to the set international standards, in protecting the rights of people living with HIV/AIDS generally and more specifically in the workplace. These laws and policies underpin the importance of equality and protection of personal dignity, irrespective of their HIV/AIDS status.

²⁰⁸ *Mapitso Lekomola v Century Clothing Manufactures LC/43/2013.*

It was demonstrated that Lesotho is a dualist state and the undomesticated international laws do not have a direct force in the interpretation and application of domestic laws in the courts of law. However, it was also demonstrated that domestic courts, with caution, seldom use international law to interpret the law in cases of ambiguity in domestic law.²⁰⁹

The discussions also showed that the Constitution of Lesotho affords protection against all types of discrimination, including HIV/AIDS status and many other national policies that focus on affording protection to those living with HIV/AIDS against all forms of discrimination in the workplace. The Labour Code was also amended to include HIV/AIDS as one of the grounds upon which an employee may not be discriminated against and it also put in place *Guidelines for Implementation of Labour Code Amendment Act*. However, despite this attempt, there are still grey areas that the guidelines do not address, which are identified in Recommendation 200. This is only because the guidelines were drafted and implemented before Recommendation 200 could come into play; thus, there are several issues that it has failed to cover.

It has been observed that discrimination against people living with HIV/AIDS in the workplace is still a challenge in Lesotho, and there is a need for Lesotho to promote a culture which promotes respect for human rights in order to address discrimination in the workplace. Discrimination in the workplace still manifests itself in the workplace despite the fact that Lesotho is a party to various international treaties that do not allow discrimination on the basis of HIV/AIDS, which also promotes rights to equality, dignity and health.

Whilst we still maintain that Lesotho has attempted to a greater extent to comply with its international obligation, it remains evident that there are still some issues relating to the protection of people living with HIV/AIDS that need to be addressed.

²⁰⁹ In the cases of *Molefi Ts'epe and Thabang Fuma* which were discussed above, the courts made huge pronouncements and relied on international law to influence its decisions in enforceability of the rights enshrined in the Constitution, highlighting Lesotho's international obligation as reflected in international instruments.

It is often said that a right, which cannot be enforced, is no right at all,²¹⁰ and that promoting respect for human rights is enforcement of rights in the national justice system, hence the need to improve the status quo. The findings illustrated above show that although there may be laws in place that prevent discrimination, it is still evident that discrimination due to HIV/AIDS exists. Unless these rights can be enforced at national level, they still remain unrealisable for many people who are subjected to discriminatory conducts based on their HIV/AIDS status in the workplace, without proper recourse in the courts of law.

In the following chapter, South Africa's position is discussed to highlight what lessons, if any, Lesotho may learn. In that regard, South Africa's legal and institutional framework is used as a benchmark.

²¹⁰ Chidi Odinkalu, "Implementing Economic, Social and Cultural Rights under the African Charter on Human and Peoples Rights in M. Evans and R. Murray (eds.) *The African Charter on Human and Peoples' Rights: The System in Practice*".

Chapter 4

4 South Africa's legislative and policy framework in affording protection to employees living with HIV/AIDS in the workplace - lessons for Lesotho

4.1 Introduction

The previous chapter evaluated the law which Lesotho has put in place which is aimed at protecting people living with HIV/AIDS in the workplace. In this chapter, it is observed which strides South Africa has taken in implementing its national law; legislative and policy framework to protect employees living with HIV/AIDS in the workplace in line with its international mandate.²¹¹

It was previously discussed that the ILO makes special provisions for protection of people living HIV/AIDS in the workplace against all kinds of discrimination based on their health status. Similarly, South Africa has put in place measures that are aimed at affording the same protection. In as much as the initial response to HIV/AIDS in general, was "lukewarm and slow", South Africa rose to be one of the nations to be able to cope with the epidemic.²¹² This was following the initiation of the National AIDS Convention of South Africa (NACOSA) which then opened doors for the establishment of both legal and none legal standards which are intended for the HIV/AIDS epidemic in general.²¹³

South Africa has since enacted several laws and policies describing duties and providing guidelines on both employers and workers in addressing the HIV epidemic in the workplace. This chapter is therefore aimed at setting out available legislative and policy frameworks as well as the extent to which they comply with the

²¹¹ Zungu-Dirwayi "An audit of HIV/AIDS policies in Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe" Human Sciences Research Council 2004 21.

²¹² Natrass "The Moral Economy of AIDS in South Africa (2010) 41.

²¹³ Natrass "The Moral Economy of AIDS in South Africa (2010) 52.

international standards on the rights of people living with HIV/AIDS in the workplace, drawing lessons which Lesotho may learn from South Africa.

4.2 Background to HIV/AIDS in South Africa

The Republic of South Africa is considered to be one of the countries with the highest HIV/AIDS prevalence in the world and numbers show that between 5 to 6 million South Africans live with this disease.²¹⁴ Ghood *et al* estimate that, by 2030, the country will have lost an equivalent of 40% - 50% of the current workforce as a result of HIV/AIDS.²¹⁵ This will have a direct impact on the labour market and put the economy at risk

Having regarded the impact which HIV/AIDS potentially has on the South African economy, the Government, in collaboration with the business community, has made it a priority to fight it.²¹⁶ Tarma *et al* state that the time has come for "South African companies to start feeling the effect of HIV/AIDS and there is still a long way to go in minimising the effect of the epidemic on businesses".²¹⁷ Since most of the affected adults are of working age, it becomes clear that profit margins will also be affected. To address that issue, the South African Government has put in place laws which are aimed at managing HIV/AIDS effectively and these are discussed hereunder.

4.3 Legislative provisions on employees living with HIV/AIDS

South Africa has taken steps that are aimed at fulfilling its international duties and obligations of ensuring that people living with HIV/AIDS are protected in the workplace. It is demonstrated that there are several policies and laws which have been enacted to guarantee such protection and these are subsequently discussed.

²¹⁴ Ghood and Conradie "HIV/AIDS Management Course for HealthCare Professionals" 2017 9.

²¹⁵ Ghood and Conradie "HIV/AIDS Management Course for HealthCare Professionals" 2017 375.

²¹⁶ Tamar Khan "HIV/AIDS takes its tool in SA Companies" Health care systems trust bulletin 2015.

²¹⁷ Tamar Khan "HIV/AIDS takes its tool in SA Companies" Health care systems trust bulletin 2015.

