

The legal position of HIV/AIDS infected employees in South Africa

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by

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1 Introduction

Based on the report of the Department of Health, the best estimate of people living with HIV in South Africa is 30.2%.¹ What is clear from this study is that there is an exceptionally severe epidemic of HIV/AIDS in South Africa and that this epidemic affects all parts of the population.²

Although the percentage of employees that are HIV positive is unclear, the highest levels of infection and the largest number of HIV positive individuals are currently in sub-Saharan Africa.³ A key concern for companies is that AIDS, because of its sexual transmission, affects those of working age.⁴

The Constitution of the Republic of South Africa⁵ grants everyone the right to equality⁶ and non-discrimination⁷ and it also grants employees the right to be treated fairly at work.⁸ These rights apply to “everyone” including HIV positive people.

With the promulgation of the *Employment Equity Act*,⁹ HIV status was first introduced as a separate ground for discrimination.¹⁰ In *Hoffman v SA Airways*,¹¹ the Constitutional Court ruled in clear terms that an employer may not exclude HIV-positive applicants who are otherwise physically fit for

¹ Noble South African HIV & AIDS Statistics Summary [Found on the Internet] HYPERLINK <http://www.avert.org/safricastats.htm> [Date of use 21 February 2007].

² Noble South African HIV & AIDS Statistics Summary [Found on the Internet] HYPERLINK <http://www.avert.org/safricastats.htm> [Date of use 21 February 2007].

³ Dickinson *Managing HIV/AIDS in the South African Workplace* 26.

⁴ Some companies really try to change their views on HIV/AIDS. For example: In the September issue of the *Banker*, Anglo American said that 23% of its 134 000 staff is HIV-positive and ABSA, South-Africa's fourth largest bank, said that 4% of its 34 000 staff is HIV positive. Anglo America announced that as South-Africa's largest mining group, it would supply free antiretroviral drugs to its workers to minimize the problem. The company also stated that any workers were to become infected, the company would not treat is differently to other illnesses like cancer. Anonymous *South-African Firms assess HIV policies* *The Banker* 128.

⁵ *The Constitution of the Republic of South Africa*, 1996. Hereafter the Constitution.

⁶ Section 9 of the Constitution.

⁷ Section 9(3) of the Constitution.

⁸ Section 23(1) of the Constitution.

⁹ *Employment Equity Act* 55 of 1998. Henceforth referred to as the EEA.

¹⁰ Section 6 of the EEA.

¹¹ *Hoffman v SA Airways* 2000 21 ILJ 2357 (CC). Henceforth referred to as the *Hoffman* case.

employment. The same principles apply to exclusion of employees from promotion.

The Namibian Labour Court also struck down the Namibian Defence Force's policy for excluding recruits solely on the basis of HIV infection.¹² Although the principles of the general constitutional right to equality were adhered to, the *Hoffman* judgement will undoubtedly be followed in cases decided under the EEA.¹³ The reason being, that HIV/AIDS was included into the EEA as a separate ground for discrimination in section 6 and most importantly that the Hoffman case was not the first case in which people living with HIV/AIDS have sought to validate their human rights in a court in South Africa.¹⁴ The Hoffman case was the first occasion in which the Constitutional Court has been faced with a conflict between HIV/AIDS related ethics and constitutional values.¹⁵ It is important to note that, the *Hoffman* case prevented discrimination against HIV infected employees only if they are otherwise healthy.¹⁶ The judgement does not hold that employees with full-blown AIDS will receive equal protection.¹⁷ Guidelines relating to incapacity can be applied to employees incapacitated by HIV related disease.¹⁸

The research will mainly be based on a study of relevant literature including the *Constitution*, the *Labour Relations Act*¹⁹, the *Employment Equity Act*, the *Compensation for Occupational Injuries and Diseases Act*²⁰, company policies relevant cases, articles, journals, text books and electronic material.

This study will focus on the rights of employees as opposed to the rights of employers. It will deal with equality and workers rights and will address the

¹² *N v Minister of Defence* 2000 21 ILJ 999 (LCN).

¹³ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 115.

¹⁴ Other cases which have addressed the issue of HIV/AIDS include *Minister of Health and Others v Treatment Action Campaign and Others* 1 2002 10 BCLR (CC) and *Van Biljon and Others v Minister of Correctional Services and Others* 1997 4 SA 441 (C).
¹⁵ Ngwena 2001 *Developing World Bioethics* 47.

¹⁶ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 115.

¹⁷ Paragraph 13. The reason for this is that as soon as a person has full-blown AIDS he or she cannot be vaccinated against yellow fever.

¹⁸ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 115.

¹⁹ *Labour Relations Act* 66 of 1995. Henceforth the LRA.

²⁰ *Occupational Health and Safety Act* 85 of 1993. Henceforth the OHSA.

most important aspects and problems relating to HIV/AIDS in the workplace, including testing, privacy and incapacity. Issues relating to HIV/AIDS in general, such as the contracting and cure for the disease fall outside the scope of this study.

The aim of this study is to analyse the nature and extent of the rights of HIV/AIDS infected persons in the workplace and to make recommendations as to how the legal position of such persons can be improved.

2 Constitutional provisions

Section 23(1) of the Constitution, provides that an employer cannot unfairly discriminate against an employee in the private or public sector.²¹

In the *Hoffman* case, the Constitutional Court was asked to decide if SAA had violated Hoffman's constitutional rights to equality,²² human dignity²³ and fair labour practices.²⁴ Because Mr Hoffman was HIV positive, SAA refused to appoint him as a cabin attendant.²⁵ The court stated that the mere assumption about an employee's ability to perform work if he or she had a particular disease would not pass in proving incapacity. Mr Hoffman argued that his constitutional rights to dignity and equality had been breached by SAA.²⁶ SAA argued in the High Court that because HIV positive people could not be vaccinated against yellow fever,²⁷ which was required for all airline personal flying on certain routes, the limitation on Hoffman's rights was justified.²⁸ According to medical research there is an unacceptable high risk that HIV positive crew would contract yellow fever, and endanger themselves, passengers and other crew members.²⁹ This argument was accepted by the

²¹ Section 23(1) of the Constitution states that everyone has the right to fair labour practices.

²² Section 9 of the Constitution.

²³ Section 10 of the Constitution.

²⁴ Section 23 of the Constitution.

²⁵ Paragraph 5.

²⁶ Paragraph 6.

²⁷ *Hoffman v South African Airways* 2000 2 SA 628 (W).

²⁸ Paragraph 7.

²⁹ Paragraph 7.

High Court.³⁰ The Constitutional Court pointed out that only persons who have advanced to a certain stage of HIV infection cannot be vaccinated against yellow fever.³¹ The court concluded that in accordance with the *Spoornet v TWU*³² judgement, Hoffman had been excluded from employment because of the growing panic caused by the HIV/AIDS pandemic. The Court found that SAA had discriminated against Hoffman.³³

2.1 *The right to equality*

The idea behind the right to equality is that all people are equal and consequently deserve equal treatment.³⁴ Personal characteristics such as gender, race or HIV status are generally unimportant as to how people are treated unless such characteristics can be justified as being appropriate.³⁵

Being employed means that an HIV-positive status should not reduce the enjoyment of the right to equal opportunities.³⁶ Discrimination against an HIV-positive applicant or employee can only be upheld if it constitutes justifiable or fair discrimination.³⁷

The right to equality finds its most direct expression in section 9 of the Constitution. Section 9(1) provides that:

Everyone is equal before the law and has the right to equal protection and benefit of the law

³⁰ Paragraph 9.

³¹ Paragraph 11.

³² *Spoornet v TWU obo Du Plessis* 1998 7 BALR 973 (IMSSA).

³³ The discrimination was found to be unfair, based on the medical evidence and being HIV negative was not an "inherent requirement" of the job of being a cabin attendant.
³⁴ Ngwena 2001 *Developing World Bioethics* 48. Also see Anonymous 2006 HYPERLINK <http://www.un.org/cyberschoolbus/humanrights/declaration/7asp> 22 Nov 2006.

³⁵ Ngwena 2001 *Developing World Bioethics* 48.

³⁶ Ngwena 2001 *Developing World Bioethics* 48. Also see Anonymous 2006 HYPERLINK <http://www.un.org/cyberschoolbus/humanrights/declaration/7asp> 22 Nov 2006.

³⁷ Ngwena 2001 *Developing World Bioethics* 48. Also see Anonymous 2006 HYPERLINK <http://www.un.org/cyberschoolbus/humanrights/declaration/7asp> 22 Nov 2006.

In terms of the Constitution, direct discrimination involves discrimination based on specified as well as non-specified grounds, since both are forbidden grounds of discrimination.³⁸ Specified grounds are the grounds listed in section 9(3) of the Constitution and section 6 of the EEA.³⁹ Discrimination on any of these grounds is automatically unfair.⁴⁰ Non-specified prohibited grounds of discrimination are distinctions based on qualities or characteristics that have the potential to harm the fundamental dignity of persons as human beings or to affect them negatively in a serious manner.⁴¹

Under the Constitution the idea of the right to equality is open and generous.⁴² The right includes not only formal equality but also substantive equality or social equality.⁴³ In the context of employment, formal equality involves treating employees in similar circumstances in the same way. Substantive or social equality has equality as the outcome. This means that a difference in treatment of employees will be tolerated.⁴⁴ Formal equality does not consider social and economic differences between employees, this means that HIV/AIDS infected employees will need medicines including anti retrovirals and this places a financial strain on the company which is an economical difference which will not be taken into account. Whereas substantive equality

³⁸ Currie and de Waal *Bill of Rights Handbook* 232.

³⁹ According to section 9(3) the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, material status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. Section 9(4) states 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.

⁴⁰ Section 9(5) of the Constitution.

⁴¹ *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) paragraphs 37, 39 and 40.

⁴² Currie and de Waal *Bill of Rights Handbook* 232. Also see Sachs 2006 [HYPERLINK http://209.85.129.104/search?q=cache:3sbU454d9o4J:law.sun.ac.za/publawconf/papers/MSachs/equality.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=8](http://209.85.129.104/search?q=cache:3sbU454d9o4J:law.sun.ac.za/publawconf/papers/MSachs/equality.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=8) 7 Dec 2006.

⁴³ Currie and de Waal *Bill of Rights Handbook* 232. Also see Jeffery 2006 [HYPERLINK http://www.sairr.org.za/wsc/pstory.htx?storyID=138](http://www.sairr.org.za/wsc/pstory.htx?storyID=138) 9 Dec 2006.

⁴⁴ Currie and de Waal *Bill of Rights Handbook* 232-233. Also see Fredman 2006 [HYPERLINK http://209.85.129.104/search?q=cache:faYbOJ3HAr0J:www.law.wits.ac.za/sajhr/conference_papers/fredmanpaper.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=3](http://209.85.129.104/search?q=cache:faYbOJ3HAr0J:www.law.wits.ac.za/sajhr/conference_papers/fredmanpaper.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=3) 9 Dec 2006 and Sachs 2006 [HYPERLINK http://209.85.129.104/search?q=cache:3sbU454d9o4J:law.sun.ac.za/publawconf/papers/MSachs/equality.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=8](http://209.85.129.104/search?q=cache:3sbU454d9o4J:law.sun.ac.za/publawconf/papers/MSachs/equality.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=8) 7 Dec 2006.

examines the social and economic differences between employees, to decide whether the Constitution's commitment to equality is being satisfied.⁴⁵ All employees are not treated equally because the HIV positive employees are being treated differently. This amounts to substantive equality and not formal equality.

