

**The use of HIV testing in the workplace as the basis for possible unfair
discrimination**

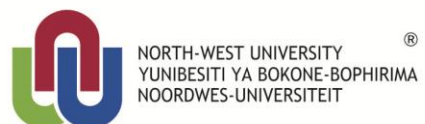
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It all starts here™



DEDICATION

I dedicate this mini-dissertation to my beloved mother, Maseboka Thejane, my wonderful husband, Motlatsi Lehloka, and my future children.

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I would like to thank God for giving me strength and direction throughout the period of writing my Master's degree. I am forever indebted to my study supervisors and the North-West University's support of the research and writing of my studies. I would like to extend my sincere gratitude to my study supervisor, Mr MM Botha, for his guidance, patience and dedication to my work throughout my studies. It has been an honour to work with him. He provided words of encouragement, which made me believe in myself and forge ahead. He gave me hope, and the writing of this mini-dissertation was not easy, but his insight, knowledge and experience helped me to complete it.

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Abstract

Human immunodeficiency virus and acquired immune deficiency syndrome (hereafter HIV/AIDS) in South Africa are epidemic virus and disease respectively, item 1.1 of the *EEA Code of Good Practice on Key Aspects of HIV/AIDS and Employment*, 2000 states that HIV/AIDS are serious public health problems, which have socio-economic, employment and human rights implications on the society, employees inclusive. The *Constitution of the Republic of South Africa*, 1996, *Employment Equity Act* 55 of 1998, *Labour Relations Act* 66 of 1995 and *Promotion of Equality and Prevention of Unfair discrimination* 4 of 2000, international and regional instruments and standards provide protection to HIV positive employees in the workplace. Notwithstanding this plethora of legislation, employees are still faced with the problems of being stigmatised, unfairly discriminated against and ultimately dismissed from work for being HIV positive. Employees are subjected to HIV testing and the information about their HIV statuses is still being disclosed without their informed consent and their right to privacy and confidentiality may be violated.

These possible violations of employees' rights may affect the economy of the country. When employees are dismissed, the amount of production and profits for the employers decrease and as a result the government loses tax revenue, the unemployment and poverty rates increase. Hence it is imperative to investigate the problems of stigmatisation, unfair discrimination and dismissals in order to see to what extent are employees' rights protected. There will be a comparative study in Canada which is experiencing the same problems as South Africa in order to find out how Canada can provide solution to South African problems.

Keywords:

South Africa, HIV/AIDS, Canada, stigmatisation, unfair discrimination, dismissals, HIV positive employees, HIV testing, disclosure of information on HIV statuses, privacy, confidentiality, economy of South Africa.

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LIST OF ABBREVIATIONS

AIDS	Acquired Immune Deficiency Syndrome
BCEA	Basic Conditions of Employment Act 75 of 1997
CAF	Canadian Armed Forces
CCMA	Commission for Conciliation, Mediation and Arbitration
CHRA	Canadian Human Rights Act, 1977
CHRC	Canadian Human Rights Commission
DNA	Deoxyribo Nucleic Acid
EEA	Employment Equity Act 55 of 1998
EEAA	Employment Equity Amendment Act 47 of 2013
HIV	Human Immunodeficiency Virus
ICCPR	International Convention on Civil and Political Rights (1966)
ILO	International Labour Organisation
LDD	Law, Democracy and Development Journal
LRA	Labour Relations Act 66 of 1995
LRAA	Labour Relations Amendment Act 12 of 2002
OHSA	Occupational Health and Safety Act 85 of 1993
OHSAA	Occupational Health and Safety Amendment Act 181 of 1993
PEPUDA	Promotion of E quality and Prevention of Unfair Discrimination Act 4 of 2000
PELJ	Potchefstroom Electronic Law Journal

QCHRF	Quebec Charter of Human Rights and Freedoms, 1975
SADC	Southern African Development Community
SAJHR	South African Journal of Human Rights
UDHR	Universal Declaration of Human Rights (1948)
UIA	Unemployment Insurance Act 63 of 2001

CHAPTER 1 Introduction and problem statement

1.1 Introduction

The human immunodeficiency virus (hereafter HIV) and acquired immune deficiency syndrome (hereafter AIDS) are epidemic concerns.

"AIDS" is defined as a:

medical condition cause by HIV. It is a clinical definition given to the onset of certain life-threatening infections in persons whose immune systems have ceased to function properly as a result of infection with HIV.¹

Many countries, such as South Africa, are engaging in different initiatives to fight the disease and the virus that causes it. Since the emergence of the disease, many people, including employees, have been the subject of stigmatisation in their communities and discriminated against in their workplaces. Employees are dismissed for testing HIV positive, and subsequently become jobless. This leads to reduced profits for employers as their workforce becomes low and production is reduced.

1.2 What is HIV?

Section 1 of the *Employment Equity Act*² defines "HIV" as "human immunodeficiency virus". A virus is a microscopic organism; this means that it is a living thing that is extremely small and not visible with a naked eye. It is seen only through a microscope. Any organism that causes diseases is called a pathogen. Viruses are all pathogens in that they cause diseases. A virus cannot reproduce on its own.³ The reason is that it does not have chemical mechanisms in its core to do so.⁴ It must enter the cell of a host organism, such as human. Once it is inside, the host cell produces and assembles all the parts of the new cell. The new viruses then

1 Glossary to the *Employment Equity Act: Code of Good Practice on Key Aspects of HIV/AIDS and Employment*, 2000.
2 55 of 1998, (hereafter the *EEA*).
3 Page, Louw and Pakkiri *Working with HIV/AIDS* 7.
4 Van Dyk *HIV/AIDS* 9.

leave the host cell and go on to infect more cells or other cells, where the process is repeated. Every infected cell is damaged and eventually dies.⁵

"HIV" is defined as a:

virus that attacks the immune system. The immune system is the system of a person's body that protects it from germs that cause infections and cause a person to fall sick. They lower the number of healthy immune cells (known as CD4 cells) that have to fight infections.⁶ "HIV" may ultimately destroy the body's natural immune system.⁷

1.2.1 The immune system of the body

The body has many different ways in which it can defend itself against pathogenic viruses. The skin is the first line of defence, as viruses cannot penetrate it. Another way in which the body protects itself against infections is through the immune system. The latter is able to recognise anything that is not part of the body and responds by destroying it, and then removing it from the body. The immune system has two main components, namely the white blood cells and antibodies.⁸

1.2.1.1 The white blood cells

There are a number of different types of white blood cells, and each type has a different function. One type of white blood cells is the CD4 cell, also known as the T-helper cell. A healthy person has approximately one thousand CD4 cells per mm³ of blood, but an infection with HIV quickly kills them because HIV replicates within them.⁹

5 Page, Louw and Pakkiri *Working with HIV/AIDS* 7.

6 Centre for Disease Control and Prevention (hereafter CDC) 2014 www.cdc.gov/hiv/basics/whatishiv.html.

7 Glossary to the *EEA: Code of Good Practice on HIV and Employment*, 2000.

8 Page, Louw and Pakkiri *Working with HIV/AIDS* 10-11.

9 Page, Louw and Pakkiri *Working with HIV/AIDS* 11.

1.2.1.2 The antibodies

Page, Louw and Pakkiti¹⁰ state that:

antibodies are special large protein molecules that are produced by the immune system. When anything that is not part of the body enters the body, they assist in getting rid of the pathogens. They normally protect the body against diseases, but HIV antibodies do not.

1.2.2 The life-cycle of HIV in a person's body

HIV can infect multiple cells in a person's body. The primary target is the CD4 lymphocyte, also called a T-cell. When a CD4 cell is infected with HIV, the virus goes through multiple steps to reproduce itself and create many more virus particles. The process is broken up into six steps, namely:¹¹

1.2.2.1 Binding and fusion

HIV binds to a specific type of CD4 receptor and a co-receptor on the surface of the CD4 cell by this process. HIV can fuse with the host cell, that is the CD4 cell, and release its generic material into the cell.¹²

1.2.2.2 Reverse transcription

Here, a special enzyme called reverse transcription changes the generic material of the virus so that it can be integrated into the host deoxyribonucleic acid (hereafter DNA).¹³

10 *Working with HIV/AIDS* 11.

11 AID.gov 2009 www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/.

12 AID.gov 2009 www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/.

13 AID.gov 2009 www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/.

1.2.2.3 The integration

The virus's new genetic material enters the nucleus of the CD4 cell and uses an enzyme called *integrase* to incorporate itself into a person's own genetic material, where it may hide and stay inactive for several years.¹⁴

1.2.2.4 The transcription

During transcription, the host cell becomes activated, and the virus uses a person's own enzymes to create more of its genetic material, along with the more specialised genetic material, which allows it to make longer proteins.¹⁵

1.2.2.5 Assembly

A special enzyme called *protease* cuts the longer HIV *proteins* into individual proteins. When these come together with the virus' genetic material, a new virus has been assembled.¹⁶

1.2.2.6 Budding

This is the final stage of the virus' life cycle. Here, the virus pushes itself out of the host cell, taking with it part of the membrane of the cell. This outer part covers the virus and contains all of the structures necessary to bind to a new CD4 cell and receptor and begin the process again.¹⁷

1.3 The stages of HIV infection and the timeline of AIDS

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- 14 AID.gov 2009 www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/.
- 15 AID.gov 2009 www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/.
- 16 AID.gov 2009 www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/.
- 17 AID.gov 2009 www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/.

HIV is a progressive disease; this means that before a person has the AIDS disease, he or she must first have been infected with HIV. HIV does not enter the body and then spread all over the body immediately; it progresses, meaning it goes through certain stages first until it reaches the AIDS stage. The stages that HIV goes through before a person has AIDS are:

1.3.1 The primary HIV infection or acute infection

During the first few weeks after the body becomes infected with HIV, there is a period of acute infection. The immune system is unprepared for the virus, and so it takes some time for the body to recognise the virus as foreign and to start preparing to fight the virus. The virus is able to invade the host cells without any interference by the immune system, and the host cells produce many new viruses. During this period, the body has an extremely high viral load and the person is very infectious. The person may show flu-like symptoms.¹⁸

1.3.2 The window period

It takes a while for the body to start producing antibodies against HIV, but eventually the antibodies are produced and there are enough to bring the viral load down. The period of time between infection and when there are enough antibodies against HIV for these to show in an HIV antibody test is known as window period.¹⁹

1.3.3 The clinically asymptomatic stage

Normally, the window period is followed by an asymptomatic period, which can last for about six months to ten years. During this time, a person feels and looks well, but the virus is being produced in the body on an ongoing basis.²⁰ This happens in the lymph nodes,²¹ and it progressively damages the immune system.

18 Page, Louw and Pakkiri *Working with HIV/AIDS* 21.

19 Page, Louw and Pakkiri *Working with HIV/AIDS* 21.

20 Page, Louw and Pakkiri *Working with HIV/AIDS* 21.

21 Avert Date Unknown www.avert.org/stage-hiv-infection.htm.

1.3.4 The symptomatic HIV infection

The HIV severely damages the immune system because years of activity damage the lymph nodes and tissues. HIV transforms and becomes more pathogenic, this means that it becomes stronger and varied, which leads to the destruction of more T-helper cells and the body fails to keep up with replacing the loss of T-helper cells. Once the person's CD4 cells drop to a low level, he or she should start taking antiretroviral treatment, which will stop the HIV from damaging the immune system. HIV-infected individuals on antiretroviral treatment, in most cases, remain clinically asymptomatic. However, in HIV-infected persons who are not on antiretroviral treatment, or are on the treatment that is not working, the immune system fails and symptoms develop; the symptoms worsen as the immune system deteriorates. The emergence of certain opportunistic infections that the immune system would normally prevent causes the symptomatic HIV infection.²²

1.3.5 Progression of HIV to AIDS

Severe opportunistic infections and cancers may develop as the immune system becomes severely damaged, and this leads to an AIDS diagnosis. A clinical criteria used by the World Health Organisation (hereafter WHO) to diagnose the AIDS progression in adults is when the CD4 count is less than two hundred cells per mm³ or a CD4 percentage is less than 15.²³

1.4 The HIV transmission

HIV infection is transmitted primarily by sexual intercourse, HIV-infected blood passing directly into the body of another person, and by a mother to her baby during pregnancy or childbirth, or as a result of breastfeeding. HIV has been identified in various body fluids, but it is mainly highly concentrated in blood, semen, and vaginal fluids. Although HIV is present in tears, saliva, sweat and urine, the concentration of

22 Avert Date Unknown www.avert.org/stages-hiv-infection.htm.

23 Avert Date Unknown www.avert.org/stages-hiv-infection.htm.

the virus in these fluids is very low for successful transmission.²⁴ Two things must occur for the HIV transmission, these are that the virus must find a way to enter the bloodstream, and that the virus must take hold. This is likely to happen if there is a sufficient quantity of the virus in the semen, vaginal fluids, blood and breast milk, and if the virus gets access into the bloodstream and the duration of exposure is long enough. The risk of infection increase with the length of time a person is exposed to the virus.²⁵

1.4.1 Sexual transmission of HIV infection

HIV infection is transmitted sexually primarily through unprotected penetrative vaginal or anal intercourse, and through oral sex under certain conditions. HIV is transmitted when the virus enters a person's bloodstream via the body fluids of an infected person. In order for it to gain entry into the body, HIV needs to connect to the CD4 receptors, which are found on various types of cells such as macrophages.²⁶

1.4.2 The transmission of HIV through contaminated blood

HIV can be transmitted from one person to another when a person receives HIV-contaminated blood in a blood transfusion, when he or she uses needles that are contaminated with HIV-infected blood to inject drugs, or when he or she uses or is injected with blood-contaminated needles, syringes, razor blades, or other sharp instruments,²⁷ in hospital or clinics where medical hygiene is poor.²⁸ The re-use of instruments in traditional African healing or cultural practices such as circumcision also poses the risk of HIV transmission.²⁹

1.4.3 The transmission of HIV from mother to baby

24 Van Dyk *HIV/AIDS* 34.
25 Van Dyk *HIV/AIDS* 34.
26 Van Dyk *HIV/AIDS* 34.
27 Van Dyk *HIV/AIDS* 38.
28 Van Dyk *HIV/AIDS* 40.
29 Van Dyk *HIV/AIDS* 38.

