

# The 'intentional' sexual transmission of HIV: A note of caution in light of *Phiri v S*

## 1 Introduction

Most legal practitioners and laypersons agree, if someone deliberately or intentionally transmits the Human Immunodeficiency Virus (HIV) to a sexual partner, that person deserves legal sanction.<sup>1</sup> South Africa has opted not to establish a separate set of criminal offences to criminalise HIV transmission in this context,<sup>2</sup> unlike several other African countries that have established separate crimes for the intentional or negligent transmission of HIV.<sup>3</sup> In South Africa, policy considerations have prompted the application of existing criminal law principles in court cases dealing with the intentional or negligent transmission of HIV to sexual partners.<sup>4</sup>

Up to now, surprisingly few civil or criminal cases that relate to the wrongful or unlawful transmission of HIV during sexual intercourse have reached our courts. As I have pointed out elsewhere<sup>5</sup> this is due to a variety of factors, most importantly, however, in the context of the transmission of communicable

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<sup>1</sup>Cases where HIV was deliberately transmitted are rare. See, Bunnell *et al* 'Changes in sexual risk behaviour and risk of HIV transmission after antiretroviral therapy and prevention interventions in rural Uganda' (2006) *AIDS* 85-92 and Marks *et al* 'Meta-analysis of high-risk sexual behaviour in persons aware and unaware they are infected with HIV in the United States: implications for HIV prevention programs' (2005) *Journal of Acquired Immune Deficiency Syndromes* 446-53.

<sup>2</sup>South African Law Commission *Project 85 Fifth interim report on aspects of the law relating to AIDS: The need for a statutory offence aimed at harmful HIV-related behaviour*.

<sup>3</sup>For example, in Benin, Botswana, Lesotho, Malawi, Mali, Niger, Sierra Leone, Uganda, Tanzania, Togo, Zambia and Zimbabwe; in this regard, see Eba 'Pandora's box: The criminalisation of HIV transmission or exposure in SADC countries' in Viljoen and Precious (eds) *Human rights under threat: Four perspectives on HIV, AIDS, and the law in Southern Africa* (2007) 29-34; Pieterse 'Disentangling illness, crime and morality: Towards a rights-based approach to HIV prevention in Africa' (2011) *African HRLJ* 57; and Canadian HIV/AIDS Legal Network (2007) *A human rights analysis of the N'djamena model legislation on AIDS and HIV specific legislation in Benin, Guinea, Guinea Bissau, Mali, Niger, Sierra Leone and Togo*.

<sup>4</sup>Regarding the academic debate in South Africa about the possible criminalisation of sexual HIV transmission, see eg Van Wyk 'The need for a new statutory offence aimed at harmful HIV related behaviour: The general public interest perspective' (2000) *Codicillus* 2; Viljoen 'Stigmatising HIV/AIDS, stigmatising sex? A reply to Professor Van Wyk' (2000) *Codicillus* 11.

<sup>5</sup>Nienaber 'Liability for the wrongful transmission of communicable diseases in South African prisons: What about HIV?' (2013) *SAPL* 163.

diseases such as HIV, that it is difficult to prove the element of causation – specifically factual causation – required for criminal and delictual liability.<sup>6</sup> The best-known reported case concerning the intentional or negligent transmission of HIV to a sexual partner is a delictual action for damages, namely, *Venter v Nel*.<sup>7</sup> Regrettably, *Venter v Nel* is considered 'bad' law because the claimant's action was unopposed and judgment by default was granted.<sup>8</sup>

Therefore, in light of the dearth of cases concerning the transmission of HIV to sexual partners, this case note examines the implications of the recent North Gauteng High Court decision in *Phiri v S*<sup>9</sup> for potential charges or claims regarding the unlawful or wrongful transmission of HIV, and questions the appropriateness of the court's decision in the context of public health efforts to curb the epidemic. I begin the discussion with a short outline of the different forms and definitions of fault in South African criminal law in the context of HIV transmission as these are pertinent to the issues raised in the case under discussion. Next follows an outline of the facts and the North Gauteng High Court's decision in *Phiri v S*, after which the wisdom of the court's decision on the facts is questioned. I conclude the discussion with a few observations regarding the implications of the case for public health efforts in South Africa.