The exclusion of unfair discrimination in terms of section 9 applies both vertically (against the state) and horizontally (against private persons as natural or juristic persons).⁴⁶ Employers fall under the category horizontal application. This means that employers may not discriminate unfairly against any employees, and legislatures may not discriminate unfairly against employees when making any labour law.

The judicial definition of unfair discrimination acknowledges the connection between equality and human dignity.⁴⁷ According to the Constitutional Court, unfair discrimination essentially means 'treating people differently in a way which impairs their fundamental dignity as human beings who are inherently equal in dignity'.⁴⁸

In *Harksen v Lane NO and Others*,⁴⁹ decided under the Interim Constitution,⁵⁰ the Constitutional Court had laid down the assessment principles that have to be applied when deciding about a possible infringement of fundamental rights such as equality and unfair discrimination. The test consists of three basic aspects: firstly to determine whether or not differentiation has taken place, secondly to determine whether the differentiation amounts to discrimination and whether or not the discrimination is unfair and the thirdly to determine whether or not the discrimination is justifiable in terms of section 36 of the

⁴⁵ Currie and de Waal *Bill of Rights Handbook* 233. Also see Sachs 2006 [HYPERLINK http://209.85.129.104/search?q=cache:3sbU454d9o4J:law.sun.ac.za/publawconf/papers/MSachs/equality.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=8](http://209.85.129.104/search?q=cache:3sbU454d9o4J:law.sun.ac.za/publawconf/papers/MSachs/equality.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=8) 7 Dec 2006.

⁴⁶ Section 9(4) of the Constitution.

⁴⁷ De Waal, Currie and Erasmus *Bill of Rights Handbook* 194.

⁴⁸ *Harksen v Lane NO and Others* 1997 11 BCLR 1489 paragraph 31. Henceforth referred to as the *Harksen v Lane*.

⁴⁹ *Harksen v Lane*.

⁵⁰ *Constitution of the Republic of South Africa*, Act 200 of 1993.

Constitution.⁵¹ Differentiation involves treating people in the same circumstances differently.⁵² Government may classify people and treat them differently for a variety of legitimate reasons.⁵³ Differentiation is not prohibited by the Constitution.⁵⁴ Once it has been determined that differentiation has occurred, the question of discrimination must be determined. Discrimination is a particular form of differentiation, namely differentiation on illegitimate grounds.⁵⁵ The illegitimate grounds are listed in section 9(3) of the Constitution. If discrimination occurs on one of the listed grounds in section 9(3) it will be unfair discrimination and this is not allowed. If on an unspecified ground, unfairness will have to be established by the complainant.⁵⁶ The following factors must also be taken into account in determining whether discrimination has an unfair impact.⁵⁷ First, the position of the complainant in society and whether he or she has been a victim of past patterns of discrimination. Secondly, the nature of the discriminating action and the purpose it wants to achieve. The third factor is the degree to which the complainants' rights have been impaired.⁵⁸ If the discrimination does not amount to unfair discrimination, there is no violation of section 9(3).

The third aspect is to determine whether it is justifiable in terms of section 36. Section 7(3) of the Constitution provides for the limitation of fundamental rights by way of section 36, the general limitations clause.⁵⁹ This clause applies to all the rights in the Bill of Rights and provides that all the rights may be limited according to the same set of criteria.⁶⁰ Limitations are established by the courts interpretation of the rights. In an enquiry into the limitation of a right, the court will ask two questions.⁶¹ The first question is whether a right in

⁵¹ Paragraph 1508 A-D.

⁵² Currie and de Waal *Bill of Rights Handbook* 239.

⁵³ De Waal and Currie *Bill of Rights Handbook* 239 and an example in terms of section 19(3)(a) of the Constitution is the right to vote, this section states that a person has to be 18 years to be able to vote in South Africa.

⁵⁴ Currie and de Waal *Bill of Rights Handbook* 243.

⁵⁵ Currie and de Waal *Bill of Rights Handbook* 243.

⁵⁶ The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation.

⁵⁷ *Harksen v Lane* paragraph 46.

⁵⁸ Currie and de Waal *Bill of Rights Handbook* 245.

⁵⁹ De Waal, Currie and Erasmus *Bill of Rights Handbook* 168.

⁶⁰ De Waal, Currie and Erasmus *Bill of Rights Handbook* 169.

⁶¹ De Waal, Currie and Erasmus *Bill of Rights Handbook* 168-170.

the Bill of Rights had been infringed by a law of conduct of the respondent and the second question is whether the infringement can be justified as a permissible limitation of the right.⁶² If the court finds that a right had been infringed, the respondent may then seek to demonstrate that the infringement of the right is never the less permissible in terms of the criteria for a legitimate limitation of rights laid down in section 36.⁶³ A law may legitimately limit a right in the Bill of Rights if it is a law of general application that is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.⁶⁴ The factors that must be taken into account are; the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose and less restrictive means to achieve the purpose.⁶⁵

In *Hoffman v SAA* the judge followed the test laid down in *Harksen v Lane*.⁶⁶

First, whether the provision under attack makes a differentiation that bears a rational connection to government purpose. If the differentiation bears no such rational connection, there is a violation of section 9(1). If it bears such a rational connection, the second enquiry arises. That enquiry is whether the differentiation amounts to unfair discrimination. If the differentiation does not amount to unfair discrimination, the enquiry ends there and there is no violation of section 9(1). If the discrimination is found to be unfair, this will trigger the third enquiry, namely, whether it can be justified under the limitation provision. Whether the third stage, however, arises will further be dependant on whether the measure complained of is contained in a law of general application.

The judge in the *Hoffman* case also said the following in terms of discrimination against HIV positive people:⁶⁷

⁶² In *Christian Education South-Africa v Minister of Education* 2000 4 SA 757 (CC), the Constitutional Court showed that it was willing to depart from the two-stage approach to rights and their limitations in order to avoid having to decide the question whether a right had been infringed.

⁶³ This was demonstrated in *S v Makwanyane* 2004 3 91 (CC) para 102.

⁶⁴ Section 36 of the Constitution.

⁶⁵ Section 36(1)(a)-(e).

⁶⁶ Paragraph 24.

⁶⁷ Paragraph 28.

The appellant is living with HIV. People who are living with HIV constitute a minority. Society has responded to their plight with intense prejudice. They have been subjected to systemic 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 prejudices and stereotypes against HIV positive people still persist. In view of the prevailing prejudice against HIV positive people, any discrimination against them can, to my mind, 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 the right to earn a living. For this reason, they enjoy special protection in our law.

In *Leonard Dingler v Employee Representative Council v Leonard Dingler (Pty) Ltd & Others*⁶⁸ the Labour Court stated that whether or not discrimination is unfair will depend on what the object of the discrimination is as well as on the means used to achieve it.⁶⁹

The court resolved the *Hoffman* case by focusing on the second question only, namely whether the differentiation amounted to unfair discrimination. It found it unnecessary to answer the first question, whether differentiation had occurred, because it was not necessary to determine rational connection or whether the action in the case was irrational.⁷⁰

⁶⁸ *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd & Others* 1998 19 ILJ 285 (LC). Henceforth the *Leonard Dingler* case.

⁶⁹ *Smit Employment and Insolvency Protection* 519.

⁷⁰ Paragraph 26.

In the *Leonard Dingler* case, the Labour Court held that direct discrimination occurs:⁷¹

[w]here a person is treated differently because of the HIV/AIDS status or on the basis of some characteristic. It is incorrect to equate discrimination with actual prejudice. Discrimination occurs when people are not treated as individuals. To discriminate is to assign to them characteristics which are generalised assumptions about groups of people.

2.2 Human dignity

Human dignity is protected by section 10 of the Constitution. Section 10 provides that:

Everyone has inherent dignity and the right to have their dignity respected and protected.

Human dignity is inevitably inseparable from equality.⁷² Treating a person equally is to recognize his or her constitutional right to inborn worth, physical and psychological integrity and freedom by virtue of being a human being.⁷³ In *S v Makwanyane* the court stated that human dignity is by far the most important fundamental right and that equality is an essential principle of human dignity.⁷⁴ Under South African constitutional jurisprudence, equality and human dignity are intricately and deliberately connected.⁷⁵

In *President of the Republic of South Africa v Hugo*⁷⁶ where equality and unfair discrimination were at issue, the Constitutional Court stated that:

At the heart of the prohibition of unfair discrimination lies the recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups.

⁷¹ Smit *Employment and Insolvency Protection* 518-519.

⁷² Ngwena 2001 *Developing World Bioethics* 48.

⁷³ *S v Makwanyane* 1995 6 BCLR 665 (CC).

⁷⁴ *S v Makwanyane* 1995 6 BCLR 665 (CC) paragraph 328.

⁷⁵ De Waal, Currie and Erasmus *Bill of Rights Handbook* 201-202.

⁷⁶ *President of the Republic of South Africa v Hugo* 1997 6 BCLR (CC).

2.3 The role of International Law

The Constitution also places a duty on the courts to consider international law and foreign law as a guide when interpreting constitutional rights. This is stated in section 39(1) of the Constitution; which states that:

- When interpreting the Bill of Rights, a court, tribunal or forum
- (b) must consider international law; and
 - (c) may consider foreign law.

The term “considers” means that the court, tribunal or forum does not have to apply international or foreign law.⁷⁷ This section in the Constitution gives these institutions the right to take international and foreign law into account when interpreting the case, although they do not have to apply it in the specific case.⁷⁸ In terms of section 231 of the Constitution the court, forum or tribunal must follow the interpretation that agrees with international law.

The main source of international labour law is conventional labour law or agreement based labour law. An example hereof is the *Declaration of Fundamental Principles and Rights at Work*⁷⁹ which consists of four main rights that have been ratified by most countries. These four rights are the freedom of association, the ban on child labour, the ban on forced labour and the right to equal treatment.

Because of sections 39(2) and 231 of the Constitution, the courts need to take note of international agreements and declarations on HIV and AIDS, such as: the 1988 ILO Consensus Statement on HIV/AIDS⁸⁰ and the SADC Code on

⁷⁷ According to the WordReference.com English Dictionary the term “consider” means to take into account 2006 HYPERLINK <http://www.wordreference.com/es/translation.asp?tranword=consider&B10=Search> 28 Dec 2006.

⁷⁸ Smit *Employment and Insolvency Protection* 518-519.

⁷⁹ Anonymous 2006 HYPERLINK http://www.ilo.org/dyn/declaris/DECLARATIONWEB.static_jump?var_language=EN&var_pagename=DECLARATIONTEXT 6 Dec 2006.