4.3.1 *The Constitution of the Republic of South Africa 1996*

The Constitution of South Africa²¹⁸ (the Constitution) has been renowned as one of the constitutions in the world that is international law friendly.²¹⁹ Tladi *et al* state that this is based on the fact that it provides, amongst others, that the Bill of Rights must be interpreted by taking into consideration international law.²²⁰

Chapter 2 of the Constitution of the Republic of South Africa²²¹ provides for the Bill of Rights that guarantees, amongst others, civil, political, economic, social and cultural rights and all these rights affect people living with HIV/AIDS directly and indirectly. Of relevance are provisions of the Constitution which deal with the right to equality,²²² the right to human dignity,²²³ the enforcement of privacy²²⁴ and the right to fair labour practices.²²⁵

Section 8 of the Constitution clearly states that the Constitution binds all three arms of Government as well as all other organs of state.²²⁶ Cheadle *et al* state that the Constitution has both horizontal and vertical applications.²²⁷ Horizontal application, in that it makes provision for the Bill of Rights which guides in terms of how natural or juristic persons should interact with one another.²²⁸ They also state that the Constitution has a vertical application in the sense that it restricts the state to enact laws and policies that are in line with its vision and purpose.²²⁹

²¹⁸ Constitution of the Republic of South Africa Act 108 of 1996
<https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996-1>. (Accessed 3 January 2022).

²¹⁹ Tladi "interpretation and international law in south Africa: The Supreme Court of Appeal and the Al Bashire saga 2016" 16 African Human Rights Law Journal 311.

²²⁰ S 39(1) of the Constitution.

²²¹ <https://www.gov.za/documents/constitution/constitution-republic-south-africa-1996>. (Accessed 10 November 2021).

²²² S 9 of the Constitution.

²²³ S 10 of the Constitution.

²²⁴ S 14 of the Constitution.

²²⁵ S 23 of the Constitution.

²²⁶ The executive, the judiciary and legislature.

²²⁷ Cheadle, Davis, "South African Constitutional Law" The Bill of Rights 2014 22.

²²⁸ Cheadle, Davis, "South African Constitutional Law" The Bill of Rights 2014 22.

²²⁹ Cheadle, Davis, "South African Constitutional Law" The Bill of Rights 2014 21.

The Constitution entrenches the Bill of Rights which provides for fundamental human rights and their limitation concerning the protection of fundamental human rights in South Africa. All human rights provided in the Constitution are made in line with the rights under the International Bill of Human Rights. These rights are also extended to all employees in South Africa as well as to people who are living with HIV/AIDS. The Constitution has core values that include equality, privacy and dignity and all policies must foster the principles of human rights contained in the Constitution.

Section 9 of the Constitution provides for the right to equality before the law and the right to equal protection for all people who live in South Africa. Section 9(3) encloses within itself, a non-discrimination clause which reads as follows:

The state may not unfairly discriminate directly or indirectly against any person on one or more grounds including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

The Constitution further guarantees protection of the right to privacy and states that a person's right to privacy should not be infringed.²³⁰ A person's sensitive and private information may not be disclosed without the person's consent. In a case where a person does not wish to disclose his or her HIV status, they may not be forced to do so. This right is further reinforced in the working environment by labour laws which are discussed hereunder.

In the case of *Jansen Van Vuuren & NNO v Kruger*,²³¹ a doctor had disclosed the HIV status of a patient to other doctors who were not treating the particular patient. The Supreme Court held that what the doctor did amounted to an unwarranted disclosure of a patient's sensitive and private health status and that act infringed on

²³⁰ S 14(d) of the Constitution.

²³¹ 1993 (4) SA 842 (A).

the patient's right to privacy. The court further held that doctors had ethical and legal duty to preserve patients' confidential information.²³²

However, some authors have greatly criticised the doctor's duty not to disclose a patient's HIV status.²³³ McLean *et al*/pointed out that the doctor's duty to disclose a patient's health status should be extended to instances where such disclosure is intended to save the lives of others - spouses or partners.²³⁴ They argued that in all circumstances, a case-based approach should be adopted to make a correct determination of whether it is justifiable to disclose the HIV status of a patient. It can thus be concluded that employers have a statutory obligation to keep their employees' HIV/AIDS status confidential unless an employee gives consent or there is a court order to that effect.²³⁵

The case of *Harksen v Lane NO*²³⁶ has been used as a yardstick in interpreting the equality clause as provided in the Bill of Rights. The three-stage inquiry that is often referred to as the *Harksen* test was used by the Constitutional Court in the case of *Hoffman* to determine whether it was justifiable to exclude him from employment based on his HIV status. In the case of *Hoffman v SA Airways*,²³⁷ the High Court held that it was justifiable to discriminate against Hoffman on his HIV status as long as the differentiation had a rational connection with a legitimate purpose of the Government.²³⁸ However, the Constitutional court²³⁹ held that SAA had infringed Mr Hoffmann's constitutional right not to be unfairly discriminated against. It was held that not every person who is HIV positive poses the risks as alleged by SAA, but only those who are at the immunosuppressed stage. Mr Hoffmann was not immunosuppressed either at the time he applied for the position or when he brought the matter to the Constitutional Court. The practice of other airlines was not relevant

²³² 1993 (4) SA 842 (A) at 850E.

²³³ Blackbeard M "HIV/AIDS: the right to privacy v the right to life" 2002(65) THRHR 232 para5.

²³⁴ MacLean GR "HIV Infection and a limit to confidentiality" 1996 SALHR 452.

²³⁵ Mahshad, Maliheh, Mansure Pooner "To tell or not to tell: Confidentiality in an Iran HIV positive patient: A view point" *Journal of family and reproductive health* 2017 13. Also available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5664990/> (Accessed 15 February 2022).

²³⁶ *Harksen v Lane NO 1998 (1) SA 300 (CC)*.

²³⁷ *Hoffmann v South African Airways 2000 SA (2) SA 628 (W)*.

²³⁸ *Hoffmann v South African Airways 2000 SA (2) SA 628 (W) para 26*.

²³⁹ *Hoffmann v South African Airways 2000(1) SA 1(CC)*.

in determining the constitutionality of SAA's actions. People living with HIV have been stigmatised and as one of the most disadvantaged groups in society deserve special protection from our law. The Constitutional Court upheld the appeal and set aside the decision of the High Court.

Cheadle *et al*/go further to argue that section 9 of the Constitution is not closed and that any ground not listed in the Constitution can still be regarded to be unfair discrimination as long a litigant can prove that he or she received treatment that has attributes or characteristics that impair on their right to dignity.²⁴⁰

Equality, as provided by section 9 of the Constitution and the right to human dignity, as provided by section 10, are directly interrelated. Section 10 of the Constitution provides for one of the core values of the Constitution, which is the right to dignity. Devenish *et al*/state that human dignity is probably the most important right in the Constitution.²⁴¹ It has been emphasised that the right to dignity is one of the rights which is at the heart of the prohibition against unfair discrimination.²⁴²In as much as the decision in the case of *S v Makwanyane*,²⁴³ was based on section 8 of the Interim Constitution of 1993, the equality clause under the 1996 Constitution still has similar provisions. The Constitutional Court held that:

The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings; human beings are entitled to be treated as worthy of respect and concern. The right, therefore, is the foundation of many other rights that are specifically entrenched in Chapter 3.²⁴⁴

It is therefore argued that the right to dignity is important to all employees living with HIV/AIDS and guarantees that they should not be subjected to any degrading

²⁴⁰ Cheadle, Davis, "South African Constitutional Law" The Bill of Rights 2014 22. See also *Harksen v Lane NO 1998 (1) SA 300 (CC) 44*.