## 2 The criminal law element of fault in relation to HIV transmission to sexual partners

South African criminal law distinguishes between two forms of fault: intention and negligence.<sup>10</sup> As a form of fault, negligence is an attitude or conduct by a person which reflects 'carelessness, thoughtlessness or imprudence because, by giving insufficient attention to his actions he failed to adhere to the standard of care legally required of him'.<sup>11</sup> As the accused in the case under discussion was charged with attempted murder, for which intention and not negligence is required, I here leave the discussion of negligence and below focus on intention.

The elements of the crime attempted murder as outlined by our courts are unlawfulness, intention (to kill) and an attempt.<sup>12</sup> Attempted murder, then, may be

<sup>6</sup>*Id* 163 - 164.

<sup>7</sup>*Venter v Nel* 1997 4 SA 1014 (D).

<sup>8</sup>The plaintiff sought damages from a previous sexual partner who had infected her with HIV during consensual sexual intercourse. This case does not provide a good precedent on the difficulties when establishing the element of causation (or even fault) in the case of wrongful HIV infection as the action was unopposed and default judgment was granted.

<sup>9</sup>*Phiri v S* 2013 ZAGPPHC 279 (8 August 2013).

<sup>10</sup>Burchell *Principles of criminal law* (2006) 545; Snyman *Criminal law* (2008) 159.

<sup>11</sup>Neethling, Potgieter and Visser *Law of delict* (2006) 116.

<sup>12</sup>*S v Ndlovu* 1984 ZASCA 84; 1984 3 SA 23(A). At 26 I: 'Die bestanddele van poging tot moord wat *per se* 'n misdaad is, is wederregtelikheid, opset en 'n pogingshandeling. Die strafbedreiging is gerig teen die wederregtelike opsetlike bedreiging van die lewe van 'n mens. Die beskermde regsbelang

defined as the unlawful intentional attempted killing or causing the death of another human being.<sup>13</sup> Causality is not an element of attempted murder.<sup>14</sup>

It is now generally accepted that a conviction for attempt will lie even when the act constituting the attempt is frustrated or rendered impossible by circumstances not within the contemplation of the perpetrator. [...] This view rests on the premise that criminal law has as its aim the protection [of] public and social interests. Therefore, the question of the criminality of an attempt will depend in part on the actor's intent and in part on the degree of actual danger to social or public interest arising from such acts.

Fault, in the form of intention, needs to be proved beyond reasonable doubt for an accused to be guilty of attempted murder.<sup>15</sup> Intention, or *dolus*, is present when a person commits an act 'while his will is directed towards the commission of the act or the causing of the result; in the knowledge of the existence of the circumstances mentioned in the definitional elements of the relevant crime; and in the knowledge of the unlawfulness of the act'.<sup>16</sup> Intention consists of two elements: a cognitive (or intellectual) element and a conative (volitional or voluntative) element.<sup>17</sup> Three forms of intention exist: direct intention; indirect intention; and *dolus eventualis*.<sup>18</sup> To prove a charge of attempted murder, the state needs to prove the presence of any one of the three forms of intention in the actions of the accused.

In the case of direct intention, or *dolus directus*, the person is directing his will towards achieving a result (the result or act is her goal).<sup>19</sup> In the context of the transmission of HIV to a sexual partner, *dolus directus* is present in instances where the HIV positive partner has sexual intercourse with someone with the direct intention of transmitting the virus. In other words, his aim is expressly to infect the other person and he is directing his will towards achieving that result; towards infecting his partner. Thankfully, instances of the transmission of HIV in which direct intention is present, are rare.<sup>20</sup>

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is die lewe van 'n mens. 'n Geykte voorbeeld van voltooide poging tot moord is waar A sy vuurwapen op B rig met die bedoeling om hom te dood, en die skoot afvuur wat B mis of verwond sodat B die wederregtelike aanslag op sy lewe oorleef. A het alles van sy kant gedoen om B te vermoor maar die moord is onvoltooid. Die opset om die slagoffer te vermoor kan afgelei word uit die pogingshandeling asook ander aanvaarbare bewysmateriaal. Die wederregtelikheid van die pogingshandeling is geleë in die bedreiging van h regsbelang, naamlik die lewe van h mens'.

<sup>13</sup>Burchell (n 10) 159; Snyman (n 10) 423.

<sup>14</sup>*S v Ndlovu* (n 12) para 28 A–C.

<sup>15</sup>Burchell (n 10) 157; Snyman (n 10) 425.

<sup>16</sup>Snyman (n 10) 181.