Mother to child transmission happens when HIV is passed from a mother to her unborn baby during pregnancy, during birth or during breastfeeding.³⁰ Factors that increase the risk are that a child is more likely to contract HIV from its mother if she has advanced HIV infection, she has high viral load or a low CD4 count, her water breaks at least four hours before delivery, she has a vaginal delivery, her viral load is high, the labour is difficult and requires episiotomy or forceps, she has a genital infection, she uses illicit drugs during pregnancy, or she breast feeds.³¹

1.5 The problem statement

1.5.1 The problem of HIV/AIDS in South Africa

Sub-Saharan Africa is the region worst affected by HIV and AIDS (hereafter HIV/AIDS). HIV/AIDS in South Africa is a prominent health concern. Item 1.1 of the *EEA Code of Good Practice on Key Aspects of HIV/AIDS and Employment*,³² states that HIV/AIDS are serious public health problems, which have socio economic, employment and human rights implications. South Africa has the highest prevalence of HIV/AIDS compared to any other country in the world³³ with 6.1 million people living with HIV³⁴ and in³⁵ t related deaths were recorded. Many factors contribute to the high HIV/AIDS prevalence in South Africa. These factors include poverty, high levels of sexually transmitted infections, inequality, social instability, high mobility of migrant labour and limited and uneven access to quality medical care.³⁶

1.5.1.1 Stigma and discrimination in South Africa

30 Western Cape Government 2014 www.westerncape.gov.za/service/prevention-mother-child-transmission-pmtct.

31 Carter 2011 mobile.aidsmap.com/Mother-to-baby-transmission/page/1044918.

32 2000.

33 AIDS Foundation South Africa 2013 www.aids.org/hiv aids-in-south-africa/.

34 UNAIDS 2014

www.unaids.org/en/resources/presscentre/featurestories/2014/january/20140117southafrica/.

35 2011, 270, 000.

36 AIDS Foundation South Africa 2013 www.aids.org/hiv aids-in-south-africa/.

An added problem is that HIV positive people and their families in South Africa do not disclose their HIV statuses. This means that HIV/AIDS reporting in the country is extremely low. Even though empirical research regarding the number of workers denied employment opportunities, or conversely being dismissed due to their HIV status is hard to come by, it is generally accepted that these figures must be high.³⁷ Item 1.2 of the *EEA Code of Good Practice on Key Aspects of HIV/AIDS and Employment*,³⁸ states that:

it is recognised that the HIV/AIDS epidemic will affect every workplace, with prolonged staff illness, absenteeism, and death impacting on productivity, employee benefits, occupational health and safety, production costs and workplace morale.

The high numbers of undisclosed HIV statuses is attributed mainly to the great degree of stigmatisation and discrimination that still prevails in South African society.³⁹ In *Hoffmann v South African Airways*⁴⁰ the court observed that:

people who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice.⁴¹ They have been subjected to systematic disadvantage and discrimination. They have been stigmatised and marginalised as the present case demonstrates. They have been denied employment because of their HIV positive status without regard to their ability to perform the duties of the position from which they have been excluded. Society's response to them has forced many of them not to reveal their HIV status for fear of prejudice. This in turn has deprived them of the help they would otherwise have received. People who are living with HIV/AIDS are one of the most vulnerable groups in our society. Notwithstanding the availability of compelling medical evidence as to how this disease is transmitted, the prejudice and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can...be interpreted as a fresh instance of stigmatisation and I consider this to be an assault on their dignity. The impact of discrimination on HIV positive people is devastating. It is even more so when it occurs in the context of employment. It denies them to earn a living.

37 Van Niekerk *et al Law@work* 479.

38 2000.

39 Van Niekerk *et al Law@work* 479.

40 2001 1 SA 1 (CC), (hereafter *Hoffmann* case).

41 Ngwena 1999 *South African Journal of Human Rights (SAJHR)* 513-540.

The above case shows that peoples', including employees', human rights are not respected, as their dignity is undermined in the sense that they are denied entry into employment just because they are HIV positive. The case also demonstrates that decent work is not sustained in South Africa to an extent that HIV positive employees are denied entry into employment just because they are HIV positive. This is a problem that needs to be addressed because if not, then the country's decent work programmes will be considered to have failed to do their job by achieving decent work for every South African citizen.

1.5.1.2 Dismissal for being HIV positive

Section 14 of the *Constitution of the Republic of South Africa*,⁴² provides that everyone has the right to privacy. This means that no one is obliged to disclose his or her medical results to anyone. The law does not give employers the power to subject their employees to HIV testing in order to find out whether they are HIV positive or not. If the employees voluntarily go for HIV testing, they are not bound to disclose their test results to their employers. However, the problem is that employers continue to require their employees to go for an HIV testing and then dismiss them if they (employees) are tested as HIV positive.

The problem was discussed in the case of *Allpass v Mooikloof Estate (Pty) Ltd t/a Mooikloof Equestrian Centre*⁴³ the complainant, Allpass, was employed by the respondent as a horse riding instructor and stable manager. At the time of his recruitment, he had been living with HIV for almost twenty years. Prior to being hired, the complainant underwent an interview, during which he informed the respondent that he was in good health. Shortly after his hiring, the complainant, along with other employees, was asked to complete a form requiring him to disclose whether he was taking any chronic medication. The complainant complied and disclosed that he was taking, among other things daily medication to manage his

42 1996.

43 2011 2 SA 638 (LC).

HIV condition. Upon learning of his HIV-positive status, the respondent immediately terminated his employment on the grounds that he had misrepresented his condition and that he was in fact severely ill. The Labour Court found that the complainant had been discriminated against and unfairly dismissed due to his HIV positive status, and awarded him 12twelve months' compensation.

Furthermore, in the case of *Bootes v Eagle Ink Systems KZ Natal (Pty) Ltd*,⁴⁴ the petitioner, Bootes, was HIV positive. The respondent, Eagle Ink Systems, employed him as a technical representative. The petitioner was hospitalised for HIV-related illness. Following his return to work, the respondent requested information about the petitioner's medication to ensure that he was capable of driving, which was necessary for the performance of his duties as a sales representative. The petitioner was re-admitted to the hospital for four days after returning to work. The respondent forced the petitioner to take paid leave. The petitioner's health improved, however, he was offered a desk job, but he declined the offer and insisted on remaining in his position as a sales representative. The respondent nonetheless dismissed the petitioner without first obtaining the petitioner's medical opinion on the petitioner's condition and ability to perform his duties. The court held that:

the respondent dismissed the petitioner because it did not want to employ an HIV-positive technical sales representative. It stated that the respondent's management believed that its customers would be fearful and unwilling to be served by an HIV-positive person. The Court further held that the respondent did not attempt to dismiss the petitioner due to incapacity. Instead, the respondent "threw the book" at the petitioner and embarked on a misconduct proceeding, determined to dismiss the petitioner.

The court declared that:

HIV remains a highly stigmatised infection that continues to marginalise its weak and vulnerable victims and employers must be deterred from discriminating against employees on the basis of their HIV positive status. It stated further that camouflaging discrimination under the cloak of misconduct is one of the most insidious forms of unfair labour practices.

44 D781/05; 2007 ZALC 52.

These two cases illustrate how employees are treated when they disclose their HIV statuses to their employers. This is a problem because if employers continue to dismiss employees upon obtaining knowledge that they (employees) are HIV positive, the employees will continue not to disclose their HIV status and this will lead to illness and absenteeism from work. When employees are very ill, they cannot work, and as a result, they cannot afford to live. When they ultimately die, their families will suffer and the poverty rate will increase. The employers too will suffer due to lack of skills development, and they will incur costs, as they will now have to recruit new employees. In the process, there will be decline in production resulting in a decrease in the country's economy, as they will no longer be able to receive tax revenues that they were receiving when the businesses were still making good profits. When employers dismiss employees for being HIV positive, even though they (employees) are still able to perform their duties, this undermines the concept of decent work because when employees are dismissed, they become unemployed. This is against the concept of decent work, as its aim is to create more jobs to reduce the unemployment rate, which is the main problem in South Africa. The unemployment rate in South Africa increased to 25.5 percent in the second quarter, from 25.2 percent in the first quarter of⁴⁵. The unemployment rate in South Africa averaged 25.27 percent.⁴⁶

1.5.2 The problem of HIV/AIDS in Canada

1.5.2.1 HIV/AIDS-related stigma and discrimination

The problem in Canada is that the HIV/AIDS-related stigma and discrimination are an everyday reality. Stigma and the fear of discrimination often stop people from seeking to be tested for HIV, or from acknowledging their HIV status publicly. People living with, or suspected of having HIV are sometimes denied treatment by medical practitioners, housing by landlords, and jobs by employers. They may sometimes be

45 Statistics South Africa 2014 www.tradingeconomics.com/south-africa/unemployment-rate.

46 Statistics South Africa 2014 www.tradingeconomics.com/south-africa/unemployment-rate.

shunned by their families, friends and colleagues, turned down for insurance coverage, or refused entry into foreign countries.⁴⁷ People living with HIV in Canada are still affected by stigma and discrimination. Stigma is a form of prejudice that discredits or rejects an individual or group because they are seen to be different from other people in the country. When people act on their prejudice, stigma turns into discrimination. HIV-related stigma arises mostly from fear and ignorance about the disease, and/or hostility and existing prejudices about the groups most affected by it. HIV-related discrimination is the unfair treatment of people on the basis of their actual or suspected HIV status.⁴⁸

1.5.2.2 The compulsory HIV testing in Canada

There is no legislation in Canada which forces employees to go for HIV testing. In *Centre d'accueil Sainte-Domitille v Union des employés de service, local*⁴⁹ the arbitrator ruled that an employer does not have the right to require a medical examination where the purpose is merely to obtain evidence that the employee is HIV positive, when that status poses no danger to others.

1.5.2.3 The Canadian national study of people living with HIV

Canadians' attitudes and opinions towards people living with HIV were assessed in a national study in⁵⁰. In this study, sixty-nine percent of respondents felt that people may be unwilling to disclose their HIV status because of the stigma associated with HIV. Furthermore, fifty-five percent felt that people with HIV may experience difficulty with basic activities such as finding housing, healthcare or employment because of the stigma. The results of the survey also showed that stigma and discrimination still exist in Canada for people living with HIV. Seventy-one percent of Canadians have little tendency to stigmatise people living with HIV, although twenty-two percent hold a moderate degree of stigma toward people with HIV, and another

47 Canadian HIV/AIDS Legal Network 2014 www.aidslaw.ca/EN/issues/discrimination.htm.

48 CATIE Date Unknown www.catie.ca/hiv-canada/4/4-1/4-1-1.

49 1989 TA 439 (Tribunal d'Arbitrage).

50 2012.

seven percent exhibit a high level of stigma.⁵¹ This kept HIV positive people out of the workplace and on the margins of society. In *Pacific Western Airlines Ltd v Canadian Airline Flight Attendants Association*,⁵² Canadian Labour Arbitration Board, held that dismissing a flight attendant from his job on the basis of HIV status amounted to prohibited discrimination.

South Africa has the similar problems of stigmatisation, discrimination and HIV non-disclosure as in Canada; the latter has a lower statistics of people who stigmatised people, including employees. This means that Canada might be far advanced in the manner in which they tackle employment discrimination. The researcher thinks that Canada is an appropriate country to compare South Africa with, to see whether Canada can be of assistance to South Africa.

1.6 The authorisation of HIV testing in South Africa

Employees have the right in terms of section 7 (2) of the *EEA* to be tested for HIV only if the Labour Court has authorised such testing in terms of section 50 (4) of the *EEA*. The interpretation of section 7 of the *EEA* has been a matter of some controversy. In *Joy Mining Machinery, a Division of Harnischfeger SA (Pty) v NUMSA & others*,⁵³ the Labour Court pointed out that section 7 (2) of the *EEA* "is not happily worded", but however, continued to hold that its permission was necessary even if the proposed testing was voluntary and anonymous. In *Irvin & Johnson Limited v Trawler & Line Fishing Union & others*,⁵⁴ it was held that voluntary and anonymous HIV testing fell outside of section 7 (2) of the *EEA*.

1.6.1 Summary

Therefore, the summary is that with reference to the problems discussed above in the paragraph titled, The problem statement, the researcher finds it imperative to

51 CATIE Date Unknown www.catie.ca/en/hiv-canada/4/4-1/4-1-1.

52 1987 28 (LAC) (3D) 291.

53 2002 23 *ILJ* 391 (LC).

54 2003 24 *ILJ* 565 (LC).

look into the problems of employees who are stigmatised in their communities and by their colleagues in the workplace, discriminated against and dismissed from their employments on the ground that they are HIV positive, but camouflaged as dismissals for misconducts.

1.7 Description of the research methods to be used

The research will be a comparative analysis with Canada because the relations between South Africa and Canada are bilateral. Both countries are former British colonies. Britain occupied the Cape Colony, started imposing their language and culture, and influenced South Africa labour laws.⁵⁵ Since Canada experienced similar problems to that of South Africa, it is important to make a study in the legal position in Canada, with reference to the *Canadian Charter of Rights and Freedoms* part 1 of the *Constitution of Canada*,⁵⁶ the *Canadian Human Rights Act*,⁵⁷ and the Canadian Human Rights Commission,⁵⁸. The Canadian position may provide some solution to the South African problem. The study will be based on the literature study of relevant legislation, case laws, relevant books, journal articles, chapters in books, reports, conference contributions, Internet sources, policy documents and international instruments available.