⁸⁰ *The 1988 ILO Consensus Statement on HIV/AIDS*. Accessed at HYPERLINK <http://209.85.135.104/search?q=cache:XY0UpDSQMtIJ:www.ilo.org/public/english/protection/trav/aids/publ/consensusstatement.pdf+ILO+Consensus+Statement+on+HIV/AIDS&hl=en&qI=za&ct=clnk&cd=1> 12 Octr 2006.

HIV/AIDS and Employment.⁸¹ According to the in the Workplace workers with HIV infection who are healthy should be treated the same as any other worker. Workers with HIV-related illnesses, including AIDS, should be treated the same as any other worker with an illness.⁸²

2.4 Workers' rights

Section 22 of the Constitution states that every citizen has the right to choose their trade, occupation or profession freely. This can be defined as an activity through which people seek to provide for their needs not only in a material sense but also in the more idealistic sense of pursuing their self-development.⁸³ A person can choose what kind of work he or she wants to do. A person may, for example not be told that he or she cannot be a teacher or a health care worker. This practice of trade, occupation or profession may be regulated by law.

Section 23(1) of the Constitution states that everyone has the right to fair labour practice

This right has two parts: firstly the right to fair labour practice and secondly the right not to be unfairly discriminated against. Section 23(1) consists of fundamental labour rights and because it is a section in the Constitution that is applicable to all persons and not only to specific party's, as are other section

⁸¹ *The SADC Code on HIV/AIDS and Employment* (1997). Accessed at HYPERLINK <http://www.cosatu.org.za/docs/1998/sadc-hiv.htm> 12 Oct 2006.

⁸² *World Health Association/ILO Consensus Statement on AIDS*. Accessed at HYPERLINK <http://209.85.135.104/search?q=cache:XY0UpDSQMtIJ:www.ilo.org/public/english/protection/trav/aids/publ/consensusstatement.pdf+ILO+Consensus+Statement+on+HIV/AIDS&hl=en&gl=za&ct=clnk&cd=1> 12 Oct 2006.

⁸³ De Waal, Currie and Erasmus *Bill of Rights Handbook* 483. For example, if someone wants to be a teacher he or she needs to obtain a qualification and for someone to be a health care worker he or she must perform the necessary community services. A person with HIV/AIDS does not have to disclose his or her status in any circumstances, including obtaining a degree for a specific occupation or profession. Legislation like the *South African Qualification Authority Act* 58 of 1995 ensures that the necessary regulations are laid down in this regard.

in labour law.⁸⁴ The legislatures use of the word “every” states that this section is applicable to all persons.

Section 186(2) of the LRA states that an unfair labour practice is any unfair act or omission that arises between an employer and an employee, involving: unfair conduct by the employer relating to the promotion, demotion, probation or training of an employee, the unfair suspension of an employee, failure or refusal to re-instate or re-employ a former employee in terms of any agreement and an occupational damage.⁸⁵ It will be unfair labour practice, if an employee gets promoted or demoted because of their HIV status and in this case section 186(2) applies.

2.5 Privacy

Section 14 of the Constitution states that everyone has the right to privacy. This section has two parts.⁸⁶ The first part guarantees a general right to privacy and the second part protects against specific infringements of privacy.⁸⁷ The right to privacy should be interpreted as protecting an individual's interest in what is called ‘informational self-determination’.⁸⁸ As with any right in the Bill of Rights, this right can be limited in terms of section 36 of the Constitution as long as it is justifiable.⁸⁹ In terms of the right to privacy, a person has the right to keep the fact that he or she has HIV/AIDS to

⁸⁴ Section 23(2) of the Constitution states that every worker has the right to form or join a trade union, to participate in the activities and programmes of a trade union and to strike.

⁸⁵ Currie and de Waal *Bill of Rights Handbook* 503-504.

⁸⁶ De Waal, Currie and Erasmus *Bill of Rights Handbook* 315.

⁸⁷ Section 14 states that everyone has the right to privacy, which includes the right not to have (a) their person or home search, (b) their property searched, (c) their possessions seized, or (d) the privacy of their communications infringed.

⁸⁸ Currie and de Waal *Bill of Rights Handbook* 323.

⁸⁹ Hamburg 2006 [HYPERLINK http://www.themedia.co.za/article.aspx?articleid=30969&area=/media_insightlegal_sp_in/](http://www.themedia.co.za/article.aspx?articleid=30969&area=/media_insightlegal_sp_in/) 21 Nov 2006. In *De Reuk v Director of Public Prosecutions* 2004 1 SA 406 (CC) paragraphs 59, 90, 91, for example, the court stated that a justifiable limitation of the right to privacy is the prohibition on possession of child pornography.

themselves. An employer cannot force an employee to tell them, or force an employee to have an HIV test.⁹⁰

HIV/AIDS infringements of the right to equality and human dignity in the workplace cannot be prevented unless HIV-related privacy is also protected.⁹¹ Just like the right to equality, the right to privacy also has an important connection and flows from the right to human dignity.⁹²

3 Statutory provisions

3.1 Labour Relations Act

The LRA allows employers and employees to decide on rules and regulations for their industry or industrial sector through collective agreements, but it also refers to certain basic rights that are the same for all employees.⁹³

According to an example by the AIDS law project an HIV positive employee can follow the following steps:⁹⁴ If an employee is fit and well, but HIV positive, and the employee informs the employer of his or her HIV status and the employer dismisses the employee a month later the question as to the fairness of the dismissal arises.⁹⁵ If the employee believes that he was dismissed because of his HIV status, the employee can take the case to the CCMA.⁹⁶ Should the employer argue that the employee's dismissal is lawful because he was dismissed because of incapacity, as he or she was unable to

⁹⁰ *PFG Building Glass (Pty) Ltd v CEPPAWU and Others* (2003) JOL 10825 (LC) and *Irwin and Johnson Ltd v Trawler & Line Fishing Union & Others* (2003) JOL 10639 (LC).

⁹¹ Ngwena *Developing World Bioethics* 54.

⁹² Ngwena *Developing World Bioethics* 54.

⁹³ Section 1 of the LRA states 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 objects of the Act.

⁹⁴ AIDS Law Project 2006 HYPERLINK
<http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=49> 21 Nov 2006.

⁹⁵ Unfair labour practice is forbidden in terms of section 185 of the LRA.

⁹⁶ The Council for Conciliation, Mediation and Arbitration. Unfair dismissal is an unfair labour practice. The reason why it will be referred to CCMA is because it is a dispute of rights. The CCMA is a tribunal where labour disputes of rights are conciliated, mediated, arbitrated and decided.

do the job properly, the employee has to prove that he or she is well and able to do the job and that he was dismissed because of his HIV status. This kind of dismissal is automatically unfair⁹⁷ and the employer has to prove that the dismissal was in fact fair.⁹⁸ A dismissal is automatically unfair if the reason for the dismissal is one that amounts to an infringement of the fundamental rights of employees or if the reason is one of those listed in section 187.⁹⁹

According to section 187(1)(f) of the LRA:

It will amount to infringement if the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility;

Section 186 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 incapacity), or is based on the operational requirements of the business. If the employer fails to prove this, or fails to prove that the dismissal was effected in accordance with a fair procedure, the dismissal is unfair.¹⁰⁰

3.2 *Employment Equity Act*

The EEA aims at creating an environment of equality and non-discrimination in the workplace.¹⁰¹ Section 6 of the EEA lists 20 grounds on which no one may be discriminated against.¹⁰² The EEA has three additional grounds, to the

⁹⁷ Section 187 of the LRA.

⁹⁸ Section 186 of the LRA.

⁹⁹ Labour Justice 2006 http://www.labourjustice.com/dismissals_procedures.html 6 Oct 2006. HYPERLINK

¹⁰⁰ Labour Justice 2006 http://www.labourjustice.com/dismissals_procedures.html 16 Oct 2006. HYPERLINK

¹⁰¹ Section 2.

¹⁰² Section 6(1) states that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

17 grounds listed in section 9 of the Constitution. These three additional grounds are responsibility, HIV status and political opinion.

The EEA was the first law to directly provide that employers may not unfairly discriminate against employees because of their HIV status.¹⁰³ The unfair discrimination may involve using HIV status or one of the other listed grounds to demote (to give the employee a lower position and/or salary because of his or her HIV status) or promote (to give the employee a better position and/or salary, above someone else, because of his or her HIV status) an employee, block the employee from access to training and development or make an unfair distribution of employee benefits to the employee.¹⁰⁴

Furthermore, the EEA states that an employer may not force an employee to take an HIV test.¹⁰⁵ The employer is not allowed to ask a job applicant to take an HIV test when applying for a job, or ask existing employees to test for HIV every year, or ask employees to take an HIV test before being promoted or offered special training.¹⁰⁶

If an employer wants to test employees for HIV and the employer thinks that HIV testing may be important and reasonable, the employer must apply to the Labour Court to allow for HIV testing.¹⁰⁷ The Labour Court will then have to decide whether HIV testing is justified in the employer's workplace.¹⁰⁸ The conditions that the Labour Court can set for HIV testing include, pre and post-test counselling, procedures to ensure that the results are confidential, the length of time that the employer is allowed to conduct testing and the kinds of employees that can be tested.¹⁰⁹

¹⁰³ Section 6.

¹⁰⁴ Section 5 states that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. See Smit *Employment and Insolvency Protection* 516-517.

¹⁰⁵ Section 7(1).

¹⁰⁶ Section 7(1)(b).

¹⁰⁷ Section 7(2).

¹⁰⁸ Section 50(4) of the EEA states that the Labour Court may make an order declaring that medical testing for HIV is justifiable.

¹⁰⁹ Section 50(4).

Section 6(1) of the EEA states that, every employee has the right not to be discriminated against, either directly or indirectly, in any employment policy or practice. In terms of section 9 of the EEA, this protection in section 6, also applies to applicants for employment. Specific grounds, which are usually covered by formal social security systems,¹¹⁰ such as HIV/AIDS status and disability, are also listed grounds in the discrimination provision of the EEA.¹¹¹

A Code of Good Practice on Key Aspects of HIV/AIDS and Employment has been added to both the LRA and the EEA to firstly be a general guideline on how employers, employees and trade unions should respond to HIV/AIDS in the workplace and secondly to encourage all employers to develop a workplace HIV/AIDS policy and programme.¹¹² The primary objective that these guidelines lay down for employers and trade unions is the prevention of unfair discrimination.¹¹³ This Code is a guide for employers, employees and trade unions on all aspects of HIV/AIDS in the workplace and must be read in conjunction with the Constitution and all relevant legislation.¹¹⁴ It is important to note that failure to observe the Code does not, by itself, render an employer liable in any proceedings, except where the Code refers to obligations set out in law.¹¹⁵ Some of the guidelines laid down by the Code includes, HIV testing in the workplace, employee benefits, dismissals, management of HIV in the workplace and information and education.¹¹⁶

¹¹⁰ Formal systems are applicable where the majority of the population is employed, or working for an employer. Informal systems are applicable where the majority is unemployed or self employed. Formal social security includes state regulations and a legislative framework governing the rights and obligations of beneficiaries and is not designed to address the needs of the informal sector. Informal social security is currently providing social protection particularly to those who are marginalized in terms of the formal system. Formal support, be it from government or private role-players, is necessary. Formal social security systems are not properly providing protection to the majority of South Africans. Informal social security provides a means for survival, but it is not a sustainable option to provide long-term solutions to needs. An example of an informal system in South Africa would be the people selling fruits and vegetables on the side of the road. In South Africa the majority in the informal systems are also the majority of HIV/AIDS infected people.