²⁴¹ Devenish G "The South African Constitution" 61.

²⁴² Cheadle, Davis, "South African Constitutional Law" The Bill of Rights 2014 59.

²⁴³ *S v Makwanyane 1995(3) SA 391 (CC)*.

²⁴⁴ *S v Makwanyane 1995(3) SA 391 (CC) at 328*.

treatment or stigmatisation. This right has been said to be the foundation of many human rights, including physical integrity.²⁴⁵

With regard to the stigma and stereotype that are linked with HIV/AIDS, it may be reasonably deduced that a person with HIV/AIDS may lose their dignity, if it is known to other people that they have acquired this virus. It can also be concluded that, once pretesting is used as a prerequisite for employment, it can be regarded as a direct infringement of a person's right to be treated with dignity. In terms of section 14 of the Constitution, everyone is guaranteed the right to privacy. As a result of the section, everyone has the right to privacy which includes the right not to have them, or their home searched, to have their possessions taken away from them, or for their private communications intercepted.

It was in the case of *Bernstein and Others v Bester NO and others*,²⁴⁶ where the court held that:

A very high level of protection is given to the individual's intimate personal sphere of life and the maintenance of its basic preconditions and there is a final untouchable sphere of human freedom that is beyond interference from any public authority. So much so that, in regard to this most intimate core of privacy, not justifiable limitation thereof can take place...

This reinforces the fact all people have the right to privacy, including people living with HIV/AIDS as afforded by section 14 of the Constitution. This right is extended into the labour sphere by making it clear that an employee is not required to disclose his or her HIV status without their consent.²⁴⁷

The Constitution further provides for the protection of the right to fair labour practices in an employment environment.²⁴⁸ This includes all practices that come as a result of an established employment relationship between the employer and the

²⁴⁵ Cheadle "Fundamental Rights in the new Constitution" 2 ed 1997 273.

²⁴⁶ *Bernstein and others v Bester NO and others* 1996 (2) SA 751 (CC).

²⁴⁷ S 7(2) of the EEA.

²⁴⁸ S 23 of the Constitution.

employee.²⁴⁹ Cheadle *et al* argue that the right to fair labour practices was incorporated into the Constitution as one of the provisions which are aimed at providing support of the public service for the new Constitutional dispensation and also to create harmony in the public service which will be a representative of the South African community.²⁵⁰ These rights are discussed in detail later in this study.

Section 23(1) of the Constitution states that "everyone has the right to fair labour practices". In the case of *NEHAWU v University of Cape Town*,²⁵¹ the court was tasked with determining the meaning of section 197 of the LRA, on whether upon transfer of a business as a going concern, the employees were automatically transferred with the business without any agreement stating that between the transferor and transferee. Amongst the issues which the court discussed, *obiter dictum* was made that the right to fair labour practices should be equally enjoyed by both employers and employees, in creating a balance between their competing interests and building sound working relations.²⁵²

Section 27 of the Constitution proves that everyone has the right to access health care services and that the states should take reasonable legislative steps to achieve the realisation of the right to health care. It can therefore be argued that this right is available to every citizen and can also be extended to people living with HIV/AIDS, as they are identified to be amongst the vulnerable groups of society.

Section 36(1) of the Constitution recognises that the rights contained in the Bill of Rights, that afford protection to all people, including those living with HIV/AIDS, are not absolute. "These rights may be limited in terms of the law of the general application for reasonable and justifiable reasons, considering five listed factors which include the nature of the right, the importance of the purpose of the

²⁴⁹ *NEHAWU V University of Cape Town and Others 2003 (3) SA 1 (CC) para 40.*

²⁵⁰ H. Cheadle "Fundamental Rights in the new Constitution" 2 ed 1997 209.

²⁵¹ 2003 5 BLLR 409 (CC).

²⁵² *NEHAWU V University of Cape Town and Others 2003 (3) SA 1 (CC) para 40-41.*

limitation, the nature and extent of the limitation, the relation between the limitation and its purpose and the less restrictive means to achieve the purpose".²⁵³

4.4 Labour legislation protecting people living with HIV/AIDS

It has already been stated above that states have an international obligation to enact laws that are intended to prevent and prohibit discrimination against all people. This obligation is shown by ratification of Convention on Discrimination (Employment and Occupation),²⁵⁴ making specific provisions in the Constitution²⁵⁵ as well as enacting labour laws that are specifically designed to deal with all kinds of discrimination in the workplace, as discussed below.

4.4.1 Employment Equity Act

In giving effect to section 9 of the Constitution, South Africa has enacted the Employment Equity Act (EEA),²⁵⁶ which is primarily aimed at achieving equality in the workplace. The EEA promotes, amongst other things, fair treatment of employees and elimination of all forms of discriminatory acts in the workplace²⁵⁷ while conducting recruitments, appointments, remuneration, employment benefits, terms and conditions of employment, promotions and dismissals.²⁵⁸

The EEA is regarded as the only act applicable in the labour sphere which is specifically designed to address issues of discrimination and equality against people living with HIV/AIDS in the workplace.²⁵⁹ Section 6(1) of the EEA provides a list of similar grounds as section 9 of the Constitution upon which an employee may not be unfairly discriminated. Of importance to the listed grounds is that an employee

²⁵³ S 36(1) of the Constitution.

²⁵⁴ South Africa ratifies the Discrimination (Employment and Occupation) Convention, 1958 (No. 111) on 5 March 1997.

²⁵⁵ S 9 and 23 of the Constitution.

²⁵⁶ Employment Equity Act No 55 of 1998.

²⁵⁷ S 5 of the EEA.

²⁵⁸ S 1 of the EEA.

²⁵⁹ In terms of section 4 of the EEA, the Act does not apply to members of the security services; the National Defense Force, National Intelligence Agency, South African Secret Service.

may not be subjected to unfair discrimination in the workplace directly or indirectly,²⁶⁰ based on gender, sex, disability and HIV/AIDS status.²⁶¹

The case of *Transport and General Workers Union and another v Bayete Security Holding*,²⁶² related to a claim of equal pay for work of equal value. It was the claimant's case was that he was unfairly discriminated on the basis of the grounds listed under section 6(1) of the EEA. The court pointed out that once a party alleges that he or she has been discriminated on a particular ground means that the alleged ground is the reason for unequal ground which is complained of. It showed that an employee had a burden of proof to establish that the differentiation complained about was made on the listed grounds of section 6(1) of the EEA for him or her to successfully claim that he or she was unfairly discriminated at work. The court further pointed that the mere existence of unequal treatment in the workplace is not discrimination on its own, but that the differentiation and unequal treatment should be the reason for the unequal treatment.