1.8 Relevance for the research unit theme

The proposed research study falls under the research unit, Development in the South African Constitutional State, because it seeks to address developmental and legal challenges in South Africa. It specifically falls within the research project: Developing and Utilising Labour Law to promote decent work in South Africa and the Southern African Development Community (hereafter SADC) region, because it seeks to reconsider and develop Labour Law in relation to HIV positive employees' rights in

55 Pretorius 2011 www.bbc.co.uk/history/british/victorians/boer_wars_01.shtml.

56 1982, (hereafter the *Canadian Charter of Human Rights and Freedoms*).

57 1977, (*CHRA*).

58 1996, (*CHRC*).

relation to equality. It aims at critically analysing HIV testing to establish whether HIV positive employees' rights are adequately protected in the workplace.

This research is categorised in chapters which will be outlined as follows; chapter 1 deals with the introduction and problem statement in South Africa and Canada, gives an introduction of what is HIV, how is it transmitted, and its stages in a person's body. Chapter 2 deals with the constitutional and statutory outline to HIV testing, and the concept of unfair discrimination in South Africa, international and regional instruments and standards will be examined. Chapter 3 is on HIV testing and the concept of unfair discrimination, in this chapter a critical analysis of section 7 (2) of the *EEA*, which relates to testing of employees for HIV only where the Labour Court has authorised such testing. Chapter 4 is on the position in Canada where an inquiry will be made about the HIV testing in Canada, and an investigation on what Canada has done as far as HIV testing, stigma and discrimination in the workplace are concerned. In chapter 5 conclusions will be drawn after proper consideration of the position in South Africa and Canada, together with recommendations that might assist South Africa.

CHAPTER 2 Constitutional and statutory outline to HIV testing and the concept of unfair discrimination in South Africa

2.1 Introduction

South Africa is a country with a diverse society, which is experiencing inequalities, high unemployment rates and poverty because of the injustices of the past brought about by the government of the apartheid era. During this time, human rights were violated through the use of discriminatory laws, which were in place at that time. The term "apartheid" means "separation".⁵⁹

2.2 Constitutional guarantees

The preamble to the *Constitution of the Republic of South Africa*,⁶⁰ states that the people of South Africa, recognise the injustices of the past... adopt the *Constitution* to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights. This preamble plays an importance role in South African democracy because it guarantees every citizen freedom from the violation of their human rights and injustices. Section 2 of the *Constitution* provides that the *Constitution* is the supreme law of the Republic, law or conduct inconsistent with it is invalid, and the obligation imposed by it must be fulfilled.

2.2.1 Limitation of fundamental rights

Chapter 2 of the *Constitution* provides for Bill of Rights. Section 7 (1) of the *Constitution* provides that the Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in South Africa and affirms the democratic values of human dignity, equality and freedom. The Bill of Rights was enshrined in the *Constitution* in order to make sure that for people whose human rights were violated in the past, the effect of the violation is redressed.

59 About.com Date Unknown africanhistory.about.com/od/apartheid/.
60 1996, (hereafter the *Constitution*).

2.2.2 *The constitutional right to fair labour practice and equality*

Section 23 (1) of the *Constitution* provides that everyone has the right to fair labour practices. The constitutional right to fair labour practices enshrined in section 23 (1) of the *Constitution* protects both the employer and the employees.⁶¹ Section 9 of the *Constitution* provides for equality. Section 9 (1) of the *Constitution* provides that everyone is equal before the law and has the right to equal protection and the benefit of the law. Subsection (2) provides that equality include the full enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to advance persons, or categories of persons, disadvantage by unfair discrimination may be taken. Section 9 (4) of the *Constitution* provides that no person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair. Section 9 of the *Constitution* lays the foundation for the principle of equality in South Africa.

Section 14 of the *Constitution* provides that everyone has the right to privacy. Section 10 of the *Constitution* provides that everyone has an inherent right and the right to have their human dignity respected and protected. The Court in *Hoffmann v South African Airways*⁶² held that South African Airways' policy had violated Hoffmann's right to equality as guaranteed by section 9 of the *Constitution*. The Court went on to hold that the denial of employment to the applicant because he was living with HIV impaired his dignity and constituted unfair discrimination. In *S v Makwanyane*⁶³, O'Regan J pointed out that "without dignity, human life is substantially diminished." He pronounced the prime value of dignity as follows:

61 *NEHAWU v University of Cape Town* 2003 3 SA 1 (CC).

62 2001 1 SA 1 (CC).

63 1995 6 BCLR 665 (CC) at para 144.

the importance of dignity as a founding value of the new *Constitution* cannot be overemphasised. 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. This right therefore, is the foundation of many of other rights that are specifically entrenched in Chapter 3 of⁶⁴

2.3 The Employment Equity Act⁶⁵

The *Constitution*, as the highest law in the country, should be given effect to. The *EEA* is one piece of legislation that was enacted to give effect to the *Constitution*. It is the only piece of legislation that expressly provides for discrimination on the basis of HIV status in South Africa.

2.3.1 The purpose of the EEA

Section 2 of the *EEA* provides that the purpose of the Act is to achieve equity in the workplace by (a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; (b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workplace is needed. This section gives effect to the *Constitution* in promoting equity in the workplace and adopting measures that will help reduce and ultimately remove the disadvantages of the past. Section 3 of the *EEA* provides that the Act must be interpreted– (a) in compliance with the *Constitution*; (b) So as to give effect to its purpose.

2.3.2 The application of the EEA

Section 4 (1) of the *EEA* provides that Chapter II of the Act applies to all employees and employers. An "employee" is defined as:

any person excluding an independent contractor, who works for another person or for the state and receives; or is entitled to receive, any remuneration and

64 The *Interim Constitution* 200 of 1993, (now Chapter 2 of the *Constitution*), at par 144.

65 55 of 1998, (hereafter the *EEA*).

any other person who in any manner assist in the carrying on or conducting the business of an employer. "Employed" and "employment" have meanings corresponding to that of employee.⁶⁶

A similar definition is found in section 1 of the *Basic Conditions of Employment Act*.⁶⁷ The *EEA* replaced the unfair labour practice as the primary source of the right to equality in employment.⁶⁸ Chapter II of the *EEA* prohibits unfair discrimination in employment. The chapter applies to all employers, irrespective of the size of the business⁶⁹. The *EEA* implements the constitutional prohibition of unfair discrimination in the workplace. The employees alleging unfair discrimination, therefore, must rely upon the *EEA*.⁷⁰ Section 5 of the *EEA* provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 (1) of the *EEA*, as amended by section 3 (a) of the *Employment Equity Amendment Act*⁷¹, provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more of the listed grounds, including race, pregnancy, family responsibility...HIV status...and birth or any other arbitrary ground. Section 6 (2) provides that it is not unfair discrimination to (a)... (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

2.3.3 The burden of proof under the *EEA*

Section 11 of the *EEA* as amended by section 6 of the *EEAA* provides for burden of proof. It substituted section 11 as follows:

Section 11 (1), if unfair discrimination is alleged on a ground listed in section 6 (1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination- (a) did not take place as alleged; or (b) is rational and not unfair, or is otherwise justifiable. Subsection

66 Section 213 of the *LRA*.

67 75 of 1977, (hereafter the *BCEA*).

68 Previously, Schedule 7 to the *LRA* of 1995 provided for the prohibition of unfair discrimination.

69 Van Niekerk *et al Law@work* 125.

70 Du Toit 2007 *Law, Democracy and Development Journal* (hereafter *LDD*) 1-15.

71 47 of 2013, (hereafter the *EEAA*).

(2) if unfair discrimination is alleged on an arbitrary ground, the complaint must prove, on the balance of probabilities, that- (a) the conduct complained of is rational; (b) the conduct complained of amounts to discrimination; and (c) the discrimination is unfair.

This section has the effect of shifting the burden of proof which was initially on the employer to the employee unnecessarily.

Section 7 (2) of the *EEA* provides that testing of an employee to determine that employee's HIV status is prohibited unless such testing is determined justifiable by the Labour Court in terms of section 50 (4) of the Act. Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair. In terms of this section, the employer is the one who has to prove that the discrimination is not unfair. In *Joy Mining Machinery, a Division of Harnischfeger SA (Pty) v NUMSA & others*,⁷² the Labour Court pointed out that section 7 (2) of the *EEA* "is not happily worded", but however, continued to hold that its permission was necessary even if the proposed testing was voluntary and anonymous. In the case of *Irvin & Johnson Limited v Trawler & Line Fishing Union & others*,⁷³ it was held that voluntary and anonymous HIV testing fell outside of section 7 (2) of the *EEA*.⁷⁴

2.4 Promotion of Equality and Prevention of Unfair Discrimination Act

The government, in an effort to promote equality and prevent unfair discrimination, has enacted the *Promotion of Equality and Prevention of Unfair Discrimination Act*⁷⁵ which seeks to further promote a democratic society that is united ...prevents and prohibits unfair discrimination. The objectives of the *PEPUDA* are to give effect to the letter and spirit of the *Constitution*; to provide remedies of victims of unfair

72 2002 23 *ILJ* 391 (LC).

73 2003 24 *ILJ* 565 (LC).

74 The issue of HIV testing will be dealt in depth in Chapter 3.

75 4 of 2000, (hereafter *PEPUDA*).

discrimination; to educate the public by raising awareness on the importance of promoting equality and overcoming unfair discrimination ...and to facilitate compliance with the international law obligation.⁷⁶

2.4.1 The application of PEPUDA

Section 5 (3) of *PEPUDA* provides that *PEPUDA* does not apply to any person to whom and to the extent to which the *EEA* applies. Section 4 (1) of the *EEA* applies to all employers and employees. The *EEA* and *PEPUDA* are legislation that give effect to the provisions of the *Constitution*, which is the highest law in the Republic and offer a protection to the employees.

2.5 The Labour Relations Act⁷⁷

2.5.1 The purpose of the LRA

The *LRA* is another piece of legislation that was enacted to give effect to the *Constitution*. It offers protection to the employees in the workplace. Section 1 of the *LRA* provides that the purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objectives of this Act, which include the right to fair labour practices.

2.5.2 Application of the LRA

Section 2 of the *LRA* does not apply to members of (a) the National Defence Force; (b) the National Intelligence Agency; and (c) the South African Secret Service.

2.5.3 Interpretation of the LRA

76 Demana 2011 www.justice.gov.za/docs/artigles/201103_peguda.html.
77 66 of 1995, (hereafter *LRA*).

Section 3 of the *LRA* provides that any person applying this Act must interpret its provisions- (a) to give effect to its primary objects; (b) in compliance with the *Constitution*.

2.6 Employees' rights under the LRA

2.6.1 The right not to be unfairly dismissed and the right to fair labour practice

Section 185 of the *LRA* provides that every employee has the right not to be (a) unfairly dismissed; and (b) subjected to unfair labour practices. Section 186 (1) of the *LRA* defines "dismissal" as (a) "an employer has terminated a contract of employment with or without notice"... Section 186 (2) of the *LRA* provides that "unfair labour practice" means any unfair act or omission that arises between an employer and an employee involving- (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissal for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.

2.6.2 Automatically unfair dismissal

Section 187 (1) of the *LRA* provides that a dismissal is automatically unfair if the reason for dismissal is (f) that the employer unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender...or family responsibility. The section does not expressly provide for HIV status as a ground for dismissal that is automatically unfair. However, the section 187 (1) (f) of the *LRA* states that the grounds for automatically unfair dismissal are not limited to only listed grounds, this means that by expressly stating that an employer shall not discriminate against the employees on any arbitrary ground, it includes the HIV status. Furthermore, section 187 (1) (f) of the *LRA* has to be read with section 6 (1) of the *EEA* as amended by section 3 (a) of the *EEAA*. This is where

an employee is discriminated against by being dismissed because of his or her HIV status. Courts have recognised claims based on "analogous grounds", such as HIV.⁷⁸

Any person considering whether the reason for dismissal is a fair or whether it was effected in accordance with a fair procedure must take any relevant *Code of Good Practice* issued in terms of the Act.⁷⁹ Item 2 (3) of schedule 8 of the *LRA Code of Good Practice: Dismissal* as amended by section 56 of the Act⁸⁰ states that the *LRA* provides that a dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees and trade unions, or if the reason is one of those listed in section 187...item 2 (4) of the *Code of Good Practice: Dismissal* states that in cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a reason related to the employee's conduct or capacity, or is based on the operational requirements of the business. If the employer fails to do that, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair. In *Allpass v Mooikloof Estate (Pty) Ltd t/a Mooikloof Equestrian Centre*,⁸¹ the Labour Court found that the complainant had been discriminated against and unfairly dismissed due to his HIV positive status, and awarded him twelve months' compensation.⁸²

2.6.3 Unfair dismissal

Section 188 of the *LRA* provides for other unfair dismissals. It provides in subsection (1) that a dismissal that is not automatically unfair, but it is unfair if the employer fails to prove- (a) that the reason for dismissal is a fair reason- (i) related to the employee's conduct or capacity; or (ii) based on employer's operational requirements: (b) that the dismissal was effected in accordance with a fair

78 Van Niekerk at al Law@work 252.

79 S 188 (2) of the *LRA*.

80 12 of 2002, (hereafter *Code of Good Practice: Dismissal*).

81 2011 2 SA 638 (LC).

82 This case will be thoroughly discussed in Chapter 3.

procedure. In *Fidelity Cash Management Services v Commissioner for Conciliation, Mediation and Arbitration and others*,⁸³ the court held that:

...fairness or otherwise of the dismissal of an employee must be determined on the basis of the reasons for dismissal which the employer gave at the time of the dismissal. The exception to this general rule is where at the time of dismissal the employer gave a particular reason as the reason for dismissal in order to hide the true reason such as union membership. In such a case the court or tribunal dealing with the matter can decide the fairness or validity of the dismissal not on the reason that the employer gave for the dismissal but on the basis of the true reason for dismissal.