¹¹¹ Smit *Employment and Insolvency Protection* 517.

¹¹² Clause 2.2.

¹¹³ Clause 2.1.

¹¹⁴ Clause 5.1.

¹¹⁵ Clause 4.3.

¹¹⁶ See discussion on HIV/AIDS related aspects in par 5 and 8.

3.3 Occupational Health and Safety Act

The *Occupational Health and Safety Act* states that an employer must:¹¹⁷

Provide and maintain as far as is reasonably practicable, a working environment that is safe and without risk to the health of the employees.

This means that all employers must make sure that the workplace is safe, and that employees are not at risk, *inter alia*, of getting infected with HIV at work.¹¹⁸ In every workplace where there are more than 20 employees, there must be at least one Health and Safety Representative.¹¹⁹ Health and Safety Representatives must talk to employees on issues affecting the health and safety of the employees in the workplace.¹²⁰ This means that the Health and Safety Representatives can make recommendations to the employer about HIV/AIDS and health and safety in the workplace.¹²¹

To succeed in a claim for compensation for having been infected with HIV in the workplace, an employee needs to show that HIV infection was the result of the occupational accident.¹²² The steps that an employee can take to show that he or she was infected with HIV as a result of an occupational accident are to report the accident, to request counselling and take an HIV test immediately after the accident to show he or she is HIV negative. He or she can further ask the source patient to take an HIV test and if the source patient refuses to take an HIV test, make sure that all efforts to ask the source patient to test are written down. An HIV test should again be taken 6 weeks to 3 months later, to see if the employee is HIV positive as a result of the accident.¹²³

¹¹⁷ Section 14.

¹¹⁸ Section 8.

¹¹⁹ Section 17(1).

¹²⁰ Section 18.

¹²¹ Section 18. It is important to note that these are only recommendations and that they, consequently, do not have to be followed.

¹²² Section 1(i), of the *Compensation for Occupational Injuries and Diseases Act* 103 of 1993, states that unless the context states otherwise, "accident" means an accident arising out of and in the course of an employee's employment and resulting in a personal injury, illness or death of the employee. Section 1(ixxx) states that an occupational injury means a personal injury sustained as a result of an accident.

¹²³ Section 34 of OHSA.

3.4 Basic Conditions of Employment Act¹²⁴

This BCEA sets out the minimum working standards for all employment relationships.¹²⁵ The Act states that every employee has the right to 6 weeks paid leave over any 3 year cycle, in the first 6 months of employment, an employee is allowed 1 day sick leave for every 26 days worked and a doctor's note is needed for absence of longer than 2 days and for repeated absence.¹²⁶

Employees are allowed to take two weeks paid sick leave every year.¹²⁷ An employee cannot be dismissed while he or she is on sick leave. If he or she has used up all their paid sick leave and vacation leave, the employer does not have to pay the employee for the additional time that he or she is off sick.¹²⁸ If an employee is off sick for more than two days, he or she must give the employer a doctor's letter that says that he or she was too sick to work. The doctor is not allowed to mention his or her HIV status in the letter.¹²⁹ Employers must see if it is possible for the employee to carry on working at some other job, or for shorter hours or fewer days in the week as soon as they become too ill to stay in their current position.¹³⁰ Employers must discuss this with the employee and give him or her a chance to explain what symptoms they have and where they would be comfortable working and why. If the employee is too sick to work at all, the employer can dismiss the employee for incapacity.¹³¹ HIV infected employees often need more sick leave than other

¹²⁴ *Basic Conditions of Employment Act* 75 of 1997. Henceforth referred to as the BCEA.
¹²⁵ Section 2 of this Act states that the purpose of this Act is to advance economic development and social justice by fulfilling the primary objects of this Act which are mentioned in sub-articles (a) and (b).

¹²⁶ Section 22.

¹²⁷ Section 22.

¹²⁸ Anonymous 2006 HYPERLINK
<http://66.102.9.104/search?q=cache:rJ3XulfNgJ:dedi20a.yourserver.co.za/alp/images/upload/Domestic%2520Worker%2520rights.pdf+sick+leave+%26+V&hl=en&gl=za&ct=clnk&cd=8> 20 Nov 2006.

¹²⁹ In terms of section 14 of the Constitution everyone has the right to privacy (as explained in paragraph 2.4 and 4).

¹³⁰ Anonymous 2006 HYPERLINK
http://www.labour.gov.za/basic_guides/bgguide_display.jsp?id=4700 20 Nov 2006.

¹³¹ Anonymous 2006 HYPERLINK

employees, because they are more likely to contract an illness such as cold, flu, etc. Therefore, it is important for the employer to take this into account as soon as the employee informs him or her of his or her status. As soon as an employer is aware of the employees' status, he or she must make reasonable accommodations towards these employees.

3.5 *Medical Schemes Act*¹³²

In terms of section 24(2)(e), the *Medical Schemes Act* prevents medical schemes from discriminating against people living with HIV or AIDS by providing that a medical scheme may not be registered if it discriminates directly or indirectly against any person on the basis of his or her health status. All schemes must offer minimum levels of benefits to employees with HIV or AIDS.¹³³

In *NS v Old Mutual* the Labour Court stated that because NS was HIV positive the employer (Old Mutual) refused membership of three employee benefits including the medical aid scheme and this is unfair discrimination. Therefore, the Labour Court decided the case in favour of NS.

4 Privacy and fair practices

Section 7(2) of the EEA states 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).

Neither the Act nor case law provides an answer to the question whether section 7(2) of the EEA should be interpreted literally or only where the

<http://66.102.9.104/search?q=cache:rJ3XulfNgJ:dedi20a.yourserver.co.za/alp/images/upload/Domestic%2520Worker%2520rights.pdf+sick+leave+%26+V&hl=en&gl=za&ct=clnk&cd=8> 20 Nov.

¹³² *Medical Schemes Act* 131 of 1998.

¹³³ At the moment the minimum benefits state that employers must treat all employees as susceptible to the contraction of HIV or AIDS but they do not have to provide anti-retroviral treatment.

Labour Court has stated that HIV testing is a job requirement.¹³⁴ No one is excluded from the requirements of HIV testing. The employer must get permission from the Labour Court for HIV testing in all circumstances. Therefore, the Labour Court must declare that it is a job requirement and that the testing is justifiable.¹³⁵

An employment policy is an agreement between the employer and the employees, which is mandatory in terms of the EEA. An employment policy indicates all the rights, obligations and benefits of all employees and needs to be reviewed constantly, to ensure that it is updated to be in line with changing legislation. It is imperative that the employment policy treats all employees equally.¹³⁶ The question of fairness arises as soon as an employment policy excludes people who have contracted HIV. To begin with, it must be established whether the testing for HIV/AIDS is warranted and, if so, in which manner it must be conducted to be fair to all concerned.¹³⁷ Constitutionally protected rights, for example, the right to privacy¹³⁸ and the right to fair labour practices¹³⁹ may be infringed.¹⁴⁰

Section 1 of the EEA defines medical testing also to include any test, question, inquiry or other means designed to determine, or which has the effect of enabling the employer to determine, whether an employee has any medical condition. Section 7 of the EEA specifically prohibits medical testing in the workplace, unless such testing is justifiable by the Labour Court.¹⁴¹ The *Code of Good Practice on Key Aspects of HIV/AIDS and Employment* also

¹³⁴ The term "literally" means in all circumstances and not only when a person applies for a job. It will therefore also apply within the workplace, when a person is already an employee.

¹³⁵ Section 50(4) of the EEA.

¹³⁶ Grogan 2006 HYPERLINK <http://66.102.9.104/search?q=cache:OiL6DSVduokJ:www.siberink.co.za/uploads/sibergrammes/bbbf12d0b1f880f1b9e8c9f8e750e3ea.doc+right+to+fair+practices&hl=en&gl=za&ct=clnk&cd=3> 20 Nov 2006.

¹³⁷ Section 7(2) of the EEA and Clause 7 of the *Code of Good Practice on Key Aspects of HIV/AIDS and Employment*.

¹³⁸ Section 14 of the Constitution.

¹³⁹ Section 23 of the Constitution.

¹⁴⁰ Constitutionally protected rights can be infringed when the employer forces an employee to take an HIV test or when an employer does not follow the correct procedures in terms of fair labour practices.

¹⁴¹ Section 7(2) of the EEA.

states that it will not be justifiable to require of an employee to undergo an HIV/AIDS medical test as a condition for receiving employee benefits.¹⁴² Clause 10 of this Code specifically prohibits discrimination on the basis of HIV/AIDS in the allocation of employee benefits.

The Code also recognises the Constitutional right to privacy.¹⁴³ Thus, the employee cannot be forced to disclose his/her HIV/AIDS status. Clause 7 of the Code states that an employer must approach the Labour Court for authorisation to test an employee as an access requirement to obtain employee benefits. If HIV-related privacy is protected, infringements of the right to equality and human dignity based on HIV status in the workplace will be prevented.¹⁴⁴

Equality and privacy are both rights that cannot be separated from human dignity.¹⁴⁵ In most employment situations the HIV testing of the job applicant causes the most HIV/AIDS related discrimination. The right to privacy prevents intrusions, including obtaining and spreading of personal information such as HIV status.¹⁴⁶

The right to privacy is not absolute but the invasion of privacy should still be justified.¹⁴⁷ There are a number of factors that justifies a policy of HIV testing. In the main, these factors are considerations relating to health and safety in the workplace; performance of the inherent requirements of the job; access to employment-related benefits of an insurable nature; and statutory requirements.¹⁴⁸ Testing will be justified if it is conducted with informed

¹⁴² Clause 7.1.4 (v).

¹⁴³ Clause 5.3.10.

¹⁴⁴ Ngwena 2001 *Developing World Bioethics* 54-55. Also see Anonymous 2006 HYPERLINK <http://www.journaids.org/livingwithhiv aids.php#privacy> 9 Dec 2006.

¹⁴⁵ Ngwena 2001 *Developing World Bioethics* 54-55. Also see Anonymous 2006 HYPERLINK http://www.paralegaladvice.org.za/docs/12_full.html 9 Dec 2006.

¹⁴⁶ Hamburg 2006 HYPERLINK http://www.themedia.co.za/article.aspx?articleid=30969&area=/media_insightlegal_sp in/ 21 Nov and AIDS Law Project 2006 HYPERLINK http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=246&DC100SID=8e39886ee5f6c40c8daa4d0fd6b3d057 9 Dec 2006.

¹⁴⁷ Ngwena *Developing World Bioethics* 54-55. Also see Anonymous 2006 HYPERLINK <http://www.journaids.org/livingwithhiv aids.php#privacy> 9 Dec 2006.