The case of *Swanepoel v Western Region Council and another*,²⁶³ on the other hand, demonstrates a situation where an applicant failed to prove to the court that her alleged differentiation had been made based on any of the listed grounds under section 6(1) of the EEA. The applicant had acted in a more senior position for a period over 2 years without being confirmed as a substantive holder of that position. The applicant claimed that she had the required qualifications to hold that office, and that while she was acting, her immediate supervisor praised her performance, and that they were impressed by her diligence, trustworthiness and all-round abilities. The employer had failed to recruit her to that position, on the basis of a policy of affirmative action which it had been implemented. She alleged that failure

²⁶⁰ Gaibe 2015 32-33 states that "Direct discrimination occurs when an employee is treated unfavorably because they possess certain characteristics as those listed under section 6(1) of the EEA. Indirect discrimination occurs where the employer's practices or policies appear to have a uniform application on all employees whereas in operation, they negatively impact on certain groups of employees due to their characteristics".

²⁶¹ S 6(1) of the Employment Equity Act.

²⁶² *Transport and General Workers Union and another v Bayete Security Holding* 1999 20 JU 1117, see also *Harken v Lane NO and others* 1998 (1) SA 300.

²⁶³ *Swanepoel v Western Region Council and another* 1998 19 JU 1418 (SE).

on the part of the employer to permanently appoint her in that position discriminated against her based on her gender, her race and her political affiliation. The court held that there was no evidence produced which supported the subjective contention that she was unfairly discriminated. Also, in the case of *Walters v Transitional Local Council and another*,²⁶⁴ the court held that the applicant had failed to prove that there had been any evidence that he had been discriminated against on the grounds of political opinion as he had failed to prove the political opinion of the alleged beneficiary.

Section 11 of the EEA points out that, in an instance where an employee has been able to establish a *prima facie* case and that they have been subjected to discriminatory acts on any of the listed grounds, the onus shifts to the employer to show that the discrimination has been fair. In the case of *Association of Professional Teachers and another v Minister of Education and others*,²⁶⁵ the employer was required to justify why the alleged discrimination or differentiation should be permitted by law. The case related to a policy which the employer had put in place, to exclude married women teachers from an entitlement of housing allowance based on their sex and marital status. The court adopted a strict approach and held that any kind of differentiation on those grounds is only allowed in very limited circumstances. It was ruled that denying a home owner's allowance to married women teachers amounted to sex discrimination and was therefore an unfair labour practice

In the famous case of *Woolworths v Whitehead*,²⁶⁶ a pregnant woman claimed that she was not appointed to a permanent position because she was pregnant. The Labour Appeal Court concluded that the basis why she was not appointed to a permanent position had nothing to do with her being pregnant, but was based on the availability required by the said position which she would not be able to fill. The court found that the continuity of the said position was a justifiable inherent

²⁶⁴ *Walters v Transitional Local Council and another* (2001) 1 BLLR 98 (LC.).

²⁶⁵ *Association of Professional Teachers and another v Minister of Education and others* 1995 16 JU 1048.

²⁶⁶ *Woolworths v Whitehead* 2000 21 ILJ (LAC) para 121.

requirement of that position. It was then concluded that the inherent requirements of a particular job become a clear and valid defence which is also in line with ILO Conventions.²⁶⁷

However, in terms of section 6(2)(b) of the EEA, unfair discrimination does not include "any distinction, exclusion, preference in respect of a particular job based on inherent requirements". Section 6(2)(a) further provides that any affirmative action measures which are intended to address any imbalance in the society may not be regarded as unfair discrimination. The court in the case of *Swanepoel v Western Region Council and another*,²⁶⁸ reaffirmed this position by stating that an employer is allowed to establish affirmative action measures that are consistent with the purpose of the EEA, and they serve as a complete defence against a claim of unfair discrimination, and rebuts any assumption of unfair discrimination based on race, gender or disability.²⁶⁹

It should however be noted that it is often difficult to identify someone who is HIV positive in the first two phases of the infection as they generally do not depict any signs of illness and they are still able to carry out their normal duties.²⁷⁰ It is ever so often in the last phase of the illness if a person has not received medical attention that they start to show signs of illness and may be unable to carry out certain tasks due to the disease.²⁷¹ Therefore, it becomes unfair to exclude or discriminate against people who are HIV positive based on their status, even though they are still able to carry out their duties as expected. If an employee is incapable to render any services, they may be excluded from work due to illness or incapacity and not necessarily based on their HIV status.²⁷²

²⁶⁷ Article 1(2) of ILO Convention concerning Discrimination in respect of Employment and Occupation NO 111 states "That any distinction, exclusion, preference in respect of a particular job based on inherent requirements thereof shall not be deemed to be unfair discrimination".

²⁶⁸ *Swanepoel v Western Region Council and another 1998 19 JU 1418 (SE)*.

²⁶⁹ *Swanepoel v Western Region Council and another 1998 19 JU 1418 (SE) para 13*.

²⁷⁰ Blackbeard M "HIV/AIDS: the right to privacy v the right to life" 2002 (65) THRHR 232 para 7.2.

²⁷¹ Blackbeard M "HIV/AIDS: the right to privacy v the right to life" 2002 (65) THRHR 232 para 8.3.

²⁷² Blackbeard M "HIV/AIDS: the right to privacy v the right to life" 2002 (65) THRHR 232 para 7.2.

In circumstances where the employer has failed to create a safe working environment in taking appropriate measures to eliminate and guard against all kinds of discrimination at his or her place of work, such an employer may be held vicariously liable for the discrimination which is made by employees against employees living with HIV.²⁷³ Therefore, an employer must also put in place policies that are intended to provide protection to every employee despite their health status and to deal with all cases reported to him relating to discrimination. McGregor *et al* point out that the court may order an employer who has taken no reasonable steps after incidents of discrimination have been reported to him to pay damages and also to be instructed to take appropriate measures which will be aimed at preventing similar incidents from taking place in the future.²⁷⁴

In terms of section 7(2) of the EEA, an employer is not allowed to require an employee to undergo HIV testing for purposes of determining their HIV status. It is only under circumstances listed under section 50(4) of the EEA upon application to the Labour Court, that conditional authorisation to test an employee may be granted.²⁷⁵ If conditional authorisation is granted, the Labour Court shall then impose on the employer, conditions relating to counselling of the employees, confidentiality of the HIV status, the period which the authorisation of the testing applies and also the category of employees which the authorisation to test applies to.²⁷⁶

Basson *et al* highlight that the issue of HIV testing cuts across many segments of life and also possesses complex social, ethical and legal questions.²⁷⁷ They point out that, due to the high unemployment rate, some people who are applying for jobs may find themselves "voluntarily" disclosing their health status with the hope that

²⁷³ S 60(3) of the EEA.

²⁷⁴ McGregor 2002 Juta's Bus. L 102.

²⁷⁵ S 50(4) of the EEA provides that "If the Labour Court declared that the medical testing of an employee as contemplated in section 7 is justifiable, the court may make any order that it considers appropriate in the circumstances, including imposing conditions relating to (a) the provision of counselling, (b) the maintenance of confidentiality, (c) the period during which the authorisation for any testing applies: and (d) the category or categories of jobs or employees in respect of which the authorisation for testing applies.

²⁷⁶ S 50(4) of EEA.