<sup>17</sup>*Id* 182.

<sup>18</sup>Burchell (n 10) 157; Snyman (n 10) 425.

<sup>19</sup>Snyman (n 10) 183.

<sup>20</sup>See (n 1).

In the case of indirect intention, or *dolus indirectus*, the prohibited act or result is not the person's goal, but he realises, if he wants to achieve his goal, the prohibited act or result will of necessity materialise.<sup>21</sup> In the context of HIV transmission, the transmission of the virus is not the HIV positive sexual partner's goal but he realises, if he wants to achieve his goal, the transmission of the virus will of necessity materialise. Put differently, this form of intention requires that the HIV positive sexual partner must foresee, as a certainty, the transmission of the virus to his sexual partner and he must have reconciled himself to that certainty. Indirect intention differs from direct intention with regards to the sexual transmission of HIV in that, in the case of indirect intention, the HIV positive partner does not specifically will the infection of the other partner as his aim, but foresees it (as a certainty) and reconciles himself to it. Of course, indirect intention in the context of the transmission of HIV during sexual intercourse will be almost impossible to establish: it is scientifically impossible to be sure that one will transmit the HI virus during sexual intercourse. In fact, one's chances of transmitting the virus are as low as 0.04 per cent per sexual encounter.<sup>22</sup> The certainty required for indirect intention to be present, then, is unlikely, if ever, to be established in the case of the sexual transmission of HIV.

The third form of intention, *dolus eventualis*, is most relevant to the sexual transmission of HIV in the case under discussion. *Dolus eventualis*, as a form of intention, may be defined as follows: the doer 'actively foresees'<sup>23</sup> the possibility that, in striving to attain his main aim, the unlawful act may be committed or the unlawful result may be caused, and reconciles himself to that possibility.<sup>24</sup> This form of intention requires that the HIV positive sexual partner foresees the possibility of the infection of the other partner and reconciles himself to that possibility.<sup>25</sup> Although not directly willing his sexual partner's infection with HIV, he will have *reconciled* himself to the *possibility* that sexual intercourse may bring about his sexual partner's HIV infection.

It is important to distinguish *dolus eventualis* from negligence. In respect of negligence, the HIV positive sexual partner does not foresee the eventuality of infecting the HIV negative sexual partner, though he reasonably should have

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<sup>21</sup>Snyman (n 10) 183.

<sup>22</sup>This is for vaginal intercourse. Expressed as an estimated per-act probability of acquiring HIV from an infected source, by exposure act, the probability of acquiring HIV is as follows: For receptive anal intercourse 138 per 10 000 exposures; for insertive anal intercourse: 11 per 10 000 exposures; for receptive penile-vaginal intercourse: 8 per 10 000 exposures; and for insertive penile-vaginal intercourse: 4 per 10 000 exposures. See Centres for Disease Control and Prevention (2011) 'HIV/AIDS statistics overview: Transmission risk' from *HIV surveillance report: Diagnoses of HIV infection and AIDS in the United States and dependent areas*, available at: <http://www.cdc.gov/hiv/policies/law/risk.html> (accessed 2014-08-01).

<sup>23</sup>Snyman (n 10) 184.

<sup>24</sup>*Ibid.*

<sup>25</sup>*Ibid.*

foreseen it, and, therefore, does not take the steps reasonably required of him to prevent the infection of his sexual partner. In the case of *dolus eventualis*, the HIV positive sexual partner foresees the risk of infection and reconciles himself to that risk.

Whether the intentional transmission of HIV to a sexual partner during intercourse constitutes a criminal offence was considered by our courts in *S v Nyalungu*.<sup>26</sup> In *Nyalungu* it was established that conduct by a HIV positive sexual partner who does not take measures to prevent transmission during sexual intercourse constitutes the necessary *mens rea* and amounts to attempted murder.<sup>27</sup> Below, the facts of *Phiri* as well as the North Gauteng High Court's judgement in the matter are outlined, followed by conclusions regarding the potential impact of the Court's judgment upon a charge of the intentional transmission of HIV during sexual intercourse. Note that it is not the aim of this discussion to analyse the High Court's treatment of the element of fault in detail, but rather to examine the implications of the Court's judgment in respect of future litigation regarding the sexual transmission of HIV.