2.7 Potentially fair reason for dismissal

2.7.1 Incapacity: Poor work performance

Code of Good Practice: Dismissal, which was made pursuant to section 188 (2) of the *LRA* is in line with article 4 of the International Labour Organisation (hereafter ILO) *Convention on the Termination of Employment at the Initiative of the Employer*,⁸⁴ which provides that the employment of the worker shall not be terminated unless there is a valid reason. Incapacity is considered a legitimate reason for dismissal.⁸⁵ The term incapacity is not defined in the *LRA*, but the *Code of Good Practice: Dismissal* splits it in two forms, namely poor work performance and ill health or injury. The employees in both instances are incapacitated in the sense that they are unable to perform their duties they are employed to carry out.⁸⁶

2.7.1.1 Procedure leading to dismissal

The procedure leading to dismissal should include an investigation to establish the reasons for the unsatisfactory performance and the employer should consider other

83 2008 3 BLLR 197 (LAC), at par 32.

84 1982, (hereafter *Convention* 158 of 1982).

85 Section (hereafter S) 188 (1) of the *LRA*.

86 Van Niekerk *et al Law@work* 282.

ways, short of dismissal, to remedy the matter.⁸⁷ In the process, the employee should have the right to be heard and to be assisted by a trade union representatives or a fellow employee.⁸⁸ The *Code of Good Practice: Dismissal* is in compliance with the *LRA* obligation to international law because article 7 of the *Convention*⁸⁹ provides that the employment of the worker shall not be terminated for reasons related to the worker's conduct or performance before he is given a chance to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide opportunity.

2.7.2 Medical incapacity

Item 10 (1) *Code of Good Practice: Dismissal* states incapacity on the grounds of ill health or injury may be temporary or permanent. If an employee is temporarily unable to work in these circumstances, the employer should investigate the extent of the incapacity or the injury. If the employee is likely to be absent for a time that is unreasonably long in the circumstances, the employer should investigate all the possible alternatives short of dismissal. When alternatives are considered, relevant factors might include the nature of the job, the period of absence, the seriousness of the illness or injury, and the possibility of securing a temporary replacement for the ill or injured employee. In cases of permanent incapacity, the employer should ascertain the possibility of securing alternative employment, or adapting the duties or work circumstances of the employee to accommodate the employee's disability. In the process of the investigation referred to in subsection (1) the employee should be allowed the opportunity to state a case in response and to be assisted by a trade union representative or fellow employee.⁹⁰ The degree of incapacity is relevant to the fairness of the dismissal. The cause of the incapacity may also be relevant. In the case of certain kinds of incapacity, for example alcoholism, counselling and rehabilitation may be appropriate steps for an employer to consider.⁹¹

87 Item 8 (3) of the *Code of Good Practice: Dismissal*.

88 Item 8 (4) of the *Code of Good Practice: Dismissal*.

89 158 of 1982.

90 Item 10 (2) of the *Code of Good Practice: Dismissal*.

91 Item 10 (3) of the *Code of Good Practice: Dismissal*.

2.7.2.1 Guidelines in cases of dismissal arising from ill health or injury

Item 11 of the *Code of Good of Good Practice: Dismissal* states that any person determining whether a dismissal arising from ill health or injury is unfair should consider- (a) whether or not the employee is capable of performing the work; and (b) if the employee is not capable- (i) the extent to which the employee is able to perform the work; (ii) the extent to which the employee's work circumstances might be adapted to accommodate disability, or where this is not possible, the extent to which the employee's duties might be adapted; and (iii) the availability of any suitable alternative work. In *National Education Health & Allied Workers Union obo Lucas v Department of Health (Western Cape)*⁹² the arbitrator found that in the course of determining whether or not a dismissal based on incapacity was fair, regard should be given on whether an employee is a person with a disability, however, this not the kind of disability provided for in Canada through interpretation of disability by the Canadian courts.

2.7.3 Date of dismissal

Section 90 (1) of the *LRA* provides that the date of dismissal is the earlier of- (a) the date on which the contract of employment terminated; or (b) the date on which the employee left the service of the employer.

2.7.4 Onus of proof in dismissal disputes

Section 192 (1) of the *LRA* provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. If the existence of the dismissal is established, the employer must prove that the dismissal is fair.⁹³ There was some controversy about the deference...that a commissioner was required to extend to an employer's decision to dismiss. In *Rustenburg Platinum*

92 2004 25 *ILJ* 2091 (BCA).

93 S 192 (2) of the *LRA*.

*Mines Ltd (Rustenburg section) v CCMA & others*⁹⁴ the Supreme Court of Appeal held that, commissioners ought to exercise caution when interfering with employer's decisions to dismiss, and that they were not at liberty to interfere only because they would have imposed a different sanction. On appeal, in *Sidumo and another v Rustenburg Platinum Mines and others*⁹⁵ the Constitutional Court overruled the Supreme Court of Appeal's decision and took a different approach.⁹⁶ It held that it was the commissioner's sense of fairness and not the employer's view that must prevail. However, this did not mean that a commissioner is at liberty to ask what the appropriate sanction is; the commissioner must ask whether the employer's decision to dismiss was fair. This decision is a value judgment that the commissioner must exercise with due regard to the interests of both the employer and the employee. In the majority judgment, Navsa AJ explained how value judgment should be exercised:

in approaching the dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee's challenge to the dismissal. There are other factors that will require consideration.

2.7.5 Remedies for unfair dismissal and unfair labour practices

Section 193 (1) of the *LRA* as amended by the *Labour Relations Amendment Act*⁹⁷ provides that if the Labour Court or an arbitrator appointed in terms of the Act finds that a dismissal is unfair, the court or the arbitrator may (a) order the employer to reinstate the employee from any date not earlier than the date of dismissal; (b) order the employer to re-employ the employee, either in the work in which the employee was employed before the dismissal or in other reasonably suitable work on any terms and from any date not earlier than the date of dismissal; or (c) order the employer to pay compensation to the employee. In *Kroukam v SA Airlinks (Pty)*

94 2006 11 BLLR 1021 (SCA).

95 2007 12 BLLR 1097 (CC).

96 2007 12 BLLR 1097 (CC).

97 12 of 2002, (hereafter *LRAA*).

*Ltd*⁹⁸ the court held that a court or arbitrator has no discretion to award reinstatement or re-employment...the court held further that reinstatement is not a competent remedy in circumstances where a dismissal is only procedurally unfair.

Section 193 (2) of the *LRA* provides that the Labour Court or arbitrator must require the employee to reinstate or re-employ the employee unless (a) the employee does not wish to be reinstated or re-employed; (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;⁹⁹ (c) it is not reasonably practical for the employer to reinstate or re-employ the employee; or (d) the dismissal was unfair only because the employer did not follow a fair procedure. If a dismissal is automatically unfair, or if a dismissal based on the employer's operational requirements is found to be fair, the Labour Court, in addition, may make any other order that it considers appropriate in the circumstances.¹⁰⁰ Section 193 of the *LRA* as amended by section 47 of the LRAA by inserting after subsection (3), subsection (4), which provides that an arbitrator appointed in terms of the Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deem reasonable, which may include ordering reinstatement, re-employment or compensation.

2.8 The BCEA

2.8.1 Purpose of the BCEA

The purpose of the *BCEA*, in terms of section 2, is to give effect to the right to fair labour practice as referred to in section 23 (1) of the *Constitution* by establishing and making provision for the regulation of basic conditions of employment; and thereby to comply with the obligations of the Republic of South Africa as a member state of the ILO; and to provide for matters connected therewith.

98 2005 12 BLLR 1172 (LAC), (hereafter the *Kroukam* case).

99 In *Kroukam* case, the Labour Appeal Court held that the mere allegations that the employment relationship had broken down and that continued employment was not feasible were not sufficient.

100 S 193 (3) of the *LRA*.

2.8.2 Application of the BCEA

Section 3 (1) of the *BCEA* provides that the Act applies to all employees and employers except- (a) members of the National Defence Force, the National Intelligence Agency and the South African Secret Service; and (b) unpaid volunteers working for an organisation servicing a charitable purpose... Section 7 (a) of the *BCEA* provides that every employer must regulate the working time of each employee in accordance with the provisions of the Act governing occupational health and safety; (b) with due regard to the health and safety of employees; (c)...and (d) with due regard to the family responsibilities of employee. Section 9 (1) of the *BCEA* provides that subject to chapter two, an employer may not require or permit an employee to work more than (a) 45 hours in any week; and (b) nine hours in any day if the employee works for five days or fewer in a week; or (c) eight hours in any day if the employee works on more than five days in a week. In terms of section 15 (1) of the *BCEA* an employer must allow an employee- (a) a daily rest period of at least twelve consecutive hours between ending and recommencing work; and (b) a weekly rest period of at least 36 consecutive hours, which unless otherwise agreed, must include Sunday.

2.9 Other legislation

2.9.1 Medical Schemes Act

The *Medical Schemes Act*,¹⁰¹ states that it was enacted to consolidate the laws relating to registered medical schemes; ...to make provision for registration and control of certain activities of medical schemes; to protect the interests of the members of medical schemes...section 24 (2) (e) of the *Medical Schemes Act*¹⁰²as amended by section 7 *Medical Scheme Amendment Act*¹⁰³ provides that the medical scheme does not or will not unfairly discriminate directly or indirectly against any person on one or more arbitrary grounds including race, age, gender, marital status,

101 131 of 1998.

102 131 of 1998.

103 55 of 2001.

ethnic or social origin, sexual orientation, and state of health...HIV is a state of health and as such persons living with HIV are given protection under this Act.

2.9.2 Occupational Health and Safety

Every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees.¹⁰⁴

Every employer shall keep the health and safety representatives designated for their workplaces or sections of the workplaces, informed of the actions taken under subsection (1) in their respective workplaces or sections thereof and of the results of such actions: provided that individual results of biological monitoring and medical surveillance relating to the work of the employee, shall only with the written consent of such employee be made available to any person other than an inspector, the employer or the employee concerned.¹⁰⁵

104 S 8 (1) of the *Occupational Health and Safety Act* 85 of 1993 as amended by *Occupational Health and Safety Amendment Act* 181 of 1993, (hereafter *OHSAA*).

105 S 12 (2) of the *OHSAA*.

CHAPTER 3 HIV testing and the concept of unfair discrimination

3.1 Introduction

The principle of equality dictates that all people in the same position or same environment are equal, and as such, they should be treated in a like manner. For example, it demands that employees holding the same position must be treated in the same manner, meaning that they should receive equal pay for equal work. They should be entitled to the same benefits offered by their employer to other employees in the same positions without any preferences.

3.2 Concept of equality

"Equality" is traditionally understood to mean the right to be equal to men. This becomes problematic when it is extended to the understanding that women must be treated exactly like men if they are to gain equality with men. It implies that women must be treated according to male standards, disguising the ways in which women are different from men and how they will be disadvantaged because of these differences.¹⁰⁶ There is nothing wrong with employers differentiating between employees on justifiable reasons in order to give effect to the *Constitution* and respect their right to equality and dignity.

3.2.1 Discrimination

More often, at the workplace, employees are the victims of discrimination by their employers on various grounds. The concept of "discrimination" is defined in *PEPUDA* as:

Meaning any act or omission, including a policy, law, rule, practice, conditions or situation which directly or indirectly-

- (a) imposes burdens, obligations or disadvantage on;
- (b) withholds benefit, opportunities or advantages from, any person on one or more of the prohibited grounds.

106 IWRAW Asia Pacific 2009 <http://www.iwraw-ap.org>.

3.2.1.1 The scope of prohibition

The applicant in a discrimination claim must be able to establish that the discrimination alleged exists in an employment policy or practice.¹⁰⁷ In terms of section 1 of the *EEA*, "employment policy or practice" is defined as including but not limited to:

(a) recruitment procedures; (b) Advertising and selection criteria; (c) appointments and appointment process; (d) job classification and grading; (e) Remuneration, employment benefits and the terms and conditions of employment; (f) job assignments; (g) the working environment and facilities; (h) training and development; (i) performance evaluation system; (j) promotion; (k) transfer; (l) demotion; (m) disciplinary measures other than dismissal; and (n) dismissal.

3.2.2 Substantive and formal equality

Section 1 of the *Constitution* provides that South Africa is founded on the values of human dignity, the achievement of equality and the advancement of the human rights and freedoms. The concept of equality has two dimensions. The first is formal equality. Formal equality requires that like must be treated as like. It demands that all persons should be treated in the same manner, notwithstanding their circumstances. The second dimension is substantive equality. It focuses on equality of outcome. An examination of the social and economic conditions of groups and individual is considered significant, and the results or effects of a rule rather than its form, are important.¹⁰⁸ In *President of the Republic of South Africa v Hugo*¹⁰⁹ the constitutional court held that:

we need to develop the concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth...we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved.

107 Van Niekerk *et al Law@work* 131.

108 Van Niekerk *et al Law@work* 124.

109 1997 4 SA 1 (CC).

Substantive equality recognises that policies and practice put in place to suit everyone appear to be non-discriminatory, but may not address the specific needs of certain groups, making them indirectly discriminatory.¹¹⁰ Recognising that formal equality prevents progress towards true equality, substantive equality allows classification along race...in order to achieve greater equality across the board.¹¹¹

3.2.2.1 Direct discrimination

Discrimination may be direct or indirect. Direct discrimination is easy to recognise. It occurs where a differentiation or distinction between employees is clearly and expressly based on one or more of the listed grounds in section 6 (1) of the *EEA*. Direct discrimination would be established where an employer treats a woman less favourably than a man in the same position simply because the employee is a woman.¹¹² In *Swart v Mr Video (Pty) Ltd*,¹¹³ the Commission for Conciliation, Mediation and Arbitration (hereafter CCMA) held that limiting the pool of applicants to those between the ages of 18 and 25, the employer had unfairly discriminated against the applicant on the ground of her age.