²⁷⁷ Basson A "The new essential Labour Law" 2019 7th ed 205.

they may be able to secure some employment. In as much as it may be seen as voluntary disclosure, more often than not they are forced to do so by economic considerations which they are faced with on a daily basis.²⁷⁸ The EEA has therefore been able to limit the employer's prerogative to subject employees to HIV testing as a prerequisite for job applications, conducting recruitments, appointments, remuneration, employment benefits, terms and conditions of employment, promotions and dismissals.²⁷⁹

In the case of *Joy Mining Machinery-A Division of Harnischfeger (SA) Pty Ltd v National Union of Mine Workers*,²⁸⁰ the employer together with the trade union sat down and agreed that the employer should conduct anonymous and unlinked HIV testing at the workplace with the purpose to determine the prevalence of HIV in the workplace. The Labour Court granted that application after being convinced that there was a genuine consent of the employees to be tested for HIV and also after considering factors such as the employer's policy on prohibition of unfair discrimination in the workplace, the need and purpose of the testing, the inherent requirements of the job, how the tests were financed and others.²⁸¹

It can thus be seen that the EEA is an important piece of legislation that regulates protection to employees from being unfairly discriminated against based on their health status. The act further provides for the right of employees not to be subjected to arbitrary HIV testing without their consent and for their right to privacy to be respected at all times.²⁸²

4.4.2 *The Labour Relations Act*

The Labour Relations Act (LRA)²⁸³ came into operation in 1996 and it is intended to give effect to section 23 of the Constitution as well as to give effect to South Africa's

²⁷⁸ Basson A "The new essential Labour Law" 2019 7th ed 207.

²⁷⁹ S 5 and S 6 of the EEA.

²⁸⁰ *Joy Mining Machinery-A Division of Harnischfeger (SA) Pty Ltd v National Union of Mine Workers (2002) 23 ILJ 391 (LC)*.

²⁸¹ *Joy Mining Machinery-A Division of Harnischfeger (SA) Pty Ltd v National Union of Mine Workers (2002) 23 ILJ 391 (LC) para 22-23 at 399*.

²⁸² This is with exception to where the employer has complied with section 50(4) of the EEA.

²⁸³ The Labour Relations Act (LRA) NO 66 of 1995.

public international law obligations relating to labour relations, as a member of the ILO.²⁸⁴ The primary objective of the LRA is to "advance economic development, social justice, labour justice, labour peace and democratisation of the workplace."²⁸⁵ Provisions of the LRA are interpreted with the aim to give effect to its primary objectives, in compliance of the provisions of the constitution, as well as compliance with the public international obligation of South Africa.²⁸⁶

As indicated above, the EEA is used as the primary piece of legislation that regulates equality and unfair discrimination in the workplace. The LRA takes that initiative further by making provisions for both collective and individual labour law, which regulate, amongst others, the right not to be unfairly dismissed and the right not to be subjected to unfair labour practices.²⁸⁷

In terms of the LRA, dismissal of an employee is deemed to be fair if a proper procedure has been followed and when it was for a fair and valid reason.²⁸⁸ A dismissal is deemed to be automatically unfair if the employer discriminates against the employee based on any of arbitrary grounds listed under section 187(1)(f) of the LRA.²⁸⁹ In as much as HIV status is not listed, when section 187(1)(f) is read with section 6(1) of the EEA, it can be safely concluded that termination of an employment relationship based on HIV status alone amounts to unfair dismissal. In the case of *Bootes v Eagles Inc System KZ Natal (Pty) Ltd*,²⁹⁰ Pillay J stated that even though HIV status was not one of the grounds listed under the LRA, it constituted as one of the grounds envisaged in section 187(1) of the LRA.

Under the LRA, an employee may only be dismissed fairly for reasons relating to misconduct committed by him or her, the capacity of an employee and for

²⁸⁴ S 1 of the LRA.

²⁸⁵ S 1 of the LRA.

²⁸⁶ S 3(a)(b)(c) of the LRA.

²⁸⁷ S 185 (a) (b) of the LRA.

²⁸⁸ Schedule 8 of the Code of Good Practice: Dismissal of the LRA.

²⁸⁹ S 187(1)(f) of the LRA provides that: "A discrimination is automatically unfair if the employer, in dismissing the employee, unfairly discriminates 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."

²⁹⁰ *Bootes v Eagles Inc System KZ Natal (Pty) Ltd* (2008) 29 ILJ 139 (LC).

operational requirements. The employer has in all instances the onus to prove that there was a fair and valid reason to terminate the employment relationship. Failure to do so renders the dismissal to be unfair.²⁹¹

In the case of *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd*,²⁹² the applicant was dismissed for having committed acts of breach of trust and confidentiality, for having not disclosed that he was HIV positive and because he was allergic to penicillin. Allpass, on the other hand, argued that the sole reason why he was dismissed was because of his HIV status. He indicated that it was only after he disclosed his status that he was summarily dismissed. The court ruled in favour of Allpass and found that his dismissal was automatically unfair in terms of section 187(1) (f) of the LRA, as it was based on his HIV status.

4.4.3 Basis Conditions of Employment Act

As stated in the preamble of the Basic Conditions of Employment Act (BCEA),²⁹³ it was enacted with the primary purpose to give effect to fair labour practices as provided by section 23(1) of the Constitution of South Africa, in conformity with the standards of the ILO.²⁹⁴ All provisions of the BCEA automatically form part of all employment contracts where the act is applicable.²⁹⁵

In terms of section 22 of the BCEA, employers should see to it that all employees receive an amount of paid sick leave which is equal to the number of days which the employee works in six weeks.²⁹⁶ However, an employer is not under any obligation to pay sick leave if the employee has been absent from work two consecutive days in eight weeks, or if an employee fails to produce a valid sick note indicating that the employee was unable to work due to sickness or injury.²⁹⁷

²⁹¹ S 188 of the LRA.

²⁹² *Gary Shane Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre (LC) unreported, JS 178/09*

²⁹³ Basis Conditions of Employment Act NO 77 of 1998.

²⁹⁴ S 2(b) of the BCEA.

²⁹⁵ S 4 of the BCEA.

²⁹⁶ S 22(2) of the BCEA.

²⁹⁷ S 23(1) of the BCEA.

4.4.4 Occupational Health and Safety Act

The Occupational Health and Safety Act (OHSA)²⁹⁸ was enacted with the purpose to down regulations that are intended to assist in the creation of a safe and healthy working environment. Section 9 of OHSA states that “every employer shall provide and maintain as far as reasonably practicable, a working environment that is safe and without risk.” This section puts an obligation on the employer to take appropriate measures to prevent situations that may result in the spread of HIV/AIDS in the workplace. HIV/AIDS cannot be transmitted in ordinary working conditions unless there is blood contact. Thus, employers are required to create a working environment where people are not subjected to cases of blood contact. On the other hand, section 14 of OHSA imposes an obligation on the part of employees to take reasonable care of their health and the health of other employees who may be affected by their actions or omissions.