¹⁴⁸ Ngwena *Developing World Bioethics* 54-55.

consent.¹⁴⁹ The information that is obtained from the testing may only be used for the purpose for which it was obtained and not for unfair discrimination.¹⁵⁰ The job applicant or employee must be informed of the test and pre-and post-test counselling is required for the implications in an HIV positive result.¹⁵¹

The dispute in the *Hoffman* case arose before the commencement of the EEA which prohibits employers from conducting HIV testing unless the permission of the Labour Court has been obtained.¹⁵² It is not apparent in the *Hoffman* case whether SAA had a carefully thought-out policy, code or practice for HIV testing, which included safeguards for job applicants and employees.¹⁵³ The *Code of Good Practice on Key Aspects of HIV/AIDS and Employment* contains guidelines that will assist employers, employees and trade unions in complying with their obligations under the Constitution and EEA regarding the treatment of people living with HIV/AIDS in the workplace, including HIV testing and discrimination. Unless job applicants and employees will be assured that their HIV status will not influence their position in the workplace and that the testing of HIV will be confidential and according to the law, there is no reason for them to be open with their status or for testing. This may have been the case in *Hoffman v SAA*.¹⁵⁴

¹⁴⁹ Hamburg 2006 HYPERLINK http://www.themedia.co.za/article.aspx?articleid=30969&area=/media_insightlegal_sp in/ 21 Nov 2006.

¹⁵⁰ Ngwena *Developing World Bioethics* 54-55. Also see Anonymous 2006 HYPERLINK <http://www.journaids.org/livingwithhivaids.php#privacy> 9 Dec 2006 and Hamburg 2006 HYPERLINK http://www.themedia.co.za/article.aspx?articleid=30969&area=/media_insightlegal_sp in/ 21 Nov 2006.

¹⁵¹ Ngwena *Developing World Bioethics* 54-55. Also see AIDS Law Project 2006 HYPERLINK <http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=246&DC100SID=8e39886ee5f6c40c8daa4d0fd6b3d057> 9 Dec 2006.

¹⁵² Section 7(2) of the EEA.

¹⁵³ Ngwena *Developing World Bioethics* 54-55. Also see Hamburg 2006 HYPERLINK http://www.themedia.co.za/article.aspx?articleid=30969&area=/media_insightlegal_sp in/ 21 Nov 2006.

¹⁵⁴ Ngwena *Developing World Bioethics* 54-55. Anonymous 2006 HYPERLINK http://www.paralegaladvice.org.za/docs/12_full.html 9 Dec 2006.

In *I & J Ltd v Trawler & Line Fishing Union & Others*,¹⁵⁵ I & J applied to the Labour Court to declare that voluntary and anonymous HIV testing fell outside of section 7(2) of the EEA. In other words, where HIV testing was voluntary, an employee should not have to apply to the Labour Court for authorisation to offer such testing. I & J wished to provide a service in the workplace which would be linked to an on-going study in that test results would not only be provided to employees but would, in anonymous fashion, be analysed in accordance with ages and job categories by an external service provider.¹⁵⁶

The court granted their order and held that voluntary and anonymous HIV testing does not fall within the scope of section 7(2) and therefore an employer does not have to apply to the Labour Court for authorisation to offer this type of service to employees.¹⁵⁷

Furthermore, in *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood and Allied Workers Union & Others*¹⁵⁸ the court granted an order allowing anonymous and voluntary HIV testing in the workplace. It stated that if the employee consented to the testing, then there was no need for the employer to approach the Labour Court for authorisation.¹⁵⁹

5 HIV testing and informed consent

Every employee has the right to privacy,¹⁶⁰ dignity,¹⁶¹ to make his or her own freedom and security,¹⁶² and the protection of his or her own body from harm

¹⁵⁵ *I & J Ltd v Trawler & Line Fishing Union & Others* 2003 24 ILJ 565 (LC).

¹⁵⁶ Landis and Grossett *Employment and the Law* 23-24.

¹⁵⁷ AIDS Legal Network 2006 HYPERLINK http://www.aln.org.za/downloads/HIV_AIDS_and_the_Law_Individual_Modules/HIV_AIDS_and_the_Law_Module_4.pdf#search=%22The%201998%20ILO%20Consensus%20Statement%20on%20HIV%2FAIDS%22 12 Oct 2006.

¹⁵⁸ *PFG Building Glass (Pty) Ltd v Chemical Engineering Pulp Paper Wood and Allied Workers Union & Others* 2003 24 ILJ 974 (LC).

¹⁵⁹ AIDS Legal Network 2006 HYPERLINK http://www.aln.org.za/downloads/HIV_AIDS_and_the_Law_Individual_Modules/HIV_AIDS_and_the_Law_Module_4.pdf#search=%22The%201998%20ILO%20Consensus%20Statement%20on%20HIV%2FAIDS%22 12 Oct 2006.

¹⁶⁰ Section 14 of the Constitution.

¹⁶¹ Section 10 of the Constitution.

¹⁶² Section 12 of the Constitution.

by others.¹⁶³ This means that every person has the right to make his or her own decisions about his or her body.¹⁶⁴ An employee must therefore consent to an HIV test. Other legislation also requires informed consent. Section 12(c) of the Constitution states that everyone has the right to bodily and psychological integrity, which includes the right not to be subjected to medical or scientific experiments without their informed consent. Part 7 of *The Code of Good Practice on Key Aspects of HIV/AIDS and Employment* states that no employer may require an employee or an applicant for employment to undertake an HIV test in order to be sure of their HIV status. Section 7 of the EEA states that medical testing to determine the HIV status is prohibited and section 50(4) states that the Labour Court may make an order declaring that medical testing for HIV is justifiable.

The term consent consists of two parts, information and permission.¹⁶⁵ The employer will have to give the employee the required information on the reasons for the test and obtain the employee's permission for the test.¹⁶⁶ The employer must ensure that the employee knows what the HIV test is, why it is being done and what the result will mean, before the employee agrees to his or her blood being taken.¹⁶⁷ No employee may not be forced or tricked into taking a HIV test.¹⁶⁸

In *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA & Others*¹⁶⁹ it was found that, section 7 of the EEA as a whole applies only to compulsory testing and not to voluntary testing. Provided that testing is truly voluntary, the applicant was of the opinion that it does not matter whether the initiative for the testing comes from the employer or the employees. Clause 7.1.5 of the *Code of Good Practise on Key Aspects of*

¹⁶³ Section 12(2)(b) of the Constitution.

¹⁶⁴ Section 12(2) of the Constitution.

¹⁶⁵ Landis and Grossett *Employment and the Law* 242.

¹⁶⁶ Section 7 of the EEA and part 7 of the Code of Good Practice on Key Aspects of HIV/AIDS and Employment.

¹⁶⁷ Landis and Grossett *Employment and the Law* 242.

¹⁶⁸ Landis and Grossett *Employment and the Law* 243.

¹⁶⁹ *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA & Others* J158/02 (Unreported).

HIV/ AIDS and Employment was stated as support for the view that voluntary testing does not fall within the ambit of section 7(2) of the EEA.¹⁷⁰

The *Draft National Policy on Testing of the Department of Health*,¹⁷¹ states that the patient should understand and be aware of the test.¹⁷² The patient should also know the benefits, risks, alternatives and social implications of the test results.¹⁷³

Already in 1923 the Supreme Court found in *Stoffberg v Elliot*¹⁷⁴ that:

By going into hospital (a person) does not give up his or her right to security of the person... patients remain human beings with the right to control their own body.

The Constitution has now entrenched this right in section 12 that protects the right to security and control of a person's own body.

It is important that employers create a safe working environment as far as is reasonably practicable.¹⁷⁵ This can be done by minimising the risk of occupational exposure to the virus, developing plans should occupational exposure occur, implementing training and awareness programs to identify and manage HIV transmission in the workplace, monitoring the risk of or the actual exposure to HIV in the workplace and to adhere to statutory requirements as laid down in the *Occupational Health and Safety Act* and the *Mine Health and Safety Act*.¹⁷⁶

6 HIV/AIDS as a disability

Section 9 of the Constitution lists grounds on which no one may be discriminated against. However, the Constitution does not specifically list

¹⁷⁰ Landis and Grossett *Employment and the Law* 24.

¹⁷¹ The Draft Policy on Testing (February 2002) Department of Health in terms of the National Policy for Health Act 116 OF 1990.

¹⁷² Landis and Grossett *Employment and the Law* 244.

¹⁷³ Landis and Grossett *Employment and the Law* 245.

¹⁷⁴ *Stoffberg v Elliot* 2 ILJ 1923 (LAC).

¹⁷⁵ Landis and Grossett *Employment and the Law* 24.

¹⁷⁶ *Occupational Health and Safety Act and Regulations Act* 85 of 1993 and the *Mine Health and Safety Act* 29 of 1996.

HIV/AIDS in its equality clause as a prohibited ground for unfair discrimination. The possibility exists that HIV/AIDS might be classified as a disability, which is a listed prohibited ground for unfair discrimination or it might constitute an unlisted ground of unfair discrimination.¹⁷⁷

The grounds for discrimination listed in section 6 of the EEA include HIV status. The fact that HIV status is listed as one of the grounds for unfair discrimination in the EEA, does not however address the issue whether it should be classified as a disability. The *Code of Good Practice on Key Aspects of Disability in the Workplace*¹⁷⁸ defines people with disabilities as people with a long-term or recurring, physical or mental impairment and which substantially limits their work.¹⁷⁹ The term long-term means that the impairment has lasted for or will last for 12 months.¹⁸⁰ Recurring means that it is probable that it will occur again.¹⁸¹ Impairment consists of two parts. The first is physical impairment which means a partial or total loss of bodily function or part of the body and the second is mental impairment which means a clinically recognised condition or illness that affects a person's thought processes, judgment and emotions.¹⁸² Substantially limiting means that because of the specific impairment, the employee will be unable to do the job at all without any accommodation of the employer.¹⁸³ It is important to note that the employer need not accommodate an employee if this will impose an unjustifiable hardship on the employers business.¹⁸⁴

If HIV/AIDS is a disability, one must establish at what stage in the progression of the disease it would fall within the definition of a disability. The Disability Code states that:¹⁸⁵

¹⁷⁷ Dupper *Essential Employment Discrimination Law* 172.

¹⁷⁸ *Code of Good Practice on Key Aspects of Disability in the Workplace*. Henceforth the Disability Code.

¹⁷⁹ Clause 5.1 of the Disability Code.

¹⁸⁰ Clause 5.1.1 of the Disability Code.

¹⁸¹ Clause 5.1.1 of the Disability Code.

¹⁸² Clause 5.1.2 of the Disability Code.

¹⁸³ Clause 5.1.3 of the Disability Code.

¹⁸⁴ Clause 6.11 of the Disability Code.

¹⁸⁵ Clause 5.1.1(iii).

[p]rogression of recurring conditions which have no overt symptoms or which do not substantially limit a person are not disabilities.

This definition in the Disability Code means that a symptomatic disease that does not limit an employee in the workplace would not fall under the category of a disability.¹⁸⁶ A person with HIV in the asymptomatic stage could not be defined as a person with a disability.¹⁸⁷ According to Christianson¹⁸⁸ it remains to be seen, whether a person with full-blown AIDS could be defined as a person with a disability. Certain, countries such as the USA, however, have included HIV/AIDS within the broad concept of disability. Belgium and the United Kingdom are also moving towards this.