3.2.2.2 Differentiation

In many cases, in trying to attach meaning to the concept of discrimination, people often think of differentiation, which means treating employees differently by including some and excluding others, preferring some employees to others.¹¹⁴ The court in *Prinsloo v Van der Linde & another*¹¹⁵ defined "discrimination" as "treating persons differently in a way that impairs their fundamental dignity as human beings". Differentiation on any of the grounds specified in section 8 (1) of the

110 The Equal Opportunity Commission of Western Australia 2010 www.eoc.wa.gov.au/Substantiveequality.aspx.

111 Marie 2013 erinaree.com/2013/07/31/equality-formal-vs-substantive-and-why-i-care/.

112 Garbers "Employment Equity" 16.

113 1998 19 *ILJ* 1315 (CCMA).

114 Garbers "Employment Equity" 16.

115 1997 6 BCLR 759 (CC).

Interim *Constitution* (now super ceded by section 9 (3) of the *Constitution*) *ipso facto* amounts to discrimination and is presumed to be unfair unless the contrary is proved.¹¹⁶ There may be a number of reasons for differentiating between employees such as experience, educational qualification or seniority and listed grounds under section 6 (1) of the *EEA*. However, if an employee is discriminated against for a reason not listed in section 6 (1) of the *EEA*, our laws take the view that an unlisted reason for differentiation would amount to discrimination if it meets the following test.¹¹⁷

3.2.2.3 Establishment of discrimination and the connection between differentiation and grounds of discrimination

In *Harksen v Lane NO & others*¹¹⁸ the constitutional court established a three stage inquiry into an alleged violation of the equality clause. The stages have been described as follows, (a) does the provision differentiate between people or categories of people? If so (b) does the differentiation amount to discrimination? This requires a two stage analysis: (i) firstly, does the differentiation amount to discrimination? If it is on the specified ground, the discrimination will have been established... (ii) if the differentiation amounts to discrimination, does it amount to unfair discrimination? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant.

3.2.2.4 Indirect discrimination

Indirect discrimination may be harder to identify because it occurs where an employer applies a rule that looks, on the face of it, neutral to all employees, but the application of that rule has a disproportionate effect on certain groups of employees.

116 Prinsloo v Van der Linde & another 1997 6 BCLR 759 (CC).

117 Garbers "Employment Equity" 16.

118 1997 11 BCLR 1489 (CC), (hereafter *Harksen case*).

It will occur where the employer applies a sex neutral criterion such as height and weight; this has a disproportionate effect on women.¹¹⁹

3.2.2.5 The onus of proof in discrimination disputes

Section 11 of the *EEA* as amended by section 6 of the *EEAA*, substituted section 11 for section 11 (1), which provides that if unfair discrimination is alleged on a ground listed in section 6 (1) of the *EEA*, the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination (a) did not take place as alleged; or (b) is rational and not unfair, or is otherwise justifiable. (2) if unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on the balance of probabilities, that- (a) the conduct complained of is not rational; (b) the conduct complained of amounts to discrimination; and (c) the discrimination is unfair.

3.3 International law

South Africa is a member to International Labour Organisation (hereafter ILO). Section 39 (1) of the *Constitution* provides that when interpreting the Bill of Rights, a court... (a)...(b) must consider international law. Article 1 of the *International Labour Convention on Discrimination in respect of Employment and Occupation*¹²⁰ provides that the term discrimination includes: (a) any distinction, exclusion or preference made on basis of race...or social origin which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.

3.3.1 Southern African Development Community (hereafter SADC) and HIV/AIDS

Item 4 of the *SADC Code on HIV/AIDS and Employment*¹²¹ states that HIV status should not be a factor in job status, promotion or transfer, any changes in job status should be based on existing criteria of equality of opportunity, merit and capacity to

119 Van Niekerk *et al Law@work* 130.

120 111 of 1958 (hereafter *ILO Discrimination Convention* 111).

121 1997 (hereafter *SADC Code on HIV/AIDS and Employment* 1997).

perform the work to a satisfactory standard. The *SADC Code on HIV/AIDS and Employment*¹²² is not binding on South African courts but it provides the guidelines, which the courts may use in dealing with HIV cases.

3.3.2 *The concept of decent work*

The ILO's objective is to achieve social peace.¹²³ The primary goal of the ILO is to promote opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity.¹²⁴

3.4 *HIV testing and the world of work*

Section 1 of the *EEA* defines medical testing as including any test, question, inquiry or other means designed to ascertain, or which has the effect of enabling the employer to ascertain, whether an employee has any medical condition. HIV is a health issue that has brought about many problems. The glossary to the *EEA Code of Good Practice on Key Aspects of HIV and Employment*,¹²⁵ gives an explanation of HIV testing. "HIV testing" is defined as:

taking medical test to determine a person's HIV status. This may include written or verbal questioning about previous HIV tests; questions related to the assessment of risk behaviour (such as questions regarding sexual practices, the number of sexual partners or sexual orientation); and any other indirect methods designed to ascertain an employee's or job applicant's HIV status.

*ILO Code of Practice on HIV/AIDS and the World of Work*¹²⁶ forms one of the international minimum standards, and therefore, it has to be considered in South Africa. Section 8 of the *ILO Code of Practice on HIV/AIDS and the World of Work*,¹²⁷ provides that:

122 1997.

123 Van Niekerk *et al Law@work* 457.

124 Van Ginneken *ESS Extension of Social Security* 5.

125 2000.

126 2001.

127 2001.

testing for HIV should not be carried out at the workplace except as specified in the *Code*. It is unnecessary and imperils the human rights and dignity of workers: test results may be revealed and misused, and the informed consent of workers may not always be carefully free or based on an appreciation of all the facts and implications of testing. Even outside the workplace, confidentiality testing for HIV should be the consequence of voluntary informed consent and performed by suitably qualified personnel only, in conditions of the strictest confidentiality.

In *C v Minister of Correctional Services*,¹²⁸ the court emphasised the importance of informed consent in relation HIV testing done on a person. In this case, a prisoner had been informed that he was being tested for HIV and that he had the right to refuse the test, while he was standing in a hallway with a group of other prisoners. This information was repeated later while he was in the consulting room when his blood was drawn, in the presence of other prisoner. The High Court held that the lack of privacy and reasonable time for reflection accorded to the prisoner before being asked for consent to the test, and the absence of any pre-test counselling, resulted in the failure to obtain informed consent.

Section 8.1 of the *ILO Code of Practice on HIV/AIDS and the World of work*,¹²⁹ provides that HIV testing should not be required at the time of recruitment or as a condition of continued employment. Section 7 (2) of the *EEA* provides that testing of an employee to determine an employee's HIV status is prohibited unless the testing is determined to be justifiable by the Labour Court in terms of section 50 (4) of the *EEA*. The interpretation of section 7 of the *EEA* has brought a lot of debate in the workplace.¹³⁰ In *Joy Mining Machinery, a Division of Harnischfeger SA (Pty) v NUMSA & others*,¹³¹ Joy Mining had applied to the Labour Court for permission to test employees for HIV as part of an HIV prevalence study, which would be used to establish the exact prevalence of HIV amongst staff. The Labour Court gave them permission to test a number of employees for HIV provided amongst others: the testing would be voluntary; testing would be anonymous; employees would have the option of a second HIV test to determine their own HIV status. The testing would

128 1997 JOL 407 (T).

129 2001.

130 Van Niekerk *et al Law@work* 147.

131 2002 23 *ILJ* 391 (LC).

not form part of the surveillance study but would be for the benefit of interested employees; the testing and analysis would be performed by an independent consulting company and Joy Mining would not be involved in the process in any way; HIV positive employees would not be discriminated against in any way; and all testing would be conducted with the consent of the affected employee and no prejudicial interference would be drawn from an employee who refused to be tested. The court held further and pointed out that section 7 (2) of the *EEA* "is not happily worded" but appeared to hold that its sanction was necessary even if the proposed testing was voluntary and anonymous.

However, a different view was held by the court in *Irvin & Johnson Limited v Trawler & Line Fishing Union & others*,¹³² In this case an employer applied to the Labour Court for an order declaring that the testing in question, which was to be both voluntary and anonymous, did not fall within the ambit of section 7 (2) of the *EEA*. As a precaution, an order was sought in the alternative that the testing was justifiable as contemplated in the subsection, subject to certain conditions set out in the application. The applicant submitted that it required information on HIV prevalence in its workplace to assess the potential impact of HIV/AIDS and to assist it in engaging in appropriate human resource planning and to facilitate the effective implementation of proactive steps to prevent employees becoming infected with HIV/AIDS. The proposed testing, as stated above, was both voluntary and anonymous and was to be accompanied both by pre-test and post-test counselling.

3.4.1 Anonymous testing

Section 8.3 of the *ILO Code on Practice on HIV/AIDS and the Work of Work*,¹³³ provides that anonymous, unlinked surveillance of HIV testing in the workplace may occur provided it is undertaken in accordance with the ethical principles of scientific research, professional ethics and the protection of individual rights and confidentiality. Where such research is done, workers and employer should be

132 2003 24 *ILJ* 565 (LC).

133 2001.

consulted and informed that it is occurring. The information obtained may not be considered anonymous if there is a reasonable possibility that a person's HIV status can be deduced from the results. The court, in *Irvin & Johnson Limited v Trawler & Line Fishing Union & others*,¹³⁴ dealt first with anonymous testing and noted that section 7 of the *EEA* forms part of a chapter dealing with the prohibition of discrimination in the employment. Where employees are tested in such a way that the employer is unable to identify which employees are suffering from medical condition, the risk of discrimination based on medical condition is absent.¹³⁵

3.4.2 Voluntary testing

Section 8.4 of the *ILO Code of Practice on HIV/AIDS and the World of Work*,¹³⁶ provides that:

there may be situations where workers wish at their own initiatives to be tested, including as part of voluntary testing programmes. Voluntary testing should normally be carried out by the community health services and not at the workplace. Where adequate medical services exists, voluntary testing may be undertaken at the request and with the written informed consent of a worker, with advice from the worker's representative if so requested. It should be performed by suitably qualified personnel with adherence to strict confidentiality and disclosure requirements. Gender-sensitive pre- and post-counselling, which facilitates an understanding of the nature and purpose of the HIV tests, the advantage and disadvantages of the tests and the effects of the results upon the worker, should form an essential part of the testing procedure.

The court, in *Irvin & Johnson Limited v Trawler & Line Fishing Union & others*,¹³⁷ widely dealt with anonymous and voluntary testing:

"compulsory testing" is not limited to the case of taking a sample from an employee by physical force. In the absence of consent, such conduct would amount to an assault, and it would require any statutory provision in order to render it unlawful. By compulsory testing it is meant, in the context, the imposition by the employer of a requirement that employees...submit to testing on the pain of some or other sanction or disadvantage if they refuse consent. This is to be contrasted with voluntary testing, where it is entirely up to the

134 2003 24 *ILJ* 565 (LC).

135 Van Niekerk *et al Law@work* 148.

136 2000.

137 2003 24 *ILJ* 565 (LC).

employee to decide whether he or she to be tested and where no disadvantage attaches to a decision by the employee not to submit to testing.¹³⁸

The court concluded that anonymous and voluntary testing, which the applicant wished to arrange for its employees, did not fall within the ambit of section 7 (2) of the *EEA*, and that it did require the authority of the Labour Court before allowing its employees to be tested for HIV status. The holding of the two cases above, namely *Joy Mining Machinery, a Division of Harnischfeger SA (Pty) v NUMSA & others*,¹³⁹ and *Irvin & Johnson Limited v Trawler & Line Fishing Union & others*,¹⁴⁰ is different. The court in *Joy Mining Machinery, a Division of Harnischfeger SA (Pty) v NUMSA & others*,¹⁴¹ held that where HIV testing in terms of section 7 (2) of the *EEA* is to be conducted, the authorisation of the Labour Court is needed even if the HIV testing is going to be anonymous and voluntary. However, the court in *Irvin & Johnson Limited v Trawler & Line Fishing Union & others*,¹⁴² held that if the HIV testing is going to be anonymous and voluntary then the authorisation of the Labour Court is unnecessary. This shows a certain level of controversy as regards HIV testing in terms of section 7 (2) of the *EEA*, and in the process the rights of employees might be violated in that employee get discriminated against, and as a result be dismissed from their employment. It is this dismissal of people with HIV that bring many problems. When the employer dismisses the employee because he or she is HIV positive, that undermines the concept of decent work. ILO constituents, namely governments, employers and workers formulated the latter. It is based on the notion that work is important, not only to the worker but to his or her family. Work enhances the worker's value of human dignity.

Human dignity is the source of family stability, peace in the community, democracies that deliver for people and economic growth that expands opportunities for productive jobs and enterprise development.¹⁴³ This means that if people with HIV

138 At par 28.

139 2002 23 *ILJ* 391 (LC).

140 2003 24 *ILJ* 565 (LC).

141 2002 23 *ILJ* 391 (LC).

142 2003 24 *ILJ* 565 (LC).

143 ILO Date unknown www.ilo.org/global/about-the-ilo/decent-work-agenda/lang—de/index.htm.

are discriminated against, and dismissed ultimately, they contribute to the country's production and make a significant impact on the country's economy and development. Decent work reflects the importance of social, economic and political agendas of countries and the international system. Fair globalisation can be achieved by productive employment and decent work. This shows that if governments make good policies relating to the pandemic of HIV/AIDS, more employees will remain at work and their stay in the workplace means more production, and improvement in the standard of living of those workers and their families, thereby reducing poverty, which is one of the main concerns in South Africa.