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

In terms of section 54(1) of the EEA, the Minister of Labour has the authority to advise the Commission to establish and to issue any code of good practice and to also change or replace a code of good practice. Being aware of the severity of HIV/AIDS and the impact it has and is likely to have on the economic sector of South Africa, the Minister of labour saw it fit to establish the Code of Good Practice: Key Aspects of HIV/AIDS and Employment (The Code).²⁹⁹ The Code identifies HIV/AIDS as “a serious public health problem with socio-economic, employment and human right implication.”³⁰⁰

²⁹⁸ Occupational health and safety Act NO 85 of 1993.

²⁹⁹ Code of Good Practice: Key Aspects of HIV/AIDS and Employment 2000.

³⁰⁰ Para 1 of the introduction of Code of Good Practice: Key Aspects of HIV/AIDS and Employment 2000.

The Code has been established in line with both the ILO and UN principles which South Africa is a member of and it is intended to offer guidance to employers, employees and trade unions on how to deal with HIV/AIDS in the workplace.³⁰¹ The Code offers guidelines that may be used in the workplace to develop workplace policies that are aimed at eliminating HIV/AIDS discrimination at work. The Code has been established on the principles which are intended to promote equality and non-discrimination between people living with HIV/AIDS and also to create an enabling working environment for everyone.

In terms of section 6 of the Code, HIV/AIDS people are protected against any kind of discriminatory acts which are based on their HIV/AIDS status in the workplace. The term workplace has been given a broader meaning to also include self-employed people and people who are working in the informal economy.³⁰² Employers are placed with an obligation and duty to provide as reasonably practicable, a safe workplace.³⁰³ Paragraph 5.3.7 of the Code goes further to state that, if an employee is infected by HIV as a consequence of occupational exposure to infected blood, or bodily fluid, they may apply for benefits in terms of section 22(1) of the Compensation for Occupational Injuries and Diseases Act.³⁰⁴

4.4.2 The Promotion of Equality and Prevention of Unfair Discrimination Act

The Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA)³⁰⁵ has been enacted to provide coverage to all people who are not covered by the EEA

³⁰¹ The Code's objective is also "To provide guidance to employers, employees and trade unions on how to manage HIV/AIDS within the workplace by (i) creating a safe working environment for all employers and employees (ii) developing procedures to manage occupational incidents an claims for compensation;(iii) introducing measures to prevent the spread of HIV; (iv) developing strategies to assess and reduce the impact of the epidemic upon the workplace; and (v) supporting those individuals who are infected or affected by HIV/AIDS also that they may continue to work productively for as long as possible". Preamble of the Code.

³⁰² Para 4.2 of the Code of Good Practice: Key Aspects of HIV/AIDS and Employment 2000.

³⁰³ Para 5.3.6 and para 8 of the Code of Good Practice: Key Aspects of HIV/AIDS and Employment 2000.

³⁰⁴ Compensation for Occupational Injuries and Diseases Act NO 130 pf 1993.

³⁰⁵ The promotion of Equality and Prevention of Unfair Discrimination Act No 4 of 2000.

against unfair discrimination.³⁰⁶ It is binding on the state and to all persons. It is however not applicable in the workplace.³⁰⁷ The preamble of PEPUDA states that it is intended to give effect to section 9 of the constitution, read with item 23(1) of schedule 6 of the constitution, to prevent and prohibit unfair discrimination and harassment and to provide equality and elimination of unfair discrimination.

It can be seen from the above quotation that PEPUDA is founded on principles that are intended to advance the promotion of equality and prevention of unfair discrimination. Section 1 of the act defines discrimination as any commission or omission which may be in the form of policies, laws, rules, conditions, or situations which may potentially "impose burdens, obligations or withholds benefits, opportunities or advantages,"³⁰⁸ from any person on the prohibited grounds.

It is therefore important to highlight that, over and above the listed grounds which constitute discrimination, the act also lists grounds upon which discrimination is prohibited.³⁰⁹ The Act further goes on to define HIV status to include "actual and perceived presence in a person's body of HIV or symptoms of AIDS". The Act also states that no-one may be subjected to medical experiments without their informed consent as that falls within prohibited unfair practices³¹⁰ and that no-one may be unfairly disadvantaged or unreasonably refused grants based on their HIV/AIDS status.³¹¹ In terms of section 34(1) of PEPUDA, HIV/AIDS is included in the definition of the prohibited grounds on which a person may be discriminated. It mentions that in the view of the impact which HIV/AIDS status has on the society and the link to systemic disadvantage it has, "specific consideration must be given to the inclusion of these grounds in paragraph of the definition of prohibited grounds by the Minister."

³⁰⁶ S 5(3) of PEPUDA.

³⁰⁷ S 5(3) of PEPUDA.

³⁰⁸ S 1(viii) (a)-(b).

³⁰⁹ S 1(xxiii) (a), the prohibited grounds are "Race, sex, pregnancy, marital status, ethnic or social origin, color, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. These grounds are the same as those provided on section 9(3) of the Constitution".

³¹⁰ Para 3(a) of the Schedule of PEPUDA.

³¹¹ Para 5 (c) of the Schedule of PEPUDA.

In as much as PEPUDA is only applicable outside the ambit of employment, it is still important to be part of these discussions and it should still be taken into consideration as it has been established on the same principles as the EEA. This means it can still be used by judges, lawmakers or even scholars while contributing to South African jurisprudence. Furthermore, as demonstrated under section 4 of the EEA, there are categories of employees which the EEA does not cover and as a result, PEPUDA can be used for purposes of coverage of employees who work for the South African security services, such as those employed in the National Defence Force and Intelligence Services. It can therefore be observed that, materially and substantively, the two Acts, namely PEPUDA and the EEA, are both intended to achieve the same principles which include eliminating unfair discrimination.

4.5 Conclusion

This chapter evaluated the extent to which South Africa has been able to incorporate international standards into its national legal framework and it can be concluded that its legal framework generally conforms to international principles. The following discussions serve as lessons which Lesotho can learn from South Africa, showing particular areas where Lesotho can draw wisdom from South Africa.

The Constitution binds everyone to adhere to principles of equality, dignity and privacy of other people as prescribed in the ILO and UN instruments. The Constitution has even gone further to provide for the protection of labour practices and the elimination of all kinds of discrimination against people living with HIV/AIDS. It was shown in the case of *Hoffman v South African Airways* that discrimination based on HIV/AIDS at work amounts to unfair discrimination which is also prohibited by the Constitution.³¹² Above that, South Africa has put in place legislation which supplements these constitutional principles that are aimed at advancing statutory obligations which eradicate unfair discrimination to employees living with HIV/AIDS.

ILO instruments are very much clear that testing for HIV/AIDS should not be used as a prerequisite of recruitment and at the continued employment stage. South

³¹² *Hoffmann v South African Airways 2000(1) SA 1(CC) para 53.*

Africa has equally adopted policies that are aimed at advancing prohibition on pre-employment testing at both recruitment and continued employment. It is only under specified circumstances that the Labour Court may order an employee to undergo HIV/AIDS testing, which is made under specified terms under section 50(4) of the EEA.