It can be argued that HIV and AIDS should be protected on grounds of disability under the section 9 of the Constitution and section 6 of the EEA because people with HIV have a medical condition that may affect their day-to-day activities. When one looks at the definition of people with disabilities it is clear that HIV/AIDS also falls within this scope. HIV/AIDS is a long-term illness, it causes a physical and/or mental impairment and it substantially limits a person. According to this it is hard to understand why legislatures do not include HIV/AIDS as a disability. People living with HIV/AIDS are disabled by a condition or illness that affects the way they live and work. They experience the same kinds of discrimination experienced by other people with other disabilities. People living with HIV or AIDS, therefore, need to be protected from discrimination in the same way as other people who are disabled.¹⁸⁹

It can however also be argued that HIV/AIDS should be treated as a separate listed ground for non-discrimination under the EEA because people living with

¹⁸⁶ Christianson *Essential Employment Discrimination Law* 173. Also see Cichocki 2006 HYPERLINK <http://aids.about.com/od/legalissues/a/disability.htm> 7 Dec 2006.

¹⁸⁷ Christianson *Essential Employment Discrimination Law* 173. Also see Anonymous 2006 HYPERLINK <http://globalsurvey.med.yale.edu/Fact%20sheet.pdf> 7 Dec 2006.

¹⁸⁸ Christianson *Essential Employment Discrimination Law* 173. Also see Banda 2006 HYPERLINK http://www.dpi.org/en/resources/articles/06-23-04_hiv aids.htm 7 Dec 2006.

¹⁸⁹ Anonymous 2006 HYPERLINK <http://www.paralegaladvice.org.za/docs/chap12/02.html> 12 Oct.

HIV/AIDS are discriminated against in many ways.¹⁹⁰ It would be easier to show in court that a person was unfairly discriminated against on grounds of their HIV status and they could claim unfair discrimination on grounds of HIV status.¹⁹¹

The HIV disease has different stages as explained in *Hoffman v SAA*. It does not always impair an employee to do his or her work.¹⁹² It is submitted that excluding certain categories from the protected class frustrates rather than promotes the protective objects of the EEA.¹⁹³ It tends to promote preconceived assumptions and stereotypes about what conditions constitute disabilities and are deserving of reasonable accommodation. It is conceded that there will be certain types of disabilities that will not render a person suitable for employment and will in practice obviate the need to determine reasonable accommodation.¹⁹⁴ However, this must be determined on a case-by-case basis.

People living with HIV/AIDS are entitled to social assistance in the form of disability grant if they reach a stage of AIDS disease progression where a doctor or assessment panel is convinced that they are unable to work.¹⁹⁵ According to the Department of Social Development, disability grants are available to adult South African citizens and permanent residents who are incapacitated and unable to work due to illness or disability.¹⁹⁶ A number of people living with HIV/AIDS have access to disability grants as soon as they

¹⁹⁰ Anonymous 2006 HYPERLINK
http://209.85.135.104/search?q=cache:k1opM5MmgZgJ:www.doj.gov.za/2004dojsite/eqact/other%2520docs/research/eqc_research_ch%25206_fam_25.pdf+HIV/AIDS+should+be+treated+as+a+separate+listed+ground+for+nondiscrimination&hl=en&gl=za&ct=clnk&cd=4 7 Dec 2006.

¹⁹¹ Anonymous 2006 HYPERLINK
<http://www.paralegaladvice.org.za/docs/chap12/02.html> 12 Oct.
¹⁹² Paragraph 11.

¹⁹³ Richter 2006 *Labour Bulletin* 196.

¹⁹⁴ Richter 2006 *Labour Bulletin* 196-197.

¹⁹⁵ Richter 2006 *Labour Bulletin* 198. Also see Aids counsellors and medical practitioners are coming across HIV-positive people who wish for their CD4 count to drop to 200 or below in the hope that doctors will recommend they get a government disability grant.
Jooste 2006 HYPERLINK
http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=ct20031214121134737V640626 7 Dec 2006.

¹⁹⁶ Anonymous 2006 HYPERLINK
<http://www.org.za/modules.php?op=modload&name=News&file=article&sid=292&DC100SID=0621be77703fa2dd1986f7a2c7a3f24> 3 Oct 2006.

fulfilled the criteria set down by the Department of Social Development. The *Social Assistance Act* 59 of 1992, states that a person living with AIDS can apply for a disability grant if he or she are South African citizens, are 18 years or older, have consulted a doctor, do not have a husband or wife that is able to support them, do not live in a state-run institution, are a full-time South African student younger than 21 and unable to support oneself and he or she can only apply for a disability grant if the disability stops them from working.¹⁹⁷

7 Incapacity

Incapacity is a ground for dismissal.¹⁹⁸ Clause 10(1) of the *Code of Good Practice: Dismissal*,¹⁹⁹ states that incapacity must arise from ill health or injury and that any physical or mental disability also falls under this.²⁰⁰ Clause 11 of the Dismissal Code lays down guidelines for cases arising from ill health or injury. This clause states that the employer must determine whether the employee is capable of performing the work and if not, the employer must look at the extent of the disability, circumstances and alternative work.²⁰¹

Discretion should be used by each employer to determine the nature of the employee's incapacity.²⁰² This was demonstrated in *Hoffman case*. The onus rests on the employer to prove that the employee is in fact incapacitated, which means the employer is required to determine the nature and severity of the employee's prognosis.²⁰³ Presently the applicable legislation does not afford greater protection against dismissals of employees infected by HIV/AIDS than employees suffering from any other form of chronic illness.²⁰⁴

¹⁹⁷ A person who has HIV or an AIDS related illness will only qualify for a disability grant if he or she becomes too sick to work.

¹⁹⁸ Schedule 8 of the *Code of Good Practice: Dismissal*.

¹⁹⁹ The *Labour Relations Act* Schedule 8 *The Code of Good Practice: Dismissal*. Henceforth the Dismissal Code.

²⁰⁰ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 353.

²⁰¹ Clause 11 (a) and (b).

²⁰² Schedule 8 of the *Code of Good Practice: Dismissal*.

²⁰³ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 354. Also see Metcalfe 2006 [HYPERLINK http://www.foundation-developmentafrica.org/africa_hivaids/issues_for_employers.htm](http://www.foundation-developmentafrica.org/africa_hivaids/issues_for_employers.htm) 7 Dec 2006.

²⁰⁴ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 355.

The Dismissal Code draws a distinction between temporary absence due to illness and unreasonably long absence due to an illness.²⁰⁵ Clause 10(1) states that if the employee is temporary unable to work, the employer should investigate the extent of the incapacity and if the employee is unable for an unreasonably long time, the employer should investigate all the possible alternatives short of dismissal. Clause 10(4) provides that the employer must accommodate an employee that is incapacitated due to a work related illness. To determine whether a dismissal due to ill health is fair one must consider whether the employee is capable of performing the work.²⁰⁶ If the employee is not capable of performing the work, one must look at, how and to what extent the employee's work circumstances can be adapted and the availability of suitable alternative work.²⁰⁷ Therefore, an employee can not be dismissed because he or she has HIV/AIDS, but if the employee is not able to perform his or her work at all, none of the alternatives are available to the employer and is absent for an unreasonable time, the employee can be fairly dismissed on the ground of incapacity.²⁰⁸ Thus the employee has failed to attain a performance standard set by the employer, that the performance standard was attainable and that there was no reasonable alternative but to dismiss the employee.²⁰⁹

In *Mhlungu & another v Gremick Integrated Security Specialist (Pty) Ltd*²¹⁰ judgement the court stated that:

The enactment of legislation disqualifying an employee from performing work has also been accepted as creating a form of incapacity.

Employers are entitled to request employees to undergo medical examinations, but cannot force them to do so, because section 7 of the EEA prohibits medical testing unless it is permitted by legislation or justifiable in the light of medical facts, employment conditions, social policy, the fair distribution

²⁰⁵ Clause 10(1).

²⁰⁶ Clause 11(a).

²⁰⁷ Clause 11(b)(i)-(iii).

²⁰⁸ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 355-356.

²⁰⁹ Grogan *Dismissal, Discrimination and Unfair Labour Practices* 179.

²¹⁰ *Mhlungu & another v Gremick Integrated Security Specialist (Pty) Ltd* 2001 22 ILJ 1030 (CCMA).

of employees benefits or the inherent requirements of a job. Section 7(2) of the EEA states that testing for HIV/AIDS without the consent of the Labour Court is expressly forbidden.

8 Impact of HIV/AIDS on companies

According to the International Labour Office,

AIDS is a work place issue not only because it affects labour and productivity, but also because the work place has a vital role to play in the wider struggle to limit the spread and the effects of the epidemic.²¹¹

An HIV/AIDS programme is a new phase of the awareness campaign.²¹² It is a programme in companies to make employees and employers more aware of HIV/AIDS. The purpose of an HIV/AIDS programme is to prevent the spread of the infection, manage infected employees to enable them to work productively for as long as possible and provide strategies to deal with the direct and indirect costs of HIV/AIDS in the workplace.²¹³ HIV/AIDS programmes should incorporate measures such as education and training on HIV/AIDS, encouraging voluntary testing and regular awareness programmes.²¹⁴

The question which arises is whether employment programmes are really working in terms of meeting the needs of those South Africans infected and

²¹¹ Adendorff 2005 *Management Today* 51.

²¹² South African Government Information 2006 HYPERLINK <http://www.info.gov.za/faq/aids.htm#prevention> 7 Dec 2006.

²¹³ Landis and Grossett *Employment and the Law* 238.

²¹⁴ Landis and Grossett *Employment and the Law* 238.

affected by HIV/AIDS.²¹⁵ The key in making sure that programmes achieve their aims is through committed monitoring and evaluation processes.²¹⁶

Guidelines for responding to HIV/AIDS in the workplace balance prevention of HIV infection with care.²¹⁷ One of the central problems with providing treatment is the cost of antiretroviral drugs. While employees on medical aid schemes often have access to managed antiretroviral drug treatment, those without medical aid schemes do not, and are generally not in the position to afford such treatment themselves.²¹⁸ Given the benefits for the company and individual of effective treatment, a number of South African companies have recently announced schemes providing antiretroviral drugs for their employees and, in some cases, dependants.²¹⁹ For example De Beers²²⁰ and ABSA.²²¹

The *Code of Good Practice on Key Aspects of HIV/AIDS and Employment* states in clauses 13 and 14 that employers and trade unions should develop appropriate strategies to understand, assess and respond to the impact of HIV/AIDS in their particular workplace and sector, in co-operation with

²¹⁵ Adendorff 2005 *Management Today* 51. Replacement of workers that have succumbed to AIDS involves recruitment, training costs and lower levels of productivity while the new employee gains experience. Within the workplace the impact of AIDS illness and death on medical insurance and pension must be considered. Kalavakonda 2006 HYPERLINK <http://66.102.9.104/search?q=cache:fDvrsJAplIJ:siteresources.worldbank.org/INTAFRREGTOPHIVAIDS/Resources/HIVAIDSEnterpriseRiskManagementModel.doc+managing+HIV+in+the+workplace&hl=en&gl=za&ct=clnk&cd=6> 18 Nov 2006.