The *EEA Code of Good Practice on Key Aspects of HIV and Employment*,¹⁴⁴ though they are non-binding could help employers to follow the correct guidelines in subjecting the employees to HIV testing. Item 7.1.4 of the *EEA Code of Good Practice on Key Aspects of HIV and Employment*,¹⁴⁵ states that in relation to authorised testing, employers must approach the Labour Court for authorisation in, amongst other things the following circumstances (i) during an application for employment; (ii) as a condition of employment; (iii) during procedures related to termination of employment; (iv) as an eligibility requirement for training or staff development programmes; (v) as an access requirement to obtain employee benefits. Item 7.1.5 of the *EEA Code of Good Practice on Key Aspects of HIV and Employment*,¹⁴⁶ states that in order for the HIV to be permissible, (a) an employer may provide testing to an employee who has requested a test in the following circumstances (i) as part of a health care service provided in the workplace; (ii) in the event of an occupational accident carrying a risk of exposure to blood or other body fluids; (iii) for the purposes of applying for compensation following an occupational accident involving a risk of exposure to blood or other body fluids.

3.4.3 The test for justifiability of HIV testing

144 2000.

145 2000.

146 2000.

The problem that existed before the case of *PFG Building (Pty) Ltd v Chemical Engineering Pulp Paper Wood and Allied Workers Union & others*¹⁴⁷ was that section 7 (2) of the *EEA* does not provide for grounds under which the Labour Court hold the testing of HIV justifiable. The Labour Court held that the limitations test in section 36 of the Constitution should be used to see if the testing was justifiable

3.5 Employees' rights to privacy and dignity

Every employee has the constitutional right to privacy. Article 1 of the *Universal Declaration of Human Rights*,¹⁴⁸ provides that all human beings are born free and equal in dignity and rights. Article 17 (1) of the *International Convention on Civil and Political Rights*,¹⁴⁹ states that no person shall be subjected to arbitrary or unlawful interference with privacy...the right to privacy includes respect for both physical privacy in the case of HIV testing without consent, and for privacy of information in the case of unauthorised disclosure of HIV status.¹⁵⁰ This means that no employer can compel the employee to undergo an HIV testing. Item 7.2.1 of the *EEA Code of Good Practice on Key Aspects of HIV and Employment*,¹⁵¹ states that an employee is not legally required to disclose his or her HIV status to his/her employer or to another employee. Item 7.2.2 of the *EEA Code of Good Practice on Key Aspects of HIV and Employment*,¹⁵² states that where the employee chooses to disclose his or her HIV status voluntarily to the employer or to other employees, this information may not be disclosed to others without the employee's express written consent. Where written consent is possible, steps must be taken to confirm that the employee wishes to disclose his or her status. Item 7.1.5 (b) of the *EEA Code of Good Practice on Key Aspects of HIV and Employment*,¹⁵³ states that such testing may only take place within the following defined conditions (i) At the initiative of an employee; (ii) Within a health care worker and employee-patient relationship; (iii) With informed

147 2003 24 *ILJ* 974 (LC).

148 1948, (hereafter *UDHR*).

149 1966, (hereafter *ICCPR*).

150 Southern African Litigation Centre 2012 www.southernafricanlitigatingcentre.org.

151 2000.

152 2000.

153 2000.

consent and pre- and post-test counselling, as defined by the Department of Health's National Policy on Testing for HIV; and (iv) With strict procedures relating to confidentiality of an employee's HIV status as described in clause 7.2 of this *Code*.

The doctor-patient relationship is the foundation of the ethics in the Department of Health. Doctors and nurses should uphold the highest standard of medical ethics with regards their patients' personal information. They must keep their patients' medical information secret.¹⁵⁴ This means that the patients' medical information, including HIV testing, should not be revealed to any person whatsoever; the information should only be released by a medical practitioner who has been authorised by the express consent of the patient. Otherwise, it should be respected and patients' rights to privacy and dignity are maintained. Medical confidentiality is one of the most important ethical considerations in the AIDS setting. People who are vulnerable due to HIV positive status will not voluntarily come forward to test for HIV if they are not guaranteed that all the information they reveal to their doctors will remain confidential. Confidentiality is crucial for the protection of those individuals who wish to come forward voluntarily to do an HIV testing from discrimination and stigmatisation.¹⁵⁵

In *Jansen Van Vuuren v Kruger*¹⁵⁶ the plaintiff, McGreary, instituted an action for damages against his general practitioner, Doctor Kruger, for divulging the fact that he, the plaintiff, was HIV positive, to other two medical practitioners during a golf game. The two doctors were not involved at all in the provision of care for the plaintiff and there was no sound reason to suspect that they would do so in future. The plaintiff's claim was based on the *actio injuriarum* in that his privacy was invaded and that he had been injured in his rights of personality and rights to privacy. However, the medical practitioner argued that the disclosure had been on a privileged occasion, that it was the truth, it was made in the public interest, and that it was objectively reasonable in the public interest in the light of the *boni mores*. The medical practitioner argued further that he had a social and moral duty to make the

154 Le Roux-Kemp 2013 *Potchefstroom Electronic Law Journal* (hereafter *PERJ*) 201-536.

155 Daniella's Writing 1995 www.danielaswriting.com/hiv.htm.

156 1993 4 SA 842 (AD).

disclosure to the other health practitioners and that they had a reciprocal social and moral duty to receive the information and apply due diligence when dealing with or treating the plaintiff. The court held that:

...in the long run, preservation of confidentiality is the only way of securing public health; otherwise doctors will be discredited and future individual patients will not come forward if doctors are going to yell on them. Confidentiality is vital to secure public health as well as private health, for less the infected come forward they cannot be counselled. There are, in the case of HIV/AIDS special circumstances justifying the protection of confidentiality. By the very nature of the disease people who are at risk must seek medical advice or treatment. Disclosure of HIV test results has serious personal and social consequences for the patient. The patient may be shunned at by the community once they hear that he or she is HIV positive. He or she will think low of himself or herself and once he or she thinks in that way the, he or she will no longer exercise his or her constitutional right and free his or her potential.

The *South African Medical and Dental Council's guidelines on the management of patients with HIV or AIDS*¹⁵⁷ assert that a doctor may only disclose his or her patient's HIV or AIDS status to other healthcare worker or to a third party after in-depth counselling and after trying to secure the patient's consent for the disclosure. The doctor shall disclose his or her patient's medical condition, in this case HIV status, if the patient insists on not allowing the doctor to make a disclosure. However, the medical practitioner's act or omission, which leads to unnecessary disclosure of a patient's HIV infection, will face serious challenges, including a disciplinary action.¹⁵⁸

Legal duty to respect the principle of confidentiality was enunciated in the case of *NM v Smith and others*.¹⁵⁹ Dr Marietta Botes, head of the Immuno Clinic in the Medical Faculty of the University of Pretoria, recruited volunteers, including the applicant to participate in clinical trials directed at determining the efficiency of a combination of drugs that could decrease a patient's HIV level. The applicant and others were made to sign a consent form indicating that they had been informed of the nature, benefits, site effects...concerns were raised after the trials regarding

157 1994.

158 Daniella's Writing 1995 www.danielaswriting.com/hiv.htm.

159 2007 5 SA 250 (CC).

illness and fatalities on the trials...applicants argued that their rights to privacy, dignity and psychological integrity had been violated, as their names and the fact that they were HIV positive had been disclosed, without their prior consent, in the biography of Ms Patricia de Lille, a publication that had been authorised by Ms Charlene Smith. The applicants' details were included in the book in a chapter that discussed Ms de Lille's work in campaigning for the rights of people living with HIV/AIDS. Ms Smith made use of an external report that had been e-mailed to Ms de Lille, and the detailed information about the clinical trials. The external report did not contain the informed consent forms of the applicants, and it was further not marked as confidential. However, the respondents argued that the HIV status of the applicants at the time of publication of the book was no longer private. The Constitutional Court held that:

the lack of respect for private medical information and its subsequent disclosure might result in fear, jeopardising an individual's right to make certain fundamental choices that he or she has the right to make.¹⁶⁰ Especially with regard to the disclosure of an individual's HIV/AIDS status, the Court held that confidentiality was important as it would encourage individuals to seek treatment and divulge information encouraging disclosure of HIV/AIDS.¹⁶¹ Medical information was not only private and confidential while in the hands of health care personnel. People continued to have a direct interest to control information about themselves and to keep it confidential. Thus, although the applicants had given their consent to take part in clinical trial they certainly had not given consent for their names to be published in a book having circulation throughout South Africa. The doctor-patient relationship is one of the most importance relations that can come to be between two people. It is based on trust, morality and respect, and it is crucial to the quality of care provided together with the results.¹⁶²

3.6 Summary

The above quotation confirms lack of respect for confidentiality by the medical practitioners in South Africa, and this is a barrier to employees to seek medical treatment. Stigma and discrimination prevent employees from going for HIV testing.

160 At par 41.

161 At par 42.

162 Le Roux-Kemp Law, Power and the Doctor-Patient Relationship as quoted by Le Roux-Kemp 2013 *PERJ* 201-536.

This is the reason why there should be a comparative study in others countries; Canada in this research. These issues should be investigated in Canada in an attempt to see how Canada can be of assistance to South Africa.

CHAPTER 4 The position in Canada

4.1 Introduction

Canada is one of the countries that is progressive in terms of dealing with HIV and HIV-related problems such as stigma and discrimination of people who are living, or suspected of living with HIV. Canada and South Africa have bilateral relations and Canada assisted South Africa on how best to deal with the pandemic of HIV/AIDS in general. Canada has a different definition of discrimination, which defines HIV as a disability, and this definition could help South Africa reconsider its discrimination laws and incorporate parts of the definition, which could be helpful. Canadian courts have taken relatively progressive approaches to interpreting and applying constitutional guarantees of equality. Canadian statute prohibits discrimination on a number of grounds, including but not limited to disability. Courts and tribunals have extended the protection against discrimination through the interpretation process. They have interpreted one of the discrimination grounds extensively, namely disability.¹⁶³

4.2 Constitutional protection of equality rights in Canada

The Canadian *Constitution Act*¹⁶⁴ provides that Canada is founded upon the principles that recognise the supremacy of God and the rule of law. This means that the Constitution of Canada is the supreme law of Canada, and any other law that is inconsistent with the provisions of the *Constitution* is, to the extent of its inconsistency, of no force and effect.¹⁶⁵ The courts in Canada may even modify the law that is inconsistent with the *Constitution* so that that law is in compliance with the *Constitution*.¹⁶⁶ Everyone in Canada is guaranteed equality rights. Section 15 (1) of part 1 of the Canadian *Constitution Act*,¹⁶⁷ provides that:

163 Elliott and Gold 2005 *HIV/AIDS Policy & Law Review* 20-31.

164 1982.

165 S 52 (1) of the *Constitution Act*, 1982.

166 Elliott and Gold 2005 *HIV/AIDS Policy & Law Review* 20-31.

167 1982.

every individual is equal before the law and under the law and has the right to the equal protection and equal benefits of the law without discrimination and, in particular without discrimination based on race, national origin...mental or physical disability.

The disability in section 15 (1) of the Canadian *Charter of Right and Freedoms*¹⁶⁸ has been interpreted by the court in *Brown v British Columbia (Minister of Health)*¹⁶⁹ to include HIV/AIDS. This means the Canadian Constitution protects those HIV-infected people on the ground of disability, which includes HIV/AIDS status.

4.3 Discrimination in Canada

Discrimination is defined by the Canadian court in the case of *Andrews v Law Society British Columbia*¹⁷⁰ as:

a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantage on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantage available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classified. Discrimination in the workplace can be direct or indirect.

4.4 Protection against HIV/AIDS-based discrimination under CHRA

*Canadian Human Rights Act*¹⁷¹ (hereafter *CHRA*) prohibits discrimination on a number of grounds in the areas such as employment; accommodation...the provision of goods and services...disability constitutes a ground for discrimination. Section 2 of the *CHRA* provides that the purpose of the Act is to extend Canadian laws to give effect to the principle that all individuals should have an equal opportunity with other individuals to show their full potential and make the life they want to live and have their needs accommodated, consistent with their duties and obligations as members

168 1982, (hereafter Canadian Charter).

169 1990, 66 DLR 4th 444 (BCSC).

170 1989 1 SCR 143.

171 1977.

of the society, without being barred by discriminatory practices based on race age... disability...section 3 (1) of the *CHRA* provides for prohibited grounds of discrimination, including disability.

4.5 HIV/AIDS as a disability within the meaning of CHRA

In *Fontaine v Canadian Pacific Ltd*¹⁷² a man's employment as a cook for a Canadian Pacific railway crew was terminated after it was discovered that he had HIV. The Canadian Human Rights Tribunal ruled that a man had been discriminated against, on the basis of disability. The Federal Court of Appeal upheld the decision in *Canadian Pacific Ltd v Canadian Human Rights Commission*.¹⁷³ Furthermore, in the case of *Thwaites v Canada (Canadian Armed Forces)*¹⁷⁴ Mr Thwaites, a master seafarer of the Canadian Armed Forces (hereafter CAF), filed a complaint against the CAF alleging that it discriminated against him by terminating his employment and restricting his duties and opportunities because he was HIV positive. The human rights tribunal found that Mr Thwaites had been discriminated against because of his disability. It found that the military had failed in its legal duty to accommodate him and to assess his capabilities individually in the context of the risk he potentially posed to himself and others. It also held that the increased risk posed by retaining a person with a disability in the CAF had to be more than minimal risk before the CAF could justify outright dismissal.