### 3 North Gauteng High Court in *Phiri v S*

The case concerns an appeal to the North Gauteng High Court from the Piet Retief Regional Court, in which the appellant, Mphikeleli Lovers Phiri, was convicted of attempted murder and given a six-year prison sentence. The appellant was employed as a HIV counsellor at the complainant's local clinic.<sup>28</sup> They met when the complainant underwent a HIV test.<sup>29</sup> The complainant tested HIV negative.<sup>30</sup> At that stage Phiri had been living with HIV for about three years and he was aware of his HIV positive status.<sup>31</sup>

Subsequently, a relationship developed between the complainant and Phiri during which they had sexual intercourse on two occasions.<sup>32</sup> On neither occasion did Phiri use a condom, despite being requested to do so by the complainant.<sup>33</sup> The complainant subsequently tested HIV positive.<sup>34</sup> As she not had sex with anyone but Phiri the complainant confronted him, whereupon Phiri apologised and asked for her 'forgiveness'.<sup>35</sup>

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<sup>26</sup> *S v Nyalungu* 2013 2 SACR 99 (T) 1. The case was reported only in 2013.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Phiri v S* (n 9) para 2.

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> *Id* para 3.

<sup>33</sup> *Ibid.*

<sup>34</sup> *Ibid.*

<sup>35</sup> *Id* para 2.

The only issue in dispute before the trial court was whether Phiri had used a condom during sexual intercourse.<sup>36</sup> After initially stating that he did not tell the complainant that he was HIV positive, he changed his version during cross-examination and then stated that he had told the complainant that he was HIV positive before they had intercourse for the first time and that he had used a condom on both occasions.<sup>37</sup> The trial court rejected Phiri's version of events and found him guilty of attempted murder.<sup>38</sup>

Before the North Gauteng High Court, the appellant alleged that the Regional Court had erred in its evaluation of the evidence and its application of the law, as he did not have the necessary *mens rea* to sustain a conviction of attempted murder.<sup>39</sup> No proof was tendered either in the trial court or the appeal court that the appellant in fact infected the claimant with HIV.

The North Gauteng High Court, per Makgoka J and Baloyi AJ, stressed that they cannot interfere with the trial court's finding on the facts (rejecting Phiri's version that he had used a condom on both occasions during sexual intercourse) as lacking in credibility and not being supported by the evidence.<sup>40</sup> In its judgment, the court did not specify why, in its mind, fault in the form of *dolus eventualis* was present in the appellant's behaviour. Instead, relying on *S v Nyalungu*, the court found that the appellant acted with intention, and merely stated:<sup>41</sup>

It is to be borne in mind that the appellant was not convicted of having in fact transmitted HIV to the complainant. The State did not have to go that far. It was sufficient for a conviction on the count of attempted murder, to establish that the appellant, knowing that he was HIV positive, engaged in sexual intercourse with the complainant, whom she knew to be HIV negative, without any preventative measures. This entails the presence of *mens rea* in the form of *dolus eventualis*.

The judges equally rejected the appellant's argument that he should have been found guilty not of attempted murder but of assault or assault with the intent to cause grievous bodily harm.<sup>42</sup> In this regard the court stressed that there is still no cure for AIDS and infection with HIV is likely to result in a reduced lifespan.<sup>43</sup> The court further stated that it was established in *S v Nyalungu*<sup>44</sup> that conduct of this kind (sexual intercourse without a condom) constitutes attempted murder and

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<sup>36</sup>*Id* para 4.

<sup>37</sup>*Ibid.*

<sup>38</sup>*Ibid.*

<sup>39</sup>*Id* para 5.

<sup>40</sup>*Id* para 9.

<sup>41</sup>*Ibid.*

<sup>42</sup>*Ibid.*

<sup>43</sup>*Ibid.*

<sup>44</sup>See (n 25).

not assault, and that the appellant was thus properly convicted of attempted murder in the trial court.<sup>45</sup>

As regards the appeal against the appellant's six-year prison sentence, the court rejected the appellant's argument that a six-year prison term is 'disturbingly inappropriate' for a first offender who is HIV positive.<sup>46</sup> It was also contended that the trial court did not take sufficiently into account that the appellant and the complainant were in a relationship and, therefore, that there was no forced sexual intercourse.<sup>47</sup> The judges rejected these arguments as well. They stated that this could rather be an aggravating factor, as was the fact that the appellant was a HIV and AIDS counsellor.<sup>48</sup> The North Gauteng High Court dismissed the appeal, and the appellant's conviction and sentence were confirmed.<sup>49</sup>

#### 4 A note of caution: Implications for culpability for the unlawful transmission of HIV during sexual intercourse

As said above, the discussion does not concern itself with the soundness of the Gauteng North High Court's finding or, specifically, the soundness of its approach regarding fault as a criminal element in cases concerning the sexual transmission of HIV, but rather with the possible consequences of the court's judgment for public health efforts to combat the HIV and AIDS epidemics.