²¹⁶ Kalavakonda 2006 HYPERLINK <http://66.102.9.104/search?q=cache:fDvrsJAplIJ:siteresources.worldbank.org/INTAFRREGTOPHIVAIDS/Resources/HIV-AIDS-Enterprise-Risk-ManagementModel.doc+managing+HIV+in+the+workplace&hl=en&gl=za&ct=clnk&cd=6> 18 Nov 2006.

²¹⁷ Clause 2 of the *Code of Good Practice on Key Aspects of HIV/AIDS and Employment*.

²¹⁸ This may be time consuming, but is absolutely necessary to close gaps and identify problems and solutions. An appropriate investment in addressing the needs of an HIV positive worker will give invaluable returns in terms of longevity that will result in increased productivity and the prevention of loss of skills, if the right balance is maintained. Dickinson *Managing HIV/AIDS in the South African Workplace* 28. Also see Adendorff 2005 *Management Today* 51

²¹⁹ Dickinson *Managing HIV/AIDS in the South African Workplace* 28.

²²⁰ Anonymous 2006 HYPERLINK <http://www.debeersgroup.com/debeersweb/Investing+in+the+Future/Communities/Health/Treatment.htm> 9 Dec 2006.

²²¹ Anonymous *The Banker* 128.

organisations and institutions in the wider environment. The Code furthermore states that impact assessments should include risk profiles and assessments of the direct and indirect costs of HIV/AIDS.²²² The cost effectiveness of any HIV/AIDS interventions should also be measured as part of an impact assessment. Recommendations are given as to the activities to be included in risk profiles and assessments.²²³

In this regard, the Code proposes that an integrated strategy is required that includes elements such as, an understanding and assessment of the impact of HIV/AIDS in the workplace and long-and short-term measures to deal with and reduce the impact of the disease including an HIV policy and HIV programme.²²⁴

Employers have an obligation to create a safe working environment as far as is reasonable.²²⁵ According to section 4 of OHSA, this includes the obligation to minimise the risk of occupational exposure to the infection, develop contingency plans should occupational exposure occur, implementing training and awareness programmes and monitor the risks of exposure to HIV in the workplace.²²⁶

Procedures should be examined and modified to ensure the fair management of incapacity. Aspects such as testing and confidentiality should be comprehensively dealt with and covered. Responsibilities should be clearly defined, effective consultation and communication strategies maintained and policies and procedures reviewed and amended from time to time.²²⁷

The response to HIV/AIDS by managers in South-African companies is uneven and poor. The Centre of Health Policy survey reported only 58% of

²²² Clause 14.4(i) and (ii) of the *Code of Good Practice on Key Aspects of HIV/AIDS and Employment*.

²²³ Clause 14.5 of the *Code of Good Practice on Key Aspects of HIV/AIDS and Employment*.

²²⁴ Clause 15 of the *Code of Good Practice on Key Aspects of HIV/AIDS and Employment*.

²²⁵ Section 4 of OHSA.

²²⁶ Landis and Grossnett *Employment and the Law* 239.

²²⁷ Landis and Grossnett *Employment and the Law* 244.

companies having an HIV/AIDS policy and 44% of these did not know what their policies were based on.²²⁸ Although there appears to be an encouraging amount of involvement of workers in policy development, this is actually not a true reflection of the involvement.²²⁹ It appears that very few companies distribute their policies to employees. While most companies are doing something, this does not seem to be based on effectiveness or strategic planning.²³⁰

One of the main concerns is the lack of information about HIV/AIDS and company operation on which management has to base its decisions.²³¹ This lack of data is of concern in itself. This in return is resulting in the *de facto* shifting of the burden of HIV/AIDS onto individuals, communities and society.²³² The failure to measure or to anticipate will not free companies from the impact of AIDS.²³³ Intervention at the workplace is not enough. Management needs to monitor and evaluate the effectiveness and quality of the programmes in place. Although it appears as if managers are doing something, there is still a lack of focus, strategy and responsibility.

²²⁸ See Stevens and Dickson 2005 *South African Journal of Economic and Management Sciences* 287-289.

²²⁹ The *South African Medical Journal* wanted to determine what the proportion of employees at the largest private-sector companies in South-Africa have access to HIV/AIDS care and treatment, including antiretroviral therapy. They wanted to establish how many employees are enrolled in disease management programmes. All 64 private-sector with more than 6000 employees in South Africa were identified and contacted. The results showed that fifty-two companies agreed to participate. Among these companies, 63% of employees had access to employers sponsored care and treatment for HIV/AIDS. However, access varied widely by sector. Approximately 27% of suspected HIV-positive employees were enrolled in the disease management programmes or 4.4% of the workforce overall. Fewer than 4000 employees in the entire sample were receiving ART in-house (employer) disease management programmes and independent disease management programmes achieved higher uptake of services than did medical aid schemes. The conclusion was that publicity by large employers about their treatment programmes should be interpreted cautiously. While there is a high level of access to treatment, uptake of services is low and only a small fraction of employees who qualify for ART are receiving it. Connely 2006 *South African Medical Journal* 128-133.

²³⁰ See Stevens and Dickinson 2005 *South African Journal of Economic and Management Sciences* 289-291.

²³¹ Global Reporting Initiative (2003) Reporting guidance on HIV aids: A GRI resource document[s], Draft Four.

²³² See Stevens and Dickinson 2005 *South African Journal of Economic and Management Sciences* 292-296.

²³³ See Stevens and Dickinson 2005 *South African Journal of Economic and Management Sciences* 297-299.

9 Conclusion

The Constitution grants everyone, including people with HIV/AIDS, the, right to equality, the right to human dignity and the right to fair labour practice. It further requires that any court, forum or tribunal must consider international law. This can be an advantage in the case of HIV/AIDS infected employees because international law can be considered and applied where South African law is not adequately developed.

The right to fair labour practices is important to HIV/AIDS infected employees, because it gives them the right not to be discriminated against because of their HIV status. An employer may refuse to employ a person who is clearly too ill to work but to refuse to employ a person simply because her or she is known or suspected of have HIV unfairly discriminates against that person on the grounds of HIV status and is therefore unlawful.

The application of these sections was illustrated in *Hoffman v SAA*. Although HIV/AIDS is not a listed ground of discrimination in section 9 of the Constitution, it is a listed ground in section 6 of the *Employment Equity Act* and clause 10 of the *Code of Good Practice on Key Aspects of HIV/AIDS and Employment*. The judgement explicitly stated that employers cannot refuse to appoint a job applicant because of his or her HIV status.

The right to privacy in section 14 of the Constitution can be infringed by HIV testing. Therefore, this section should be read with section 7 of the *Employment Equity Act*, which states that medical testing is prohibited unless testing is justifiable by the Labour Court in terms of section 50(4). Other statutory provisions that are also applicable to HIV/AIDS infected employees in South Africa are sections 186 and 187 of the *Labour Relations Act* which relate to unfair dismissals and discrimination, respectively.

Section 8 of the *Occupational Health and Safety Act* states that employers are obliged to ensure a safe working environment for employees. This means that the employer must ensure that employees are not at risk of getting infected

with HIV at work. Also applicable is *Compensation of Injuries and Diseases Act*, which lays down the regulations and procedures for claims by employees stating that they are HIV positive because of a work related accident.

Section 10 of the *Basic Conditions of Employment Act* provides for sick leave and the regulations thereof. While an employee cannot be dismissed solely because of his or her HIV status, if the criteria of incapacity is fulfilled the employee may be dismissed.

HIV/AIDS does not constitute a disability South Africa, although it does fall within the definition of disability in the Disability Code. According to this it is hard to understand why legislatures do not include HIV/AIDS as a disability. People living with HIV/AIDS need to be protected from discrimination in the same way as other people who are disabled. It is therefore submitted that HIV/AIDS be recognised as a disability in terms of the Disability Code. As soon as a person is diagnosed with full blown AIDS it should be recognised as a disability according to the law which will ensure that these employees are accommodated accordingly in the workplace.

Certain organisations have taken initiative in the prevention and management of HIV/AIDS, because they see HIV/AIDS as a strategic issue. Organisations are currently managing the impact of HIV/AIDS on their present and future operations by means of policies and procedures and programme implementation. Consequently it is evident that there will be an increasing number of applications made to the Labour Court for HIV testing of employees. In this regard, it can be recommended that employers should implement education and awareness, putting a human face to HIV/AIDS will make it easier for employees to relate to it, helping to confront discrimination will set a high standard and will make employees aware that the employer takes HIV/AIDS seriously, setting an example to others and incorporate measures such as education and training on HIV/AIDS, encouraging voluntary testing and regular awareness programmes. These are all recommendations that the employer should implement to address the HIV/AIDS problem.

While the right to equality does, to a degree, protect people living with HIV/AIDS, it is submitted that special provisions should be set for employees with HIV/AIDS in the workplace. It is further submitted that the USA's example of including AIDS as a disability would make the management and treatment of HIV/AIDS in the workplace much easier.

For South Africa there are tremendous challenges remaining in the fields of HIV education, prevention and care. These challenges also influence the workplace. Therefore, the problem infiltrates all aspects in South Africa. According to the research one of the recommendations is to classify HIV as a disability. In this regard some of the problems and difficulties regarding this disease will be addressed and maybe in the long term it can be solved.

Bibliography

Books

C

Currie and de Waal *Bill of Rights Handbook*

Currie I and de Waal J *The Bill of Rights Handbook* (Juta Cape Town 2005)

D

De Waal, Currie and Erasmus *Bill of Rights Handbook*

De Waal J, Currie I and Erasmus *The Bill of Rights Handbook* (Juta Cape Town 2001)

Dickinson *Managing HIV/AIDS in the South African Workplace*

Dickinson D *Managing HIV/AIDS in the South African Workplace* (Juta Cape Town 2004)

Dupper *Essential Employment Discrimination Law*

Dupper OC *Disability discrimination in the Workplace in Strydom EML* (ed) *Essential Employment Discrimination Law* (Juta Cape Town 2004) 154 -188

G

Grogan *Dismissal, Discrimination and Unfair Labour Practices*

Grogan J *Dismissal, Discrimination and Unfair Labour Practices* (Juta Cape Town 2005)

L

Landis and Grossett *Employment and the Law*

Landis H and Grossett L *Employment and the Law* (Juta Cape Town 2005)

S

Smit *Employment and Insolvency Protection*

Smit N *Employment and Insolvency Protection* in Olivier MP (ed)
Social Security: A Legal Analysis (Butterworths Durban 2003) 515-534.

Cases

Christian Education South-Africa v Minister of Education 2000 4 SA 757
(CC)

De Reuk v Director of Public Prosecutions 2004 1 SA 406 (CC)

Hoffman v SA Airways 2000 21 ILJ 2357 (CC)

Hoffman v South African Airways 2000 2 SA 628 (W).