The *CHRA* established the Canadian Human Rights Commission (hereafter CHRC) in¹⁷⁵ to receive and investigate complaints of discrimination, and contrary to *CHRA* it adopted a policy on HIV/AIDS. The policy expressly states that the prohibition in the *CHRA* against disability-based discrimination extends to discrimination based on HIV/AIDS status. The policy recognised that people who are perceived to have HIV infection may be subject to discrimination by the only reason that they are a member, or perceived to be a member of a risk group, or by association with a

172 1989 29 CCEL 192.

173 1991 1 FC 571 (CA).

174 1993 CHR D No. 9 (June 1993).

175 1996.

person or people living with HIV/AIDS.¹⁷⁶ In Canada, the *Quebec Charter of Human Rights and Freedoms*,¹⁷⁷ prohibits discrimination in employment. HIV infection is considered a handicap under the Quebec Charter. The Supreme Court of Appeal released the unanimous decision on the interpretation of disability, that it includes HIV in the case of *Quebec v Montreal (City); Quebec v Boisbriand (City)*¹⁷⁸ the decision recognises that people are protected against discrimination based on disability even if their condition does not give rise to any functional limitation and the discrimination is based the perception that they are disabled. The decision is crucial in protecting and promoting the rights of people living with HIV/AIDS, including asymptomatic HIV-positive persons. The QCHRf also provides for the right to non-disclosure of confidential information and the right to work in fair and reasonable conditions of employment, which have regard for health, safety and physical well-being.

The Arbitration Board in the case of *Pacific Western Airlines Ltd v Canadian Air Line Flight Attendants Association*¹⁷⁹ held that dismissing a flight attendant from his job on the basis of his HIV status amounted to prohibited discrimination. The employer does not have the right to subject his or her employee to medical examination without the employees consent, more especially where the aim is to establish that an employee is HIV positive. This was ruled in the case of In *Centre d'accueil Sainte-Domitille v Union des employés de service, local*¹⁸⁰ where the arbitrator ruled that an employer does not have the right to require a medical examination where the purpose is merely to obtain evidence that the employee is HIV-positive, when that status poses no danger to others. However, in *Jerome v DeMarco*¹⁸¹ the Ontario Board of Inquiry dealing with a case alleging discrimination by a dental practice, held that there was no discrimination but did not confirm that discrimination based on HIV status is covered by prohibition of discrimination based on handicap.

176 Elliott and Gold 2005 *HIV/AIDS Policy & Law Review* 20-31.
177 1975, (hereafter *QCHRf*).
178 2000 SCC 27; 2000 SCJ No 24 (QL).
179 1987 28 LAC 3d 291 (Canadian Labour Arbitration Board).
180 1989 TA 439 (Tribunal d'Arbitrage).
181 1992 16 CHRR D/402 (Ontario Board of Inquiry).

4.6 Action taken by Canada in relation to HIV/AIDS problem

Canadian society has more than thirty years' concrete action taken by them to fight HIV/AIDS. Canadians have used Leading Together as a critical part to manage and minimise HIV/AIDS in Canada, this is the renewal of the Leading Together¹⁸² Stigma and discrimination affects the relationships between partners, family, the community, workplace, and the society. Community engagement and support have been a central part to the response to HIV/AIDS in Canada, and continue to be key sources of resilience to people living with HIV/AIDS. Community organisations, workplace policies and government across Canada are involved in providing treatment, care, support and services to people living with HIV/AIDS, and work on prevention, education, and countering stigma and discrimination. People who are HIV positive play an important role in HIV prevention.¹⁸³ Canada implemented education initiatives, to educate people including employees about HIV/AIDS and the issues relating to it; it has enhanced the use of data collection tools, such as surveys targeted to people living with and at risk of HIV/AIDS about their experience with stigma and discrimination to guide anti-stigma and discrimination efforts; continue to advocate for a public health approach to HIV disclosure; and redouble efforts to understand the structural factors that lead to stigma and discrimination.¹⁸⁴

4.6.1 The need for HIV testing

A way for HIV-positive people, including employees, to prevent HIV transmission, is by knowing their statuses. If people are diagnosed and given early treatment and support, they live longer than those who are not. Employees who go for a voluntary HIV testing with their informed consent are offered pre- and post-counselling, and therefore, there is effective prevention strategy.¹⁸⁵ Canada continues to improve the

182 2005-2010 call of action.

183 CATIE 2013 www.catie.ca/en/resources/leading-together-canada-takes-action-hivaids-2013-renewal.

184 CATIE 2013 www.catie.ca/en/resources/leading-together-canada-takes-action-hivaids-2013-renewal.

185 CATIE 2013 www.catie.ca/en/resources/leading-together-canada-takes-action-hivaids-2013-renewal.

quality and consistency of HIV data collected in all jurisdictions; enhance the capacity within the existing HIV surveillance system to analyse data and provide timely information and reports to guide prevention programs; conduct research on and evaluate effective prevention strategies for communities vulnerable to HIV/AIDS, and use the findings to inform preventive programs.¹⁸⁶

4.7 Summary

Conclusions will be made in order to find out the effect of section 7 (2) of the EEA on the rights of the employees in the workplaces. There will be recommendations on how South Africa should try to reduce, or ultimately get rid of high levels of stigma and discrimination brought about by HIV-positive status.

186 CATIE 2013 www.catie.ca/en/resources/leading-together-canada-takes-action-hivaids-2013-renewal.

CHAPTER 5 Conclusions and recommendations

5.1 Conclusions

The courts in South Africa and Canada, in some instances, have interpreted certain concept similarly, while they also differed in some cases. Both in South Africa and in Canada, the *Constitutions*,¹⁸⁷ guarantee all citizens equality in the workplace. The principle of equality in South Africa is found in section 9 of the *Constitution*, while in Canada the principle of equality is provided for in section 15 (1) of the *Canadian Constitution Act*,¹⁸⁸. The two countries' content of the definition of discrimination is not different. The only difference is in the fact that in South Africa, it is referred to as unfair discrimination, whereas in Canada, it is referred to as unlawful discrimination, but the conceptual definition of discrimination is the same. However, the definition of unfair discrimination in South Africa is more advanced and all-embracing than the definition of unlawful or illegal discrimination in Canada. In South Africa, distinction in a form of an act or omission based on personal characteristics includes law, policy, rule, practice, condition or situation, which directly or indirectly imposes a burden, disadvantage or obligation.

There is difference between South Africa and Canada on some grounds upon which both countries prohibit discrimination. In South Africa, prohibition of discrimination on the listed grounds does not include HIV status. However, the *Employment Equity Act*,¹⁸⁹ is one piece of legislation that specifically prohibits discrimination on the ground of HIV status. South Africa prohibits discrimination on the ground of HIV status and then courts such as in the of *Hoffmann v South African Airways*¹⁹⁰ conclude that HIV-positive people constitute a minority and they are also being marginalised and stigmatised. They are being subjected to all forms of prejudices just because they are HIV positive. The right of human dignity of HIV-positive employees is violated in the process of being denied entry into employment. They

187 The Canadian *Constitution Act*, 1982 and the *Constitution of the Republic of South Africa*, 1996, (hereafter the *Constitution*) respectively.

188 1982.

189 55 of 1998, (hereafter the *EEA*).

190 2001 1 SA 1 (CC).

are denied the capacity to earn a living. This denial to earn a living violates the principle of decent work in South Africa, in that employees are denied a chance to work and make themselves and their families a living and improve their standard of living. They are also denied the chance to economically contribute to the economy of the country.

Marginalisation and stigmatisation of employees' HIV-positive statuses is the violation of their human rights such as equality in the workplace. There can never be equality of opportunity in the workplace if there is still discrimination of HIV-positive employees, notwithstanding that their medical condition does not incapacitate them to perform their work. Even at the time when they are no longer able to do their duties, they will not just be dismissed before a proper procedure has been followed. If the employee is incapacitated, he or she must be dismissed because incapacity is considered a legitimate reason for dismissal in terms of section 188 (1) of the *Labour Relations Act*,¹⁹¹ however, the procedure for dismissal of an employee for incapacity in a form of ill health should be complied with. Every employee is entitled to work in order to make a livelihood for him or herself and their families, and uphold country's decent work programme, so as long as they are in a position to do their work, they should be given opportunity to work if their presence in the workplace does not pose any danger to other employees and the HIV-infected employee as well. They must work just like all employees who are not diagnosed with HIV infection, they should not be discriminated against just because they tested HIV positive. The employer must first investigate alternatives before dismissal; this includes the nature of the job, the seriousness of the status of an HIV-positive employee, period of absence from work and the possibility of securing a temporary replacement of an ill HIV-positive employee until such time when he or she will have recovered. However, if it is onerous to keep an HIV-positive employee who does very little in contributing to the production of the business the employer may dismiss such employee; however, the correct procedure must be followed. Employers should avoid outright dismissals of HIV-positive employees who are still able to perform their duties.

191 66 of 1995, (hereafter the *LRA*).

However, in Canada courts have held that HIV-positive status should never be an obstacle in the way of an employee who is still able to perform his or her duties. Canada has a lot legislation that prohibits discrimination in the workplace, but they do not prohibit it because of HIV status; they do on the basis of disability. This is not the kind of disability contemplated in section 9 of the *Constitution*, section 6 (1) of the *EEA* or section 9 of the *Promotion of Equality and Prevention of Unfair Discrimination Act*¹⁹² It is a disability as interpreted by the courts in Canada. The policy states that *CHRA* prohibits disability-based discrimination and extends to discrimination based on HIV/AIDS status.¹⁹³ The *Quebec Charter of Human Rights and Freedoms* prohibits discrimination on the basis of a handicap.

Employees in South Africa have the right to privacy accorded to them by the *Constitution*, which is the supreme law of the Republic. This means that employees cannot be forced to undergo HIV testing. The health officials should obtain their informed consent before carrying out the test. However, regardless of the plethora of legislation in South Africa protecting employees against HIV testing unless it is done with authorisation of the Labour Court, employees continue to be subjected to this inhumane treatment of being tested without their consent. When observing cases such *C v Minister of Correctional Services*,¹⁹⁴ where HIV testing was performed on a prisoner without his consent and in the presence of another prisoner, it can be concluded that there is still no respect for physical privacy. Furthermore, when taking into account the cases of *Jansen Van Vuuren v Kruger*¹⁹⁵, and *NM v Smith and others*.¹⁹⁶, it can be concluded, therefore, that even though there is legislation, which is supposed to be protecting HIV-positive employees against discrimination, HIV testing in the workplace is not done in compliance with section 7 (2) of the *EEA*, and HIV-positive employees rights get violated by employers. However, employers must respect, at all times, the privacy and confidentiality of information of their employees' medical conditions. They must

192 4 of 2000, (hereafter *PEPUDA*).

193 Elliott and Gold 2005 *HIV/AIDS Policy & Law Review* 20-31.

194 1997 JOL 407 (T).

195 1993 4 SA 842 (AD).

196 2007 5 SA 250 (CC).

create a healthy environment where employees are free to open up about their HIV status, knowing that they are secure, and that the results of their medical conditions such as HIV will not be used against them, because as long as there is no openness in the workplace about this pandemic, discrimination will continue to prevail.

5.2 Recommendations

5.2.1 Removal of barriers to stigma and discrimination free workplace

Stigma and discrimination are intertwined, stigma is the basis of discrimination and discrimination violates human rights such as human dignity, right to privacy, health equality before the law, and freedom from inhumane and degrading treatment. A social environment, which promotes violations of human rights may be seen as advocating stigma and discriminatory practices, and as a result, equality will be comprised.¹⁹⁷ Due to the interrelatedness of stigma and discrimination and human rights, people with HIV continue to be stigmatised and discriminated against. Therefore, action needs to be taken that will be sustained and offer protection to HIV-positive employees. In order for South Africa to root out stigma and discrimination there should be action taken similar to that taken by Canada. Programmes should be proactive in dealing with and addressing stigmatisation and discrimination; they should not wait until damage has occurred before they can be implemented.¹⁹⁸

5.2.2 Implementation of laws and policies

There should be development and implementation of policies to protect the rights of HIV-positive employees against discrimination. Legal and policy reforms are ineffective if they are not supported by the communities and societies' values and expectations. Stigma does not only affect employees, but the whole society. Legal and policy reform can play a crucial role in changing broader social values and

197 UNAIDS 2005 <http://www.unaids.org>.

198 UNAIDS 2005 <http://www.unaids.org>.

setting standards that may reduce stigmatisation and discrimination, and bring about a supportive environment for the development and implementation of effective HIV prevention programmes.¹⁹⁹

5.2.3 HIV/AIDS education and training

Knowledge is power. If employers and employees lack knowledge in issues surrounding HIV, then the problems of stigmatisation and discrimination will never end. South Africa should provide comprehensive education and training. The latter is the most crucial and effective way to overcome the HIV stigma and discrimination. Employers, employees and society should be educated about the facts and skills to overcome HIV/AIDS. The education training is vital in trying to address HIV/AIDS issues in the workplace. It should be simple, open and consider fears and emotions of avoidance and denial by employees. HIV/AIDS education, in order to be effective, should take into considerations social and cultural sensitivity. There should no longer be stereotyping about HIV/AIDS, and the myths and misconceptions should be dealt with. They also must have knowledge about HIV/AIDS issues to enable them to draft workplace policies concerning HIV/AIDS. The Department of Health already has education and training programmes in place, they should strengthen their education and training concerning behavioural change.²⁰⁰ This is because when people feel safe in that their privacy is protected, they will go for HIV testing in great numbers.