On the face of it, a finding that fault in the form of *dolus eventualis* is present and also is sufficient for a conviction of attempted murder in cases concerning the sexual transmission of HIV if the HIV positive sexual partner fails to wear a condom, sends a necessary warning to sexual partners to take preventive measures and so curb the spread of the HIV epidemic. Such a finding may be seen by many as a laudable attempt to curb the spread of the HIV epidemic. But let us consider whether the court's finding really advances public health efforts in the context of the HIV epidemic in South Africa.

As evidence was never presented either in the trial court or in the Gauteng High Court that the appellant actually infected the complainant (it was merely deduced that he infected her with HIV on her evidence that he was the only person she had had sexual intercourse with) and as, after all, causation is not an element to be proved for a conviction on a charge of attempted murder, the court's finding, in fact, is punishing mere *exposure* to HIV in the form of unprotected sex as attempted murder, rather than unprotected sex resulting in

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<sup>45</sup> *Phiri v S* (n 9) para 9.

<sup>46</sup> *Id* para 14.

<sup>47</sup> *Id* para 15.

<sup>48</sup> *Ibid.*

<sup>49</sup> *Id* paras 10; 18-19.

actual transmission. The appellant was found guilty and sentenced because he, on the evidence of the complainant, had unprotected sexual intercourse with her while being HIV positive. In other words, it was not necessary to prove that the appellant had in fact infected the complainant.

From the High Court's judgment, therefore, it is clear that for a conviction on a charge of attempted murder in cases of the alleged sexual transmission of HIV, it must be established beyond reasonable doubt: a) the HIV positive sexual partner knew that he was HIV positive; and b) that he had unprotected sex with the complainant knowing that he put that complainant at risk of infection. Such an approach has several limitations from a public health perspective. I discuss these in the following paragraphs.

First, HIV and AIDS are again stigmatised<sup>50</sup> or treated as 'exceptional' diseases:<sup>51</sup> there have been no cases reported where the intentional exposure of another person to other potentially deadly infectious diseases such as multi-drug-resistant tuberculosis, smallpox, cholera or Ebola has resulted in successful convictions of attempted murder. HIV and AIDS are singled out for special legal sanction.

Much has been written about the motivations behind the stigmatisation of diseases, most notably the stigmatisation of HIV and AIDS. The stigmatisation of HIV and AIDS is viewed as aiming at conceptually separating those who are ill from the unaffected population, so externalising the threat of the disease and appeasing public fears of contagion.<sup>52</sup> Consequently, society is divided into a healthy 'us' and an infected 'them':<sup>53</sup> blame for infection is apportioned to those who are ill; 'healthy members of society can reassure themselves that they are safe against infection and justify their lack of compassion with those who have fallen ill'.<sup>54</sup> By employing criminal sanction, not only is HIV and AIDS stigmatised by the court but those who are ill may be blamed for spreading the disease. I return to this point below.

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<sup>50</sup>Through stigmatisation social distinctions are enhanced. Stigma thus becomes part of the social struggle for power. Difference is transformed into inequality. Moreover, it is used to produce, legitimise and reproduce social inequalities by establishing difference and using difference thus constituted to ascertain where groups of people fit into the structures of power' (Eba 'Stigma[ta]' (2008) *Aids Review* 2007 12).

<sup>51</sup>'AIDS exceptionalism' is the notion that the epidemic requires a response above and beyond 'normal' health interventions. Recently, AIDS exceptionalism came to refer to the disease-specific global response and the resources dedicated to addressing the epidemic. There has been a backlash against this exceptionalism, with critics claiming that HIV and AIDS receive a disproportionate amount of international aid and health funding. For more on so-called 'AIDS exceptionalism', see Smith and Whiteside 'The history of AIDS exceptionalism' (2010) *Journal of the International AIDS Society* 47 and Piot 'AIDS: Exceptionalism revisited' Lecture given at the London School of Economics and Political Science, 15 May 2008.