In terms of the BCEA, all employees who becomes incapacitated to render their services are entitled to paid sick leave. That enables people living with HIV/AIDS to be able to be off duty while they are sick and also to be able to receive salaries.³¹³ The LRA on the other hand provides that an employee living with HIV/AIDS may not be unfairly dismissed based on their health status, without following the prescribed procedure and for a valid reason. The LRA guarantees employees living with HIV/AIDS the right not to be unfairly dismissed based on their health status, as that will amount to automatic unfair dismissal.³¹⁴

International principles prescribe that an employer should do as much as reasonably practicable to create a healthy and safe working environment for its employees. In terms of OHSA, the same duty is also cast upon the employer and failure to do so may result in the employer being brought before the courts of law. It is, therefore, it can be concluded that South Africa has one of the most developed legal frameworks in the world and affords sufficient protection to people living with HIV/AIDS in the workplace, which has been greatly shaped by its adaptation and implementation of international principles.

In the next chapter, it is argued and demonstrated that ratification of treaties, without domestication and proper implementation at national level does not guarantee protection and elimination of unfair discrimination of people living with HIV/AIDS in the workplace. As a result, the study discusses lessons and recommendations which Lesotho may adopt to effectively implement these international standards as they have been successfully implemented by South Africa.

³¹³ This is on condition that the sick leave falls within the prescribed cycle in terms of Section 22 of the BCEA.

³¹⁴ Section 187(1)(f) of the LRA.

Chapter 5

5 CONCLUSION AND RECOMMENDATIONS

5.1 Conclusion

Lesotho and South Africa have been categorised as two of the countries with the highest HIV-prevalence rates in the world.³¹⁵As a result of this, these two countries have seen a need to put in place legislative measures that can be able to protect people who have been infected with HIV/AIDS from both stigmatisation and discrimination. Thus far, this study has demonstrated that South Africa has progressed significantly, hence it probes lessons which Lesotho can implement from South Africa's experience. The study focused on international instruments at both the UN and ILO levels which are aimed at affording people with HIV/AIDS protection against all kinds of discrimination in general as well as in the workplace. Lesotho's legal and policy framework was discussed looking at the extent to which Lesotho has incorporated those standards in its national laws. The same exercise was undertaken with South Africa, illustrating the strides it has taken to improve its national laws in line with its international mandate. As a result, South Africa's legal and policy framework, its jurisprudence as well as international standards were used as a yardstick to determine the measures that Lesotho has to take to improve its legislative and policy frameworks.

This study has further demonstrated that the protection of people living with HIV/AIDS in the workplace is a core human rights protection and that failure to ensure such protection leads to stigmatisation and discrimination, both of which have a great impact on productivity in the workplace, leading to other factors that affect the economy.³¹⁶ This fact therefore necessitated the need to address the ramifications of the stigma and unfair discrimination in the world of work.

³¹⁵ Zungu-Dirwayi "An audit of HIV/AIDS policies in Botswana, Lesotho, Mozambique, South Africa, Swaziland and Zimbabwe" Human Sciences Research Council 2004 21.

³¹⁶ Tamar Khan "HIV/AIDS takes its tool in SA Companies" Health care systems trust bulletin.

The international community has established measures that State parties should put in place to mitigate the impact which the scourge of stigma and discrimination has on both the economy and wellbeing of employees who are the driving forces behind economic growth.³¹⁷ It has been illustrated that these measures are put in place in different forms; binding and non-binding instruments which are intended to guide all states at national level.³¹⁸

Lesotho has ratified several international instruments, but it has not yet domesticated most of them. For the fact that Lesotho is a dualist state, it has become very difficult to implement and enforce those standards because they have to be domesticated after ratification.³¹⁹ Generally, legal and policy machinery that address discrimination is seen to exist in Lesotho, but what remains a challenge is the proper implementation of international standards at national level.

South Africa has put in place several laws which prescribe duties and obligations on both employees and employers to address HIV/AIDS in the workplace. The final part of this study provides suggestions on how Lesotho can improve its legal framework to people living with HIV/AIDS in the workplace against discrimination. This chapter deals with a general conclusion of the discussions, followed by lessons to Lesotho and further recommendations.

It was demonstrated in Chapter 2 of this study that the major problem lies with the practical implication of the international instruments to which Lesotho is a party. This can be seen by the fact that Lesotho does not have any legislation which is specifically designed to cater for all forms of discriminatory acts in the workplace and labour rights are not provided under the Bill of Rights in the Constitution. This

³¹⁷ Roy and Kaye the International Labour Organization: A Handbook for Minorities and Indigenous Peoples 2.

³¹⁸ Fraser, Grant, Mwanza, Naidoo, "The impact of HIV/AIDS on small and medium enterprises in South Africa" South African Journal of Economics 70:7 2002. See also Bureau for Economic Research: HIV/AIDS and the South African Economy, No 8. 2000.

³¹⁹ Pholo "Lesotho Justice Sector and the Rule of law" 24.

study showed that there are still incidents in the workplace where people living with HIV/AIDS are subjected to humiliating and discriminatory acts by their employers and that only diminutive incidents of unfair discrimination in the workplace have been reported.

It can therefore be concluded that Lesotho's legislative framework still falls short to meet its international objectives of adopting international standards that adequately address protection to people living with HIV/AIDS in the workplace and this still leaves much room for improvement with lessons from South Africa's experience.

5.2 Recommendations

The need for ensuring that there is adequate and appropriate protection for people living with HIV/AIDS in the workplace is based on the fact that international law employs a holistic approach that unfair discrimination should be prohibited in all spheres of life. Having laid down the conclusion that Lesotho's legal framework is inadequate in this regard, it is proposed that the following recommendations should be considered to improve Lesotho's legislative framework in implementing international standards that are aimed at affording people living with HIV/AIDS in the workplace protection against discrimination. The following paragraphs present a list of proposed recommendations and these are followed by an elaboration on how they can be practically implemented.

First, it is recommended that Lesotho should incorporate the provisions of the treaties it has acceded to that are aligned to offering protection to people living with HIV/AIDS in the workplace. It was also demonstrated in Chapter 3 of this study that the Constitution of Lesotho protects people living with HIV/AIDS and provides equality and freedom from discrimination. It is however recommended that Lesotho should amend its Constitution to include specific protection from discrimination for people living with HIV. The Constitution should also be amended to include provisions for labour rights in the Bill of Rights, for them to be justified and for the courts to enforce them.

It is further recommended that Lesotho should establish a HIV-specific law that deals with the rights of people living with HIV/AIDS, or any other broad anti-discrimination piece of legislation which will be aimed at affording protection to those living with HIV/AIDS. It was shown by this study that the National HIV/AIDS policy states in several sections, the importance of promoting initiatives and policies which employers should adopt that afford protection of the rights of all persons, including those who are living with HIV/AIDS. Despite this fact, it can be observed by the ongoing reports of stigma and discrimination that the protection afforded by this policy is perhaps inadequate. It is therefore recommended that Lesotho should enact a piece of legislation which is intended to prevent and also to prohibit unfair discrimination and stigmatisation and should also promote equality in general. It is further recommended that this law should also criminalise HIV/AIDS transmission for those who intentionally and even through negligence, transmit HIV/AIDS to other people.