5.2.4 Evaluation and monitoring of implementations

Education and training can be carried out through face-to-face seminars and workshops. These kinds of workshops and seminars are the effective mechanism for HIV/AIDS education and training. There could be public seminars; in-house training sessions conducted by an external trainer; facilitation workshops, where a person living with HIV educates others about the practical issues and personal experiences; train the trainer education; peer educator training, where some employees in the

199 UNAIDS 2005 <http://www.unaids.org>.

200 FASSET 2005 www.fasset.org.za/Communications/Fasset_Publications.aspx.

workplace are trained to respond to their peers' questions about HIV/AIDS and induction training for new employees. HIV/AIDS training may be included in the employer's induction programme for new employee.²⁰¹

5.2.5 South Africa may adopt the concept of disability in Canada

The prohibition of discrimination on the ground of disability in the Canadian workplace is much more advanced than the restricted prohibition of discrimination on the ground of HIV status in South Africa. It is recommended that South Africa, since it does not have cases of prohibition of discrimination on the ground of disability as contemplated in Canadian legislation as interpreted by the court, adopts the Canadian prohibition of discrimination on the ground of disability, and courts in South Africa have a chance to interpret disability as including HIV status. The country loses revenue because companies are unable to increase production and the employers incur considerable costs of recruiting employees and the country spends more money on people who are entitled to social assistance.

The country's social legislation such as *Unemployment Insurance Act*²⁰² is responsible for providing social protection to unemployed people. However, because the *UIA* provides protection upon an individual meeting the accredited requirement of being in an employment for a period of two years, if a person was employed for a period of time less than the required duration because HIV surveillance testing could be taken at any time in the workplace, such employees will not be covered by the *UIA*. The disadvantage of this is that this employee will resort to the informal sector, which South Africa is battling to transition to the formal sector. Employers, through education and training, will reap the benefits such as saving costs of recruiting new employees after they had dismissed other employees, and also costs associated with litigation; they will maximise production as there will be less absenteeism by employees due to illness or taking care of other family members who are infected with HIV and are critically ill, leading to an increase in profits.

201 FASSET 2005 www.fasset.org.za/Communications/Fasset_Publications.aspx.
202 63 of 2001, (hereafter *UIA*).

BIBLIOGRAPHY

Literature

Du Toit 2007 *Law, Democracy and Development Law Journal* 1-15

Du Toit D "Protection against Unfair Discrimination in the Workplace: Are the Courts Getting it Right?" 2007 volume 11 *Law, Democracy and Development Law Journal* 1-15

Garbers "Employment Equity" 16

Garbers C "Employment Equity" in Basson A *et al Essential Labour Law: Individual Labour Law* 3rd ed volume 1 (Labour Law Publications Pretoria 2002)

Elliott and Gold 2005 *HIV/AIDS Policy and Law Review* 2031

Elliott R and Gold J "Protection against Discrimination based on HIV/AIDS Status in Canada: The Legal Framework" 2005 volume 10 number 1 *HIV/AIDS Policy and Law Review* 20-31

Le Roux-Kemp 2013 *Potchefstroom Electronic Law Journal* 201-536

Le Roux-Kemp A "HIV/AIDS, to Disclose or not to Disclose: That is the Question" 2013 volume 16 number 1 *Potchefstroom Electronic Law Journal* 201-536

Ngwena 1999 *South African Journal of Human Rights* 513-540

Ngwena C "HIV in the Workplace: Protecting Rights to Equality and Privacy" 1999 volume 15 number 4 *South African Journal of Human Rights* 513-540

Page, Louw and Pakkiri *Working with HIV/AIDS* 7

Page J, Louw M and Pakkiri D (Juta Cape Town 2006)

Van Dyk *HIV/AIDS* 9

Van Dyk A *HIV/AIDS: Care and Counselling, A Multidisciplinary Approach* 4th ed (Pearson Education South Africa (Pty) Ltd Cape Town 2008)

Van Ginneken *ESS Extension of Social Security* 5

Van Ginneken W *ESS Extension of Social Security: Policies for Developing Countries* paper number 13 (International Labour Office Geneva 2003)

Van Niekerk *et al Law@work* 125

Case law

Allpass v Mooikloof Estate (Pty) Ltd t/a Mooikloof Equestrian Centre 2011 2 SA 638 (LC)

Andrews v Law Society British Columbia 1989 1 SCR 143

Bootes v Eargle Ink System KZ Natal (Pty) Ltd D781/05 2007 ZALC 52

Brown v British Columbia (Minister of Health) 1990, 66 DLR 4th 444 (BCSC)

C v Minister of Correctional Services 1997 JOL 4 07 (T)

Canadian Pacific Ltd v Canadian Human Rights Commission 1991 1 FC 571 (CA)

Centre d'accueil Sainte-Domitille v Union des Employés de Service, Local 1989 TA 439 (Tribunal d' Arbitrage)

Fidelity Cash Management Services v Commission for Conciliation, Mediation and Arbitration and others 2008 3 BLLR 197 (LAC)

Fontaine v Canadian Pacific Ltd 1989 29 CCEL 192

Harksen v Lane NO & others 1997 11 BCLR 1489 (CC)

Hoffmann v South African Airways 2001 1 SA 1 (CC)

Irvin & Johnson Limited v Trawler & Line Fishing Union & others 2003 24 ILJ 565 (LC)

Jansen Van Vuuren v Kruger 1993 4 SA 842 (AD)

Jerome v DeMarco 1992 10 CHRR D/402 (Ontario Board of Inquiry)

Joy Mining Machinery, a Division of Harnischfeger SA (Pty) v NUMSA & others 2002 23 ILJ 391 (LC)

Kroukam v SA Airways (Pty) Ltd 2005 12 BLLR 1097 (LAC)

National Education Health & Allied Workers Union obo Lucas v Department of Health (Western Cape) 2004 25 ILJ 2091 (BCA)

NEHAWU v University of Cape Town 2003 3 SA 1 (CC)

NM v Smith and others 2007 5 SA 250 (CC)

Pacific Western Airlines Ltd v Canadian Airline Flight Attendants Association 1987 28 (LAC) (3D) 291 (CLAB)

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

President of the Republic of South Africa v Hugo 1997 4 SA 1 (CC)

Prinsloo v Van der Linde & another 1997 6 BCLR 759 (CC)

Quebec v Montreal City; Quebec v Boisbriand City 2000 SCC 27; 2000 SCJ number 24 (QL)

Rustenburg Platinum Mines Ltd (Rustenburg section) v CCMA & others 2006 11 BLLR 1021 (SCA)

Sidumo and another v Rustenburg Platinum Mines Ltd and others 2007 12 BLLR 1097 (CC)

S V Makwanyane 1995 6 BCLR 665 (CC)

Swart v Mr Video (Pty) Ltd 1998 19 ILJ 1315 (CCMA)

Thwaites v Canadian (Canadian Armed Forces) 1993 CHRD number 9 (June 1993)

Legislation

Basic Conditions of Employment Act 75 of 1997

Canadian Charter of Human Rights and Freedoms, 1982

Canadian Human Rights Commission, 1996

Canadian Human Rights Act, 1977

Constitution Act, 1982

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Employment Equity Amendment Act 47 of 2013

Employment Equity Act: Code of Good Practice on Key Aspects of HIV/AIDS and Employment, 2000

Labour Relations Act 66 of 1995

Labour Relations Amendment Act 12 of 2002

Labour Relations Act: Code of Good Practice: Dismissal as amended by Act 12 of 2002

Medical Schemes Act 131 of 1998

Medical Schemes Amendment Act 55 of 2001

Occupational Health and Safety Act 85 of 1993

Occupational Health and Safety Amendment Act 181 of 1993

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

Quebec Charter of Human Rights and Freedoms, 1975

South African Medical and Dental Council Guidelines on the Management of Patients with HIV/AIDS, 1994

Unemployment Insurance Act 63 of 2001

International instruments

International Convention on Civil and Political Rights (1966)

International Labour Organisation Code of Good of Practice on HIV/AIDS and the World of Work (2001)

International Labour Organisation Convention Concerning Termination of Employment at the Initiative of the Employer 158 of 1982

International Labour Convention on Discrimination in Respect of Employment and Occupation 111 of 1958

Southern African Development Community Code on HIV/AIDS and Employment (1997)

Universal Declaration of Human Rights (1948)

Internet sources

About.com date unknown africanhistory.com/od/apartheid/u/Apartheid-4-D.htm

About.com date unknown Apartheid africanhistory.com/od/apartheid/u/Apartheid-4-D.htm [date of use 8 May 2014]

AIDS Foundation South Africa 2013 www.aids.org/hivaids-in-south-africa

AIDS Foundation South Africa 2013 HIV/AIDS in South Africa: What is the prevalence of HIV in South Africa www.aids.org/hivaids-in-south-africa [date of use 28 July 2012]

AID.gov 2009 www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/

AID.gov 2009 Stages of HIV infection www.aid.gov/hi-aids-basics/just-diagnosed-with-hiv-aids/hiv-in-your-body/hiv-lifecycle/ [date of use 27 July 2014]

Avert Date unknown www.avert.org/stages-hiv-infection.htm

Avert Date unknown stages of HIV infection www.avert.org/stages-hiv-infection.htm [date of use 29 July 2014]

CATIE 2013 www.catie.ca/en/resources/leading-together-canada-takes-action-hivaids-2013-renewal

CATIE 2013 Leading together: Canada takes action on HIV/AIDS www.catie.ca/en/resources/leading-together-canada-takes-action-hivaids-2013-renewal [date of use 9 October 2014]

CATIE Date unknown www.catie.ca/hiv-canada/4/4-1/4-1-1

CATIE Date unknown Stigma and discrimination: Key Points [date of use 31 July 2014]

Canadian HIV/AIDS legal network 2014 www.aids/aw.ca/EN/issues/discrimination.htm

Canadian HIV/AIDS legal network 2014 Discrimination www.aids/aw.ca/EN/issues/discrimination.htm [date of use 26 September 2014]

Carter 2011 mobile.aidsmap.com/Mother-to-baby-transmission/page/1044918

Carter M 2011 mobile.aidsmap.com/Mother-to-baby-transmission/page/1044918 [date of use 30 July 2014]

Centre for Disease Control and Prevention 2014
www.cdc.gov/hiv/basics/whatishiv.html

Centre for Disease Control and Prevention 2014 About HIV/AIDS
www.cdc.gov/hiv/basics/whatishiv.html [date of use 28 July 2014]

Demana 2011 www.justice.gov.za/docs/articles/201103_peguda.html

Demana N 2011 PEPUDA tackles inequality and unfair discrimination
www.justice.gov.za/docs/articles/201103_peguda.html
[date of use 9 April 2014]

Daniella's Writing 1995 www.daniellaswriting.com/hiv.htm

Daniella's Writing 1995 HIV and the Law of confidentiality
www.daniellaswriting.com/hiv.htm [date of use 16 September 2014]

FASSET 2005 www.fasset.org.za/Communications/Fasset_Publications.aspx

FASSET 2005 A guide to HIV/AIDS in the workplace
www.fasset.org.za/Communications/Fasset_Publications.aspx [date of use 20 July 2014]

ILO Date unknown www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-de/index.htm

ILO Date unknown Decent work agenda: promoting decent work for all
www.ilo.org/global/about-the-ilo/decent-work-agenda/lang-de/index.htm
[date of use 12 August 2014]

IWRAP Asia Pacific Date unknown www.iwraw-ap.org/cedaw/what-is-cedaw/cedaw-principles/

IWRAP Asia Pacific Date unknown CEDAW principles: principle of equality
www.iwraw-ap.org/cedaw/what-is-cedaw/cedaw-principles/ [date of use 9 July 2014]

Marie 2013 erinaree.com/2013/07/31/equality-formal-vs-substantive-and-why-i-care/

Marie E 2013 Equality: formal vs substantive, and why I care...
erinaree.com/2013/07/31/equality-formal-vs-substantive-and-why-i-care/
[date of use 10 April 2014]

Pretorius 2011 www.bbc.co.uk/history/british/victorians/boer_wars_01.shtml

Pretorius F 2011 history
www.bbc.co.uk/history/british/victorians/boer_wars_01.shtml [date of use 27 September]

Southern African Litigation Centre 2012 www.southernafricanlitigationcentre.org

Southern African Litigation Centre 2012 Protecting rights: litigating cases of HIV testing and confidentiality of status
www.southernafricanlitigationcentre.org [date of use 6 July 2014]

Statistics South Africa 2014 www.tradingeconomics.com/south-africa/unemployment-rate

Statistics South Africa 2014 Trading economics
www.tradingeconomics.com/south-africa/unemployment-rate [date of use 31 July 2014]

The Equal Opportunity Commission of Western Australia 2010
www.eoc.wa.gov.au/Substantiveequality.aspx

The Equal Opportunity Commission of Western Australia 2010 Substantive equality: preventing systemic discrimination
www.eoc.wa.gov.au/Substantiveequality.aspx [date of use 7 July 2014]

UNAIDS 2014

www.unaids.org/en/resources/presscentre/featuresstories/2014/January/20140117southafrica/

UNAIDS 2014 New HIV report finds big drop in new HIV infection in South Africa
www.unaids.org/en/resources/presscentre/featuresstories/2014/January/20140117southafrica/ [date of use 26 July 2014]

UNAIDS 2005 <http://www.unaids.org>

UNAIDS 2005 HIV-related stigma, discrimination and human rights violations: case studies of successful programmes <http://www.unaids.org> [date of use 7 July 2014]

Western Cape Government 2014 www.westerncape.gov.za/service/prevention-mother-child-transmission-pmtct

Western Cape Government 2014 Western Cape government mother to child transmission www.westerncape.gov.za/service/prevention-mother-child-transmission-pmtct [date of use 30 July 2014]

LANGUAGE EDITOR'S LETTER OF PROOF

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1 November 2014

To whom it may concern

This is to confirm that I, the undersigned, have language edited the completed research of LH Thejane (25734520) for the *Magister Legum* mini-dissertation in Labour Law entitled: *The use of HIV testing in the workplace as the basis for possible unfair discrimination*.

The responsibility of implementing the recommended language changes rests with the author of the mini-dissertation.

Yours truly,

A handwritten signature in black ink, appearing to read 'Linda Scott', written in a cursive style.

Linda Scott