<sup>52</sup>Pieterse (n 3) 60.

<sup>53</sup>*Ibid.*

<sup>54</sup>*Ibid.*



Second, the North Gauteng High Court's approach is unscientific as it fails to distinguish between different levels of risk per exposure to HIV – the Court found that mere exposure is enough for a conviction and ignored the fact that various factors, not just the use of a condom, can increase or decrease the transmission risk of HIV per exposure. For example, taking antiretroviral therapy can reduce the risk of an HIV-infected person transmitting the infection to another by as much as 96 per cent.<sup>55</sup> Conversely, having a sexually transmitted infection or a high level of HI virus in the blood (which happens in early and late stages of HIV infection) may increase the transmission risk.<sup>56</sup> The High Court did not consider whether the appellant, in fact, was on antiretroviral therapy at the time of exposing the complainant to determine the risk of HIV transmission, only whether he wore a condom. In other jurisdictions, the question of whether the accused is on antiretroviral therapy is an important consideration in determining guilt.<sup>57</sup>

Third, as indicated before, the motivation behind the court's judgment may well be to encourage safe sex practices amongst sexual partners and to encourage HIV positive partners to disclose their status. In South Africa, however, the disclosure of one's HIV status is not a simple matter. In South Africa, it may well be that sexual partners do not disclose their HIV-positive status because of the fear of violence or other serious negative consequences. On occasions, women living with HIV and AIDS are killed when they reveal their status, as in the well-publicised case of Gugu Dlamini who was stoned to death by her neighbours.

South African women are worse hit by the epidemic than men, as a result of socio-economic factors, as well as biological factors.<sup>58</sup> Thus, it is likely that women, rather than men, will be charged with attempted murder for exposing their sexual partners to HIV infection. In some cases it may well be that they neglect to reveal their status, either because of economic dependency on their male partner, or because of their fear of violence and stigmatisation. Women who live

<sup>55</sup>Cohen *et al* 'HPTN 052 Study Team. Prevention of HIV-1 infection with early antiretroviral therapy' (2011) *New England Journal of Medicine* 493 - 505.

<sup>56</sup>See source referenced in (n 22).

<sup>57</sup>Such as Switzerland; see Gasquez 'Pour la dépenalisation de l'exposition au VIH (For the decriminalization of HIV exposure)' (2009) *Plaidoyer* 4, available at: [http://www.aidslex.org/site\\_documents/CR-0095F.pdf](http://www.aidslex.org/site_documents/CR-0095F.pdf) (accessed 2014-08-01). See, generally, UNAIDS/WHO (2008) *Antiretroviral therapy and sexual transmission of HIV*, available at: [http://data.unaids.org/pub/PressStatement/2008/080201\\_hivtransmission\\_en.pdf](http://data.unaids.org/pub/PressStatement/2008/080201_hivtransmission_en.pdf) (accessed 2014-08-01).

<sup>58</sup>Several anatomical and physiological characteristics of women and girls play a role in the transmission and acquisition of HIV. Since the female genital tract has a greater exposed area than the male genital tract, women may be prone to greater per exposure risk of HIV-infection. Coercive or forced sex can lead to microlesions (very small tears in the vagina) that facilitate entry of the virus. Young women, in particular, who have less mature tissue, are more susceptible to infection, as well as more susceptible to coercive sex' (IAVI *Gender in HIV vaccine trials: Addressing challenges in developing countries* (2004) 2).

with HIV and AIDS are stigmatised (sometimes they are even blamed for spreading HIV).<sup>59</sup>

Moreover, HIV-positive women in these communities [Hammanskraal and Tembaj] are stigmatised as being prostitutes, or 'loose women', or as having 'invited' HIV infection to claim access to social grants.

Stigmatisation leads to discrimination and a violation of equality:<sup>60</sup>

The rights of people living with HIV/AIDS are often violated because of their presumed or known HIV status, causing them to suffer both the burden of the disease and the burden of discrimination. Stigmatisation and discrimination may affect the uptake of [antiretroviral] treatment, and may also affect employment, housing and other rights.