It is further recommended that Lesotho should adopt explicit legislation that promotes equal opportunities and fair treatment at the workplace by eliminating discrimination as well as eliminating harassment. The following discussions elaborate on the practical implementation of the above-listed recommendations.

5.2.1 Incorporation of international standards in national legislation

It has been demonstrated in Chapter 2 of this study that international instruments provide a comprehensive guide on the measures that state parties should put in place to afford protection against discrimination to people living with HIV/AIDS. It is a well-known principle of international law that a state may express its consent to be bound by a treaty in several ways which include "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."³²⁰

³²⁰ Article 11 of the United Nations Convention on the law of treaties.

Since Lesotho is a dualist state, treaties form a separate legal system from national law and they cannot be applied directly into the national legal system. For international standards to be applicable and accessible in Lesotho, they should first be ratified and domesticated.³²¹ It is only after Lesotho has ratified these treaties that it will be under an obligation to incorporate the provisions which prevent discrimination against people living with HIV/AIDS in its domestic legal system.

This, therefore, means that every person living with HIV/AIDS will be protected against all forms of discrimination based on their health status. Similarly, the national courts will also be in a position to directly apply the aspirations which are contained in the international instruments and also, the state can be held accountable in situations where it fails to create an anti-discrimination environment for everyone.

5.2.2 Amendments to the Constitution of Lesotho

As discussed above, international law is not directly applicable in Lesotho; therefore, it is recommended that its Constitution should be amended to include a clause that makes it possible for customary international law to be directly applicable. It is after the inclusion of this clause that national courts can easily apply international standards to protect people living with HIV/AIDS against discrimination in the workplace. This will be done with ease, without necessarily waiting for the state to ratify and domesticate those international instruments.

It is further recommended that the Constitution of Lesotho should be amended to include provisions for fair labour practices - labour laws in the Bill of Rights.³²² It has been observed that labour rights in the South African Constitution are contained under the Bill of Rights and the Constitutional Court has made it clear that the core

³²¹ Pholo "Lesotho Justice Sector and the Rule of law" 24.

³²² These rights appear under Chapter three of the Constitution which provides that for principles of state policy which are non-justiciable. They appear from section 29, 30, and 31, and they are the right to opportunity to work, the right to just and favorable conditions of work, and the right to protection of worker's rights and interests.

component of section 23(1) is the right not to be unfairly dismissed.³²³ It is under these circumstances that people living with HIV/AIDS will receive further protection not to be unfairly dismissed based on their health status.

Lastly, it is recommended that the Constitution should be amended to include HIV/AIDS status as one of the grounds that a person may not be unfairly discriminated against under section 18(3). It has been observed that the courts of South Africa have ruled that HIV/AIDS should be read to be amongst the grounds which are listed in section 9(3) of the South African Constitution.³²⁴ If parliament can amend the Constitution to include these recommendations, it will be reinforcing its international obligation to put in place laws that are aimed at prohibiting unfair discrimination, promoting equality and implementing international standards.

5.2.3 Enact anti-discrimination law

Lesotho is recommended to take appropriate measures to implement its public international law obligation of enacting laws that prohibit unfair discrimination against people with HIV/AIDS in general. This should be a piece of legislation intended to give effect to section 18 to prevent and also to prohibit unfair discrimination and stigmatisation and it should also promote equality. This study showed that South Africa has enacted the same law, namely PEPUDA.

As previously discussed, PEPUDA is founded on principles that are intended to initiate and promote equal opportunities and preventing unfair discrimination. Furthermore, PEPUDA also specifically prohibits discrimination based on HIV/AIDS in all spheres of life other than in the workplace.³²⁵ Additionally, the following recommendation is also made, that this law should be in a position to set sanctions for people who intentionally and wilfully infect others with HIV/AIDS. It is further recommended that the said legislation should also prescribe which punishment will be appropriate for those who will be convicted. It has been discussed and observed

³²³ *Association of Mineworkers and Construction Union and others v Royal Bafokeng Platinum Limited CC 181/18 para 18 [1].*

³²⁴ *Hoffmann v South African Airways 2000(1) SA 1(CC).*

³²⁵ S 34(1) of PEPUDA.

that, in South Africa, it is a criminal offence that is punishable, to intentionally and wilfully transmit HIV/AIDS to another person.³²⁶

Lastly, it is recommended that the said law should also put in place fines for perpetrators, suitable compensation and psychological support, including counselling for those who will be found to be victims of unfair discrimination based on their HIV/AIDS status.

5.2.4 Enact specific law that is aimed to achieve equality in the workplace

In as much as it has been recommended that Lesotho should adopt a piece of legislation that is aimed at prohibiting discrimination in all spheres of life, it is further recommended that Lesotho should enact a law that is aimed at achieving equality, specifically in the workplace. It has been observed that South Africa has put in place the EEA, which is primarily aimed at achieving equality in the workplace. The EEA also promotes, amongst other things, fair treatment of employees and elimination of all forms of discriminatory acts in the workplace.³²⁷

Of importance to the listed grounds is that an employee may not be subjected to unfair discrimination in the workplace directly or indirectly,³²⁸ based on gender, sex, disability and HIV/AIDS status. It is further recommended that this piece of legislation should also put an obligation on employers to put in place measures that are intended to eliminate unfair discrimination in the workplace through the implementation of policies as well as employment equity measures that will be tailored to foster good practices.

³²⁶ S 37 of the Criminal Procedure Act.

³²⁷ S 5 of the Employment Equity Act.

³²⁸ Gaibe 2011 32-33 states that "Direct discrimination occurs when an employee is treated unfavorably because they possess certain characteristics as those listed under section 6(1) of the EEA. Indirect discrimination occurs where the employer's practices or policies appear to have a uniform application on all employees whereas in operation, they negatively impact on certain groups of employees due to their characteristics".

5.3 Conclusion

This study was able to demonstrate that Lesotho still has a long way to go to improve its legislative framework by implementing international standards which have been prescribed by the ILO. It was further demonstrated HIV/AIDS affected workers have not yet been afforded enough protection and that leaves Lesotho with a huge task to improve on and to draw lessons from South Africa's experience and the approach it has taken.

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ANNEXURE

CERTIFICATE OF EDITING

I, C Vorster (ID: 710924 0034 084), Language editor and Translator and member of the South African Translators' Institute (SATI member number 1003172), herewith declare that I did the language editing of a dissertation written by Mr HP Tsolo from the North-West University (student number: 29681308).

Title of the dissertation: Lesotho's implementation of the ILO standards on prevention of discrimination against employees living with HIV/AIDS in the workplace: Lessons from South Africa



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