Irwin and Johnson Ltd v Trawler & Line Fishing Union & Others (2003) JOL
10639 (LC)

I & J Ltd v Trawler & Line Fishing Union & Others 2003 24 ILJ 565 (LC)

Jardine v Tongaat Hulett Sugar Ltd 2002 23 ILJ 547 (CCMA)

*Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA &
Others* J158/02 (Unreported)

*Leonard Dingler Employee Representative Council v Leonard Dingler (Pty)
Ltd & others* 1998 19 ILJ 285 (LC)

Mhlungu & another v Gremick Integrated Security Specialist (Pty) Ltd 2001 22
ILJ 1030 (CCMA)

Minister of Health and Others v Treatment Action Campaign and Others (1)
2002 10 BCLR (CC)

N v Minister of Defence 2000 21 ILJ 999 (LCN)

PFG Building Glass (Pty) Ltd v CEPPAWU and Others (2003) JOL 10825
(LC)

*PFG Building Glass (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)

S v Makwanyane 2004 3 91 (CC)

Spoornet v TWU obo Du Plessis 1998 7 BALR 973 (IMSSA)

Stoffberg v Elliot 2 ILJ 1923 (LAC)

Van Biljon and Others v Minister of Correctional Services and Others 1997 4
SA 441 (CC)

ILO Declarations

The 1988 ILO Consensus Statement on HIV/AIDS. Accessed at HYPERLINK
<http://209.85.135.104/search?q=cache:XY0UpDSQMtIJ:www.ilo.org/public/egi/h/protection/tra/aids/publ/consensusstatement.pdf+ILO+Consensus+Statemnt+on+HIV/AIDS&hl=en&gl=za&ctclnk&cd=1> [Date of use 12 October 2006]

The ILO Declaration on Fundamental Principles and Rights at Work Accessed
at HYPERLINK
<http://www.ilo.org/dyn/declaris/DECLARATIONWEB.INDEXPAGE> [Date of
use 6 December 2006]

Internet

AIDS Law Project Know your Rights – Workplace Rights [Found on the
Internet] HYPERLINK
<http://www.alp.org.za/modules.php?op=modload&name=News&file=article&=9> [Date of use 21 November 2006]

AIDS Law Project Privacy & Confidentiality [Found on the Internet]
HYPERLINK
<http://www.alp.org.za/modules.php?op=modload&name=News&file=article&sid=246&DC100SID8e39886ee5f6c40c8daa4d0fd6b3d057> [Date of use 9
December 2006]

AIDS Legal Network HIV and the Workplace HYPERLINK
http://www.aln.org.za/downloads/HIV_AIDS_and_the_Law_Individual_Modules/HIV_AIDS_and_the_Law_Module_4.pdf#search=%22The%201998%20ILO%20Consensus%20Statement%20on%20HIV%2FAIDS%22 12 Oct 2006

Anonymous Disability and HIV/AIDS [Found on the Internet] HYPERLINK
<http://globalsurvey.med.yale.edu/Fact%20sheet.pdf> [Date of use 7 December 2006]

Anonymous Disability grants and Antiretroviral Treatment [[Found on the Internet] HYPERLINK
<http://www.org.za/modules.php?op=modload&name=News&file=article&sid=292&DC100SID=0621be77703fa2dd1986f7a2c7a3f24> [Date of use 3 October 2006]

Anonymous Family Responsibility [Found on the Internet] HYPERLINK
http://209.85.135.104/search?q=cache:k1opM5MmqZgJ:www.doj.gov.za/2004dojsite/eqact/other%2520docs/research/eqc_research_ch%25206_fam_25.pdf+HIV/AIDS+should+be+treated+as+a+separate+listed+ground+for+nondiscrimination&hl=en&gl=za&ct=clnk&cd=4 [Date of use 7 December 2006]

Anonymous HIV/AIDS and the Law [Found on the Internet] HYPERLINK
http://www.paralegaladvice.org.za/docs/12_full.html [Date of use 9 December 2006]

Anonymous HIV/AIDS and the Workplace [Found on the Internet] HYPERLINK
http://www.aln.org.za/downloads/HIV_AIDS_and_the_Law_Individual_Modules/HIV_AIDS_and_the_Law_Module_4.pdf#search=%22The%201998%20ILO%20Consensus%20Statement%20on%20HIV%2FAIDS%22 [Date of use 12 October 2006]

Anonymous HIV/AIDS & the Workplace [Found on the Internet] HYPERLINK
<http://66.102.9.104/search?q=cache:rJ3XulfNgJ:dedi20a.yourserver.co.za/alp/images/upload/Domestic%2520Worker%2520rights.pdf+sick+leave+%26+V&hl=en&gl=za&ct=clnk&cd=8> [Date of use 20 November 2006]

Anonymous Managing HIV/AIDS Risk: An enterprise risk management model
[Found on the Internet] HYPERLINK
<http://66.102.9.104/search?q=cache:fDvrsJAplilJ:siteresources.worldbank.org/INTAFRREGTOPHIVAIDS/Resources/HIVAIDSEnterpriseRiskManagementModel.doc+managing+HIV+in+the+workplace&hl=en&gl=za&ct=clnk&cd=6>
[Date of use 18 November 2006]

Anonymous Make the bill bigger and better, say unions and civil society
[Found on the Internet] HYPERLINK
<http://www.sairr.org.za/wsc/pstory.htx?storyID=138> [Date of use 9 December 2006]

Anonymous The Right to Equality before the Law [Found on the Internet]
HYPERLINK
<http://www.un.org/cyberschoolbus/humanrights/declaration/7asp> [Date of use 22 November 2006]

Anonymous The Right to Privacy [Found on the Internet] HYPERLINK
<http://www.journaids.org/livingwithhivaids.php#privacy> [Date of use 9 December 2006]

Anonymous Treatment [Found on the Internet] HYPERLINK
<http://www.debeersgroup.com/debeersweb/Investing+in+the+Future/Communities/Health/Treatment.htm> [Date of use 9 December 2006]

Anonymous What place does prevention have in South Africa's HIV and AIDS programme? [Found on the Internet] HYPERLINK
<http://www.info.gov.za/faq/aids.htm#prevention> [Date of use 7 December 2006]

Banda I Disability, Poverty and HIV and AIDS [Found on the Internet]
HYPERLINK http://www.dpi.org/en/resources/articles/06-23-04_hivaids.htm
[Date of use 7 December 2006]

Cichocki M Is HIV/AIDS a disability? [Found on the Internet] HYPERLINK <http://aids.about.com/od/legalissues/a/disability.htm> [Date of use 7 December 2006]

Fredman S Providing Equality: Substantive Equality and the Positive Duty to Provide [Found on the Internet] HYPERLINK http://209.85.129.104/search?q=cache:faYbOJ3HAr0J:www.law.wits.ac.za/shr/conference_papers/fredmanpaper.pdf+formal+%26+substantive+equality&hl=za&ct=clnk&cd=3 [Date of use 9 December 2006]

Grogan J Labour Law [Found on the Internet] HYPERLINK <http://66.102.9.104/search?q=cache:OiL6DSVduokJ:www.siberink.co.za/upld/sibergrammes/bbf12d0b1f880f1b9e8c9f8e750e3ea.doc+right+to+fair+practices&hl=en&gl=za&ct=clnk&cd=3> [Date of use 20 November 2006]

Hamburg G Private and Confidential [Found on the Internet] HYPERLINK http://www.themedia.co.za/article.aspx?articleid=30969&area=/media_insight/easpin/ [Date of use 21 November 2006]

Jeffery A Make the bill bigger and better, say unions and civil society [Found on the Internet] HYPERLINK <http://www.sairr.org.za/wsc/pstory.htm?storyID=138> [Date of use 9 Dec 2006]

Jooste I Desperate people rely on HIV to get money [Found on the Internet] HYPERLINK http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=ct20031214121134737V640626 [Date of use 7 December 2006]

Kalavakonda V Managing HIV/AIDS Risk [Found on the Internet] HYPERLINK <http://66.102.9.104/search?q=cache:fDvrsJApIiJ:siteresources.worldbank.org/INTAFRREGTOPHIVAIDS/Resources/HIVAIDSEnterpriseRiskManagementModel.doc+managing+HIV+in+the+workplace&hl=en&gl=za&ct=clnk&cd=6> [Date of use 18 Nov 2006]

Labour Justice Dismissals – What are fair and unfair dismissals? [Found on The Internet] HYPERLINK http://www.labourjustice.com/dismissals_procedures.html [Date of use 16 October 2006]

Metcalf M HIV/AIDS issues for employers [Found on the Internet] HYPERLINK http://www.foundationdevelopmentafrica.org/africa_hivaids/issues_for_employers.htm [Date of use 7 December 2006]

Noble R South African HIV & AIDS Statistics Summary [Found on the Internet] HYPERLINK <http://www.avert.org/safricastats.htm> [Date of use 21 February 2007]

Sachs M Formal & Substantive Equality [Found on the Internet] HYPERLINK <http://209.85.129.104/search?q=cache:3sbU454d9o4J:law.sun.ac.za/publawcon/papers/MSach/equality.pdf+formal+%26+substantive+equality&hl=en&gl=za&ct=clnk&cd=8> [Date of use 7 December 2006]

South African Government Information What place does prevention have in South Africa's HIV and AIDS programme? [Found on the Internet] HYPERLINK <http://www.info.gov.za/faq/aids.htm#prevention> [Date of use 7 Dec 2006]

Journals

Adendorff T “Evaluating the needs of HIV employees in the work place” 2005 *Management Today* 51

Anonymous “South-African Firms assess HIV policies” 2002 *The Banker* 128

Connely P “Treatment for HIV/AIDS at South Africa’s largest employers: myth and reality” 2006 *South African Medical Journal* 128-133

Dickinson D “People living with HIV/AIDS in the workplace South African” 2004 *South African Labour Bulletin* 59-62

- Dickinson D "Managing HIV/AIDS in the South African Workplace: Just another duty?" 2003 *South African Journal of Economic and Management Sciences* 26-28.
- Ngweni C "Constitutional values and HIV/AIDS in the workplace" 2001 *Developing World Bioethics* 54-55
- Richter M "The right to social security of people living with HIV/AIDS" 2006 *South African Labour Bulletin* 197-198
- Stevens M and Dickinson D "Management response to HIV/AIDS in South African Workplaces" 2005 *South African Journal of Economic and Management Sciences* 287-289

Legislation

- Basic Conditions of Employment Act* 75 of 1998
- Compensation of Injuries and Diseases Act* 103 of 1993
- Constitution of the Republic of South Africa Act* 200 of 1993
- Constitution of the Republic of South Africa*, 1996
- Employment Equity Act* 55 of 1998
- Labour Relations Act* 66 of 1995
- Medical Scheme Act* 131 of 1998
- Mine Health and Safety Act* 29 of 1996
- Occupational Health and Safety Act* 85 of 1993
- Social Assistance Act* 59 of 1992
- South African Qualifications Authority Act* 58 of 1995
- The Draft Policy on Testing (February 2002) Department of Health in terms of the *National Policy for Health Act* 116 OF 1990

SADC Documents

The SADC Code on HIV/AIDS and Employment (1997). Accessed at HYPERLINK <http://www.cosatu.org.za/docs/1998/sadc-hiv.htm> [Date of use 12 October 2006]

Other

Global reporting initiative (2003) reporting guidance on HIV aids: A GRI resource documents, draft four.