Linked to the negative consequences of revealing one's status outlined above, is my fourth point of criticism against the North Gauteng High Court's judgment. In order to avoid being charged with attempted murder, many will refuse to be tested for HIV (as it is required for *dolus eventualis* that the HIV positive sexual partner *foresees* the possibility of the infection of the other partner and reconciles himself to that possibility): if one is unaware of one's status, one is unable to foresee the infection of another during sexual intercourse. The North Gauteng High Court's judgment may actually be counter-productive and increase the spread of HIV: because of the fear of being charged with attempted murder many may not get tested for HIV, persist in unsafe sexual practices, and the epidemic will continue. Together with the stigmatisation of HIV, it contributes to the vulnerability of others to infection. A fear of the negative consequences of knowing one's status, criminal sanction and HIV-related stigma and discrimination discourage individuals infected with and affected by HIV from contacting health and social services.<sup>61</sup> It is in this context that we should see the High Court's judgment.

Finally, the North Gauteng High Court's judgment is contrary to public health studies which show that criminal law, because it assumes, incorrectly, that people engage in sexual intercourse as if reasoned, rational and informed behaviour, it

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<sup>59</sup>Alexander and Mbali 'Beyond "bitches and prostitutes": Folding the materiality of gender and sexuality into rights-based HIV/AIDS interventions' in Viljoen (ed) (2005) *Righting stigma: Exploring a rights-based approach to addressing stigma* 51.

<sup>60</sup>Zuberi "'If you (be)come HIV positive, you will lose your human rights" - HIV/AIDS stigma and human rights: A localised investigation of Hammanskraal communities' in Viljoen (n 59) 13.

<sup>61</sup>*Ibid.*

entirely fails to deter high-risk conduct and, consequently, exposure to HIV.<sup>62</sup> As well, punishing HIV transmission puts the blame for spreading the epidemic once again on HIV positive people, absolving the rest of the population from taking measures to limit their exposure to the virus and, consequently, accelerating the spread of the epidemic.<sup>63</sup>

## 5 Conclusion

Marius Pieterse states:<sup>64</sup>

[i]t is probably fair to say that HIV and AIDS have challenged the way in which we think about the relationship between public health, morality and law, more so than any other disease.

This verdict is indeed true for the challenges posed by the criminalisation of the transmission of HIV – criminalisation remains a controversial issue. On the one hand it is argued that criminal sanction will prevent or lessen the intentional transmission of HIV; on the other, public health experts warn that the criminalisation of HIV transmission will hamper efforts to mount an effective public health effort to curb the spread of HIV.

There are no data indicating that the application of criminal law to HIV transmission, in the form of criminal sanction in the form of convictions for attempted murder, will achieve either criminal justice or prevent HIV transmission.<sup>65</sup> Instead, as shown above, criminal sanction, in many instances, actually hampers public health efforts to curb the spread of HIV by prompting people to avoid HIV testing and so avoid contacting the public health service.

It is in this context that the judgment on *Phiri v S* should be seen. Not only does it appear that *Phiri v S* confirms the criminalisation of mere exposure to HIV during unprotected sex, ignoring the fact that by undergoing antiretroviral treatment the risk of HIV-transmission is substantially lowered, but, also, it is likely to prompt a decrease in the voluntary uptake of HIV-testing.

In future, South African courts should take heed of the warning of UNAIDS that urges governments to limit the criminalisation of the sexual HIV transmission to cases of intentional transmission, ie, in which a person knows his HIV positive

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<sup>62</sup>UNAIDS (2002) *Criminal law, public health and HIV transmission: A policy options paper* 21; UNAIDS (2008) *Policy brief on criminalisation of HIV transmission* 4; Eba (n 3) 38 – 39; Adam *et al* 'Effects of the criminalisation of HIV transmission in *Cuerrier* in men reporting unprotected sex with men' (2008) *Canadian Journal of Law and Society* 157; Bunnell *et al* (n 1); and Marks *et al* (n 1) 446-53.

<sup>63</sup>Viljoen (n 4) 14.

<sup>64</sup>Pieterse (n 3) 57.

<sup>65</sup>UNAIDS (2008) (n 62) 1.

status and acts with the deliberate and calculated intention to transmit the virus.<sup>66</sup> Courts should, instead, find an accused guilty of attempted murder only in circumstances where direct intention in the form of a wilful and calculated intent to transmit the virus – instead of mere *dolus eventualis* – was proved. As well, the South African government should expand programmes which have been demonstrated to reduce HIV transmission and protect the human rights both of people living with HIV and those who are HIV negative.<sup>67</sup>

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<sup>66</sup> *Ibid.*

<sup>67</sup> *Id 